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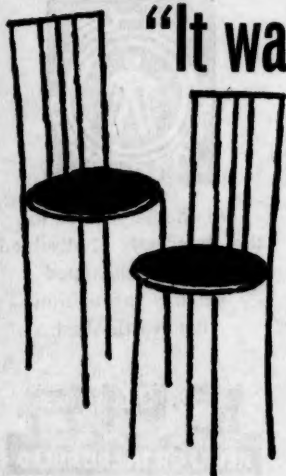
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## JUSTICE OF THE PEACE REPORTS

### VOLUME 136

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD WIDGERTY, CJ, O'CONNOR AND LAWSON, JJ)

22nd July 1971

NAISH v GORE

*Trade Descriptions—False description—Motor car—False mileage recorded on odometer—Sale by motor dealer—Defence of reasonable precautions and due diligence—Dealer ignorant of alteration of odometer—Condition of car consistent with mileage recorded on odometer—Trade Descriptions Act, 1968, ss 1 (1) (b), 24 (1), (3).*

An information was preferred against the respondent, a car dealer, charging him with supplying to one W a car to which a false description as to its history was applied, namely, the mileage recorded on the odometer. The car originally belonged to C, who, in March, 1970, sold it to a car dealer. The odometer then recorded 83,060 miles. The car passed through the hands of several dealers, and in April, 1970, was purchased by the respondent. At that time the odometer recorded 35,000 miles and the price paid by the respondent was proper on the basis of that mileage. The respondent was not responsible for tampering with the odometer in any way and he did not know that it had been altered. A servant of the respondent tested the car and it was examined by an independent expert on behalf of a prospective buyer. Both were satisfied that the general condition of the car, both inside and outside, was consistent with the mileage indicated. On 1st May 1970, by which time the respondent had not received the log book of the car, he sold it to one W, at a price which would have been reasonable if the mileage had in fact been only 35,000. W eventually obtained the log book and through checking with C. discovered the true mileage covered by the car. The justices were satisfied that the respondent had made out a defence under s 24 (1) and (3) of the Act of 1968 in that he had taken reasonable precautions and exercised due diligence to avoid the commission of an offence under the Act and could not with reasonable diligence have ascertained that the car did not conform to the description applied to it. They accordingly dismissed the information. The prosecutor appealed.

**HELD:** there was no general rule that a motor car dealer selling a second-hand car must wait for the log book and must check with the previous owner before he sells; as the justices had properly directed themselves in law and had appreciated that the onus of proof under s 24 rested on the respondent, and as there was evidence to support their finding that the respondent had discharged that onus, their finding could not be disturbed and the appeal must be dismissed.

Per O'CONNOR and LAWSON, JJ: It is open to question whether, where the real defence is under s 24 (1), i.e., that the commission of the offence was due to the act or default of another person, which requires the additional proof by the defendant that he took all reasonable precautions, it is permissible for him at the same time to say that he has a defence under s 24 (3), which appears to be more apt when an actual defect in the goods as opposed to a representation about the goods is being considered.

**CASE STATED** by Stourport-on-Severn justices.

On 7th October 1970 an information was preferred by the appellant, George Charles Naish, an inspector of weights and measures, against the respondent, Lawrence Gore, charging that he on 1st May 1970 at Stourport-on-Severn in the course of

trade supplied to Leslie Wainwright a Ford Corsair motor car to which a false trade description as to its history was applied by means of an indication on the odometer, contrary to s 1 (1) (b) of the Trade Descriptions Act 1968. The justices were satisfied that the respondent had taken reasonable precautions and exercised due diligence and could not with reasonable diligence have ascertained that the goods did not conform to the description applied to them within s 24 (1) (b) and (3) of the Trade Descriptions Act, 1968, and they dismissed the charge. The prosecutor appealed.

*A F B Scrivener* for the appellant.

*Douglas Draycott QC* and *C Morcom* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case stated by justices for the county of Worcester acting in and for the petty sessional division of Stourport-on-Severn who on 15th December 1970 dismissed an information preferred by the appellant against the respondent for that he on 1st May 1970 in the course of trade supplied a Ford Corsair motor car, GKW 16E, to Leslie Wainwright to which a false trade description as to its history, namely, 35,000 miles or thereabouts, was applied by means of an indication on the odometer. The offence was charged under s 1 (1) (b) of the Trade Descriptions Act 1968.

The facts of this case are not perhaps uncommon in the motor trade. The motor car in question belonged in March 1970 to a private owner, Mr Critchley. At that time the odometer showed 83,060 miles. Mr Critchley sold it to a car dealer and it went quickly through the hands of a number of other dealers. Eventually, on 3rd April 1970, which was nearly a month after the initial sale by Mr Critchley, it came into the hands of the respondent, Mr Gore, who had bought it from a Mr Grosvenor. On 3rd April 1970, when the car came into the hands of the respondent, the odometer had been altered by somebody so that it read 35,000 miles instead of 83,000. The justices found, and there was no suggestion to the contrary, that it was not the respondent who altered the odometer. It had been altered at some time in the car's brief history between leaving Mr Critchley's ownership and arriving into the hands of the respondent. The respondent sold the car to a Mr Wainwright on 1st May 1970. The log book of the car had not been handed over on one of the earlier sales and indeed had not reached the respondent's hands either when he bought the car in April 1970 or when he sold it to Mr Wainwright in May of that year. The price at which he sold to Mr Wainwright was £540, which the justices found was a reasonable price on the assumption that the car had done only 35,000 miles.

The justices were faced with a situation in which the respondent admitted that *prima facie* an offence under s 1 of the Act had been committed. Section 1 (1) provides:

'Any person who, in the course of a trade or business . . . (b) supplies or offers to supply any goods to which a false trade description is applied; shall, subject to the provisions of this Act, be guilty of an offence.'

It is clear that there was a false trade description consisting in the false reading of the odometer. The whole question below, as it is here, is whether the respondent made out the statutory defences or one of them set out in s 24 of the Act. Section 24 provides:

'(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions



and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control . . .

'(3) In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.'

In addition to the finding of fact to which I have already referred, the justices also found that when the respondent acquired the car in April:

'he examined it and there was nothing in its appearance or apparent performance that would lead him to suspect that it was otherwise than a 1967 model of the mileage (35,000) as represented.'

They further found that it had been driven in the form of a test by a servant of the respondent and that the car had in fact been examined by an independent expert from the Automobile Association who had been retained for this purpose by Mr Wainwright, the prospective buyer. The independent expert was of the opinion that the condition of the vehicle both inside and out was consistent with a mileage of 35,000 miles. The log book, as I have said, was not in the respondent's possession, and he did not wait to obtain it before selling the car to Mr Wainwright. In fact, when Mr Wainwright had bought the car and in due course the log book caught up with it, he checked with the previous registered owner and thus it came to light that the recorded mileage was not the correct mileage.

The justices reached their conclusion in these terms. They state:

'In conclusion, we were satisfied that the respondent had taken reasonable precautions and exercised due diligence and could not, with reasonable diligence have ascertained that the goods did not conform to the description applied to them, in all the specific circumstances of this case.'

Counsel for the appellant in supporting this appeal has submitted that the justices' finding is wrong and should be set aside because he maintains that on the facts which they have found it cannot be said that the respondent had proved that he took all reasonable precautions and exercised all due diligence. In particular, counsel submits that there were two things which the respondent might have done in this case in order to satisfy himself that the odometer had not been tampered with. He says, first of all that he could have waited until the log book came through, and then checked with Mr Critchley whose name and address would have been found in the log book. Alternatively, I think he says, although perhaps with rather less foundation, that an enquiry of the registration authority might have disclosed Mr Critchley's name and address and thus enabled the enquiry to be made. Alternatively he says that a further precaution which ought to have been taken was that the respondent should have sought an undertaking from his seller, Mr Grosvenor, as to the mileage reading at the time of his purchase and he says that that practice, if universally followed throughout the motor trade, would go a long way to avoid the kind of fraud which was clearly perpetrated in this case.

As to authority, there are two decisions in this court which have a bearing on the present issue. The first is *Sherratt v Gerald's, The American Jewellers, Ltd* (1). That was a case in which a watch had been advertised for sale as waterproof and the purchaser buying it with that description attached to it had inserted it in a glass of water and found that it very rapidly filled with water, and accordingly a false trade description

(1) (1970), 68 LGR 256.



had clearly been established. The seller of the watch sought to justify what he had done by saying that he had relied on his own supplier who had sold the watch as waterproof and he said that he had had many previous dealings with the supplier. As was pointed out in this court, the fact of the matter was that he had taken no precautions whatever and some kind of precautions must have been possible had he applied his mind to it. The effect of that authority, as I see it, is to emphasise that the onus is on the defendant. It is for the defendant to prove that he took all reasonable precautions, and if he has taken none, that means he must prove that none could reasonably have been taken.

There is a case about motor cars and also odometers, *Richmond-upon-Thames London Borough Council v Motor Sales (Hounslow) Ltd* (1). That, as I say, was a case in which the odometer of a motor car had been altered, but in that case there were facts maybe significantly different from the present one. First of all, the log book was in the possession of the seller in that case and he nevertheless failed to make the enquiry which counsel for the appellant contends ought to have been made. Furthermore, it seems that he did not examine the car at all and did not even go to the lengths of seeing what the recorded mileage was. In that case this court directed that a conviction should be entered on the simple basis that the respondent had taken no precautions and that some precautions were clearly possible, and hence the onus of proof had not been discharged.

In this case, in my judgment, it is clear on the justices' findings that some precautions were taken. The vehicle was examined; the respondent did take a certain amount of trouble to satisfy himself that the recorded mileage was consistent with the condition of the vehicle; and I for my part find it quite impossible to lay down as any general proposition in these cases that a motor dealer selling a secondhand car must wait for the log book and must check with the previous owner. To do so may be a very wise and proper precaution in appropriate cases, but I am not disposed to rule as a general principle that that must be so.

Accordingly it seems to me that the proper disposal of this case is to observe that the justices, with some evidence of reasonable precautions and due diligence before them, were satisfied that that was sufficient to satisfy the terms of s 24. In the end, if the justices properly directed themselves as to the law and appreciated the onus that rests on the respondent, the question whether the precautions taken were all reasonable precautions is a matter for them and on the facts of this case I am not disposed to say that they reached other than a conclusion which was open to them. I would, however, in view of the prevalence of this particular kind of fraud, invite justices when examining the defence of the seller to such a charge as this to be meticulous in their consideration of all the courses which the seller might have adopted. This is a matter in which justices, if they are to fulfil their duty to the public, should be very quick and alert to consider whether there are further proper precautions which might have been taken and to consider whether those precautions in the circumstances of their case are reasonable. It is an alert consciousness of their duty in this respect which, in my judgment, is the best safeguard for the future against the continued repetition of these offences. But I would dismiss the appeal for the reasons which I have given.

**O'CONNOR J:** I agree with LORD WIDGERY that the appeal should be dismissed. I only desire to add one warning. The present case would appear to show that the justices came to the conclusion that the respondent had made out a defence under both s 24 (1) and (3) of the Trade Descriptions Act 1968. For my part, I would prefer to reserve to a future occasion the question whether, where the real defence is that

the commission of the offence was due to the act or default of another person which requires the additional proof by the dealer that he took all reasonable precautions, at the same time it is permissible for him to say that he has a defence under s 24 (3) which at the moment and without argument seems to me to be more apt when one is considering some defect in the actual contents of the goods as opposed to a representation about the goods.

**LAWSON J:** I too agree with LORD WIDGERY subject to the reservation made by O'CONNOR J. I would merely like to deal with the two specific precautions which counsel for the appellant suggested should be taken in cases of this kind. As regards the first suggestion he seeks, as it seems to me, to introduce, through the back door of s 24 of the Trade Descriptions Act 1968, a position when the secondhand car is the subject of a sale in which the production and handing over of the log book would be essential to the validity of the transaction. This has long been a controversial point in the area of transfer of title to goods, and, if the point is to be dealt with, it should, in my judgment, be dealt with in that context and not in the context of the criminal offence of selling goods to which a false description has been applied.

The second precaution that counsel for the appellant suggests should be taken in cases of this kind, is that the seller of the secondhand car should take a warranty from his own supplier. That, it seems to me, would lead to a chain of warranties similar to that which can be found, for example, under s 115 of the Food and Drugs Act 1955. This is a statutory technique for tracing and dealing with those who are responsible for contraventions of the statutory provisions. It was well known at the time when the 1968 Act was passed, but it has not been incorporated in that Act. Again in my judgment it would be wrong to introduce it into the Act's enforcement machinery through the back door of s 24.

*Appeal dismissed.*

Solicitors: Sharpe, Pritchard & Co, for W R Scurfield, Worcester; Oswald Hickson, Collier & Co, for Thursfield & Adams, Kidderminster.

T.R.F.B.

### COURT OF APPEAL (CRIMINAL DIVISION)

(KARMINSKI, LJ, LAWTON AND WALLER, JJ)

23rd July 1971

R v CROSS. R v CHANNON

*Criminal Law—Assisting offender—Time when offence should be charged—Issue to be raised before evidence relating to principal offence closed—Issue arising unexpectedly in course of proceedings—Procedure proper to be adopted—Criminal Law Act, 1967, s 4 (1), (2).*

By s 4 of the Criminal Law Act 1967: '(1) Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.

(2) If on the trial of an indictment for an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the accused might on that charge be found guilty) was committed, but find the accused not guilty of it, they may find him guilty of any offence under sub-s (1) above of which they are satisfied that he is guilty in relation to the offence charged (or that other offence).'

Where the prosecution foresee that guilty of an offence under s 4 (1) may be the appropriate verdict on the facts they should include in the indictment a specific count charging such an offence. If the prosecution do not foresee in advance that this may be the appropriate verdict, but in the course of the hearing it emerges that such a verdict may be appropriate, the prosecution should raise the issue before the evidence is completed, and in such circumstances the defendant should be offered the opportunity of an adjournment to enable him to meet a charge under s 4 (1). It is not permissible for the prosecution to raise for the first time the issue of a verdict under s 4 (1) after the evidence has been closed.

APPLICATION by Bryan Woodrow Cross for leave to appeal against his conviction at the Central Criminal Court of fraudulent conversion as a trustee when he was sentenced to nine months' imprisonment. The applicant, Samuel Russell Channon, applied for an extension of time for leave to appeal against his conviction before the same court on the same day of fraudulent conversion and jointly with the appellant Cross of fraudulent conversion as a trustee, in respect of which he was sentenced to two years' imprisonment.

*Michael Havers QC and T F H Cassel for the appellant Cross.*

*H C Pownall and J A K Millar for the Crown.*

The applicant Channon was not represented.

**WALLER J** delivered this judgment of the court: These are two applications, one by Samuel Russell Channon for an extension of time for leave to appeal against his conviction at the Central Criminal Court on 6th October 1970, the other an application by Bryan Woodrow Cross for leave to appeal against a conviction at the Central Criminal Court on the same day.

The applicant Channon, who was a member of the Stock Exchange, was separately convicted on six counts of fraudulent conversion, and he and the appellant Cross, who was a solicitor, were both convicted of the offence of fraudulent conversion by trustees. The applicant Channon was sentenced to two years' imprisonment concurrent on each of the seven counts and the appellant Cross was sentenced to nine months' imprisonment on count 7, the one count on which he was convicted. They each apply for leave to appeal against conviction and sentence, and the applicant Channon asks for an extension of time, his application being two months out of time.

On 23rd October, the appellant Cross was granted bail pending the hearing of this application. His grounds for this application really seem to suggest that the learned Common Serjeant, who tried the case, vacillated between the offence as charged in count 7 and an alternative under s 4 of the Criminal Law Act 1967 and that he misdirected the jury as to the burden of proof. The applicant Channon gives as his reasons for the delay that he did not receive the notes of the trial as they were not available until the last week in December, and in essence his notice of appeal sets out and tries to rehearse the evidence and the way in which the trial went. This court has not had a full transcript of the trial because there have been difficulties about the transcript, but it has sufficient of the transcript before it to enable it to deal with this case.

Both the applicant and the appellant were 60 years of age at the time of the trial and both were men of the highest character. They had met in 1948. They had become friends and for many years the applicant Channon had acted as stockbroker in connection with trusts of which the appellant Cross was a trustee. The appellant Cross had little knowledge of the Stock Exchange, had little capital of his own, never himself dealt in investment, and had always found the applicant Channon an efficient stockbroker and had accepted his advice.

The six counts of the indictment against the applicant Channon charged fraudulent conversion. The first three counts charged fraudulent conversion in relation to one client, a Mrs Kennedy. The fourth, fifth and sixth charged fraudulent conversion in relation to the affairs of three other clients of the applicant Channon. None of these had anything whatever to do with the appellant Cross.

It is not necessary to go into all the details of the offences but what had happened was that in October 1965 a complaint had been made to the Stock Exchange, apparently by the applicant Channon himself, as a result of which accountants were asked to investigate his affairs and draw up accounts for the year ending September 1965. While this was still going on, i.e., on 10th February 1966, the applicant Channon was suspended by the council of the Stock Exchange. Between January and February 1966, February being the time when he was suspended, the applicant Channon sold shares and received on behalf of Mrs Kennedy some £7,000, on behalf of Mrs Johnson something of the order of £3,000, £780 in relation to Mr Hausser and £9,000 from Mr Duchesne, who was concerned in the sixth count. The facts were that he had gone to see Mrs Kennedy, a widow, aged 80, in November 1965 and advised the sale of certain shares—some £7,000 worth—as a result of which the money was paid into his general account. She was credited with interest paid on it, but that was all.

After his suspension in February 1966 he continued to conduct business, but did so through two other firms of brokers, and the three sums of money, the subject of counts 1, 2 and 3, were transactions which were put through those brokers, and in each case the sums charged were received by him for or on account of Mrs Kennedy. Those three sums are counts 1, 2 and 3 of the indictment. In relation to Mrs Johnson, count 4, her husband was abroad. The applicant Channon had advised her between 6th November 1964 and 10th January 1966. Shares to a total value of nearly £4,000 were sold and it was that sum which was charged as count 4. Count 6 related to Mr Duchesne. Between 3rd January and 30th March shares were sold on his behalf. On 12th April Mr Duchesne telephoned the applicant Channon to ask for a cheque and that was something just over £9,000, which he was commissioned to re-invest.

In all those cases the defence put forward on behalf of the applicant Channon was that the sums were loaned to him and that the money had disappeared in the general disorder which overcame him when he was suspended. The case for each of those witnesses was that the money was left for him to put on deposit and that he had no right to use it as a loan. I need not deal with count 5, which is a slightly different one. I have stated sufficient of the facts in relation to those six counts to say that there was ample evidence in the course of the trial on which the jury, if they were properly directed, could come to the conclusion that the applicant Channon had fraudulently converted those sums to his own use.

The court has carefully considered the direction given by the learned Common Serjeant. There is no fault whatever to be found with it and furthermore the applicant Channon's excuse for not applying for leave to appeal in time (his application being two months late), i.e., that he had not received the notes of the trial until that time, is not one which commends itself to this court. Accordingly, in relation to those six counts the application for an extension of time and leave to appeal is refused.

Count 7 relates to both the applicant and the appellant. They were charged as trustees of the Blake Trust and they were charged with converting part of the estate, i.e., £16,289, to their own use and benefit between 24th December 1961 and 31st December 1966. 24th December was the date to which the trust accounts for 1961 were made up and showed virtually no uninvested property. 31st December 1966 was the end of the trust financial year for 1966 the accounts for which show £16,289 as uninvested cash held by Channon & Co.

The prosecution's case was that that sum had gone and had been converted by the applicant Channon between those dates. His defence was that he had invested the money in a company called AJC (Consultants) Ltd. He maintained that the trustees were given by the will the widest discretion as to investment and that he did not invest in the ordinary sense of paying out money for shares. The company was only just getting on its feet. He paid out trust funds on behalf of the company for machinery the company would require and in return for that money he would get the share certificates for the trustees. Accordingly, he maintained that he was not using the money for his own purposes at all and it was paid out as an investment in AJC for which share certificates would be issued. On this count also in relation to his part in this matter there was ample evidence on which the jury could convict. They were properly directed by the learned Common Serjeant and the application for an extension of time and for leave to appeal against his conviction on that count is also refused.

In the case of the appellant Cross, however, different considerations arise. He was a co-trustee with the applicant Channon, and the nature of the case against him was, first of all, that he was a party to the breach of trust and to the fraudulent conversion of the money. The prosecution sought to say that because of his behaviour in 1967 and in 1968 when he was not answering enquiries in relation to the trust affairs with great promptitude—in one instance in 1968 he was party to the issue of share certificates in AJC in the name of the trustees and there were other instances which it is unnecessary to go into in detail—the prosecution's case was that because of that behaviour it would be open to the jury to draw the inference that, although he did not receive one penny benefit from the money, he was concerned in the actual conversion of the money fraudulently in 1966.

The learned judge in a number of places in the course of his summing-up was of the opinion that the jury would find it difficult to convict. He said for example:

'As I say, it may be on the evidence you will find it difficult to say it is proved that he knew the money was being dishonestly used by Channon for Channon's own purposes at the time that it was . . . You may think, therefore, as I said to you a little earlier, it is difficult to say that Cross during those years must have known that Channon was spending, or, indeed, had spent the trust money.'

After the jury had convicted, the learned judge interrupted counsel mitigating on behalf of the appellant Cross to say:

'I take the jury's verdict, and certainly my own view of the matter is that he did not know the conversion was actually going on, he knew of it after it happened.'

So it was quite clear that the learned judge thought that it was very difficult for the jury to be satisfied that the appellant Cross knew the money was being dishonestly used.

Although there had been no cross-examination in the course of the case to support a case under s 4 of the Criminal Law Act 1967 the learned judge interrupted counsel for the appellant Cross when he was making his final speech to the jury to say that he thought that the case was really covered by s 4 of the Criminal Law Act 1967. We have been told that that was a complete surprise to counsel. Counsel for the Crown had in the course of opening the case just mentioned s 4 of the Criminal Law Act, but from that time onwards nothing was said about it. Counsel for the appellant Cross protested at that approach to the case, but the learned judge nevertheless decided that that was the way in which he was going to approach the case in his summing-up to the jury.



He said:

'If, therefore, although not guilty of the offence as laid in count 7 he did subsequently become aware of the fraudulent conversion by Channon, and thereafter signed certificates transferring Channon's shares to the trustees for the purpose of concealing the conversion by Channon, he would, you may think, be guilty of the offence under section 4.'

He there contemplates the possibility of there being a conviction under s 4.

Finally the learned judge said:

'If he did know and did consent, and was, therefore, a party to the use of it by Channon, he, Cross, is also guilty on count seven. If he did not know, the next question for you to consider is did he discover later that that is what Channon had done, and did he by issuing those certificates dishonestly do an act intending to impede Channon's arrest and prosecution.'

The learned Common Serjeant was throughout his summing-up saying to the jury:

'There really is not sufficient evidence on the count as charged, but you may think there is evidence of an offence of which you can convict him by virtue of s 4 of the Criminal Law Act.'

Section 4 of the Criminal Law Act 1967 provides:

'(1) Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.

'(2) If on the trial of an indictment for an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the accused might on that charge be found guilty) was committed, but find the accused not guilty of it, they may find him guilty of any offence under subsection (1) above of which they are satisfied that he is guilty in relation to the offence charged (or that other offence).'

The Criminal Law Act was passed in 1967 and came into force on 1st January 1968.

Approaching the case as a whole, in our view, there are several difficulties to the approach which the learned Common Serjeant endeavoured to make. Firstly, the judge clearly thought that the offence under count 7 as charged was not proved, but the verdict showed apparently that it was, and, in our view, it is clearly wrong that there should be that kind of confusion about a verdict in a case such as this. The count charged specific knowledge by the appellant Cross in relation to a fraudulent conversion by trustees, whereas the judge was apparently allowing the jury to return a verdict of guilty on that count although he intended that it should be a verdict of guilty of an offence by virtue of s 4 (2).

Secondly, in our view, it is most undesirable and wrong for the issue of s 4 to be raised *after* the evidence is closed. If the prosecution foresee that a charge under s 4 may be the proper way in which to deal with the facts, there should be a specific count in the indictment charging it. But if in the course of the case, by reason of the evidence that is given in the case, the nature of the prosecution case changes—where, for example, the accused gives evidence which would exculpate him from the offence charged but in so doing would provide a case covered by s 4, and, therefore, could be brought in by s 4 (2), there would obviously be no objection to the prosecution raising the question of an offence under s 4. But, in our view, that matter should



be raised before the evidence has been completed so that the defence may have an opportunity to deal with it. If it were raised in the course of counsel's speech the defence would have no proper opportunity of dealing with it. Where s 4 is to be considered as a possible verdict, in our view, first, if it is foreseen in advance that an offence under s 4 would be the appropriate charge, it should be specifically charged. If it is not foreseen in advance, but arises in the course of the case, then the accused should be told *before* the evidence is closed of the possibility of a verdict under s 4, and he should be offered the opportunity of an adjournment in order to enable him to meet that particular charge.

But there is yet another difficulty, in our view, in this case. The verdict which was returned was a verdict of guilty under count 7 of the indictment, namely, of fraudulent conversion by a trustee. If the alternative of a conviction by reason of s 4 is envisaged, it is, in our view, essential that the jury should state whether or not they have found the accused guilty of the substantive charge, and, if they have found him not guilty, whether or not they have found him guilty of a charge by virtue of s 4.

There is a further difficulty in the way of the approach in this particular case which, in our view, is also fatal to the conviction. Count 7 of the indictment charged the applicant Channon and the appellant Cross 'between the 24th day of December, 1961 and the 31st day of December, 1966 being trustees of certain property' of converting a sum of money to their own use or benefit. Evidence of acts or omissions after 1966 may well have been admissible and relevant as tending to show the state of mind of the defendant in 1966, but the Criminal Law Act was not passed until 1967 and did not come into force until 1st January 1968. In our view, a man cannot be imperilled for an offence which occurred in 1968 when the indictment specifies a time limited to the end of 1966. There may be occasions where the facts show that there has been an act with intent to impede apprehension or prosecution a day or so after the date alleged in the indictment, and it may well be that this difference of time would be immaterial in those circumstances. But, in our view, it is quite impossible in this case to allow the offence which it is alleged occurred at a quite different time to be brought in by virtue of s 4 (2) of the 1967 Act under this particular count of the indictment.

Accordingly, therefore, we are of opinion that this verdict is both unsafe and unsatisfactory. It is unsafe because the learned judge took the view that there was no sufficient evidence to convict the appellant Cross of the offence of fraudulent conversion as a trustee, and that is precisely what the jury did. It is unsatisfactory because he made references to s 4 which can only have been misleading and in the respects which I have already mentioned were wrong.

Accordingly, this court will grant leave to appeal, will treat this hearing as the hearing of the appeal, and will quash the conviction.

*Orders accordingly.*

Solicitors: *Samuel Coleman ; Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

28th July 1971

R v BARNET AND CAMDEN RENT TRIBUNAL.  
EX PARTE FREY INVESTMENTS LTD

*Rent Control—Contract referred to tribunal—Reference by local authority—Setting aside—Matters which must be shown—Need of tenants' consent to reference—Reference of number of contracts together—Rent Act, 1968, s 72 (1).*

By s 72 (1) of the Rent Act, 1968, a local authority may refer a contract for the furnished letting of a dwelling to the rent tribunal for the district.

For the court to set aside the decision of a local authority to refer a contract under s 72 (1) it must be shown either that in coming to that decision the authority took into account something which it ought to have ignored or ignored something which it ought to have taken into account, or otherwise that it reached a decision which no reasonable local authority could have reached if it had been properly instructed on the law. Such matters as whether the extent of the evidence justified the belief of the authority that the rent tribunal would reduce the rent, or the failure of the authority to follow the desires of particular tenants who did not wish their contracts to be referred to the tribunal, are relevant merely in so far as they throw light on the authority's motive. The Rent Act, 1968, does not say that a local authority must get the consent of tenants before referring their contracts, and if an authority thinks that some of its tenants are hesitant to apply for a reference there is good ground for the authority to take the initiative and make the reference themselves.

Per O'CONNOR, J.: In *R v Paddington and St Marylebone Rent Tribunal. Ex parte Bell, London & Provincial Properties Ltd* (1949), 113 JP 209, LORD GODDARD, CJ, said: 'It was never intended that this Act [s 2 (1) of the Furnished Houses (Rent Control) Act, 1946, which gave a local authority the same power to refer as did s 72 (1) of the Act of 1968] should provide for general rent fixing throughout a district'. I am satisfied that the law was thus correctly stated, but I do not understand those words to mean that a number of contracts may not be referred at the same time where the proper enquiries have been made and there are reasonable grounds for thinking that the rents may be too high, even though only a little. If some tenants do not wish their contracts referred to the tribunal it is a matter for the local authority to take into consideration, but their discretion to refer those contracts should not be limited by that averment on the part of particular tenants.

MOTION by Frey Investments Ltd for an order prohibiting the respondents, the rent tribunal for Barnet and Camden, from proceeding with the hearing and determination of 22 references made by the London Borough of Camden under Part VI of the Rent Act 1968, and relating to four tenancies at 36 Bartholomew Villas, London, NW 5, two tenancies at 9 Patshull Road, London, NW 5, five tenancies at 11 Patshull Road, aforesaid, one tenancy at 13 Patshull Road aforesaid, nine tenancies at 37 Patshull Road aforesaid, and one tenancy at 42 Patshull Road aforesaid.

R H Bernstein QC and E J Prince for the applicants.

J S Colyer for the rent tribunal.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of Frey Investments Ltd for an order of prohibition to prohibit the rent tribunal for Barnet and Camden from proceeding with the hearing and determination of 22 references made by the London Borough of Camden under Part VI of the Rent Act 1968, and referring to a number of tenancies within their area. The reference by the local authority, the hearing of which it is sought to prohibit, is a reference under powers in

s 72 of the Rent Act 1968. That section forms part of Part VI of the 1968 Act which is itself a consolidating Act. Section 69 begins a series of sections dealing with the control of rent of furnished lettings and largely reproduces the legislation which originally existed in the Furnished Houses (Rent Control) Act 1946. Under that code and by virtue now of s 72 (1) either the lessor or the lessee under a Part VI control—or a local authority—may refer the contract to the rent tribunal for the district in question. The local authority, the Camden Borough Council, have made these 22 references in purported exercise of that power. We are asked to prohibit the rent tribunal from proceeding with the references on the ground that the references themselves are nullities for reasons to which I must turn in a moment.

The borough of Camden quite evidently has a serious housing problem. It is not for us to say whether it is more or less serious than in other London boroughs. It is perhaps made the worse by the fact that since the creation of the Greater London Council Camden administers three areas which were formerly under different jurisdictions, and with different standards and practices. Arising out of this housing problem, there has come into existence in the borough of Camden a body of persons who call themselves the Camden Housing Action and who have made it their business—I criticise them not at all—to try and stimulate and inspire the action of the borough council in remedying the housing difficulties in the area. This organisation, Camden Housing Action, for some reason which is not apparent to me, endeavoured to persuade the council to exercise its powers under s 72 on a very much wider basis than heretofore. In particular they suggested that initial action should be taken in regard to the contracts of tenancy made with one or other of the two brothers Frey or with one or other of the companies with whom Messrs Frey are associated. I say at once that I do not know for what reason Camden Housing Action pointed the finger initially at the Frey houses because a great deal of the evidence which is before this court is evidence which indicates that the Freys were very good landlords indeed. There is a great deal of evidence indicative that they did not push up the rent, that they kept the premises in good order, and indeed a great deal of evidence which is very much to their credit, but for reasons best known to themselves Camden Housing Action invited and pressed the borough council to make a start by referring the tenancies associated with Messrs Frey.

As a result of this pressure—and it seems to me there is no doubt it was as a result—the housing committee of Camden decided to make investigations of the terms of letting in the houses with which Messrs Frey were associated. There is no power under the Act for a local authority which contemplates making a reference to enter and inspect the premises, and it was evident that any investigation which was to be made would have to be made discreetly. In fact, four officers of the borough council—some at any rate from the valuation department—made enquiries in the houses with which Messrs Frey were associated on 9th June and 15th June 1970. There is a considerable conflict in the affidavits as to precisely how these investigations were carried out. The officers themselves say that they acted discreetly. They sought permission before they came in, and they only made the most innocent of enquiries of the tenants as to whether they were content with the rent that they were paying and as to what facilities they had under their contract of tenancy. On the other side we have affidavits which aver that the borough council officers in question went in arrogantly, went in by making false statements as to who they were and what they were doing, and otherwise acted in a manner which no one could commend. This court, of course, cannot solve disputed issues of fact on affidavits and happily we need not do so because the manner in which the investigation was made seems to me to have nothing to do with the problem which we have to solve. One thing is clear, that in the course of the second day when these investigations were being made, word

of what was going on reached Mr Frey—I think through one of his tenants—and he came down and saw these officers going around asking questions of the tenants, told them they were to desist, and I think a policeman was called in to the argument before it was over. Be that as it may, the investigations ceased at that stage, and at that time the officers had inspected 23 rooms out of some three or four houses with which Mr Frey was associated. Of those 23 rooms, one is of no further consequence, and I forget about it. The other 22 are the rooms in respect of which the references to the tribunal were made in this case.

The investigation having ceased prematurely, the matter was referred back to the housing committee, and on 8th September 1970 the town clerk prepared a report on the position for the assistance of the housing committee. It is a report which refers in the first place to a decision of this court in *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd (1)*, to which I must refer in a moment, and then goes on to summarise the effect of the inspection of the premises so far as that inspection had taken place. He states in the report:

‘It will be noted that there were 15 houses on the list and of these 8 were visited and access gained to 7. In those 7 houses, 23 tenants were interviewed and although on the whole the council’s officers felt that the rents were a little high, since there was no substantial complaint from any of the tenants interviewed, action under s 72 (1) of the 1968 Act would have failed completely.’

The reason why the town clerk took such a highly pessimistic view of the prospect of any action being taken by the local authority was, I feel sure, that he—and perhaps many other town clerks with him—had regarded the *Bell* case as imposing very severe limitations on the power of the local authority to act under what is now s 72. The town clerk’s summary of the reports brought back by the inspecting officers is important and is much relied on by counsel for the applicants. It is not in accord with the evidence which those officers have put before this court because in their affidavits the officers in question have referred individually to the various tenants whom they interviewed, and in the evidence put before us there are many statements, if the evidence is to be accepted, that individual tenants were not satisfied with the terms of their tenancy, indeed that individual tenants were in many instances prepared to support the local authority in any reference under the section. Counsel for the applicants very properly relies heavily on the passage from the town clerk’s report which I have read because he says that he would regard that as a summary of the consequences of the inspection, namely, that, although the rents were a little high, there was no substantial complaint from any of the tenants who had been interviewed.

Having received that report from the town clerk, the housing committee met on 15th September 1970. They received on that occasion not only the town clerk’s report but a deputation from Camden Housing Action and in particular Mr Sedley on behalf of that organisation addressed the housing committee. We have an affidavit from Mr Sedley as to what he said and other supporting affidavits, and I think it is fair to say that, although the housing committee was addressed on the general need for wider action under s 72, it was said that the deputation were not really in a position to inform the housing committee of the particular circumstances of the 22 rooms with which we are concerned. It does appear however from his evidence and the other affidavits that each of the houses in which these rooms are to be found is an old house which has been converted in the main by dividing each of the old large rooms into two. Partitions have been put down the centre of each of the six original rooms thus producing 12 smaller rooms. The evidence is that this work had been done quite well, the partitions are substantial and of normal construction, and they are brought

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666,

right forward to the window so that the window in each case now serves both halves of the former single room.

But to pass on to the history of the matter, the housing committee, having seen the town clerk's report, listened to Mr Sedley, and no doubt debated this matter among themselves too, decided to take counsel's opinion on whether references should proceed, and by 22nd October 1970 counsel's opinion had been obtained and the matter was back before the housing committee again. I mention for completeness at this stage—and I must refer to it in greater detail later on—that in parallel with the council's consideration of whether they should refer some or all of those contracts to the rent tribunal, there was also a great deal of correspondence between the council and the legal advisers of Mr Frey as to whether inspection of the premises should not be obtained by the medical officer of health acting under his powers in the Public Health Acts. The position on that I must, as I say, return to in a moment because it raises one particular argument which counsel for the applicants puts forward, but I mention in dealing with the history of the matter that on 27th October when the housing committee met yet again to consider this question they also had before them a report of the medical officer of health dealing with those same properties. I do not propose to read the medical officer's report in any kind of detail, save to say that it is not in any sense a bad report from the landlords' point of view. It finds defects and deficiencies and a measure of overcrowding which is perhaps only to be expected in such an area, but it certainly is not a report which would cause anyone to think that the landlords in this case were doing their work as landlords any worse than the ordinary run of landlords in such a district.

Counsel's opinion has been put before us as it was put before the housing committee and counsel if I may say so makes some very helpful, sensible suggestions as to the procedure to be adopted in the light of the *Bell* case (1), but he does not seem to have been asked to advise whether the evidence of high rental was sufficient to justify a reference to the tribunal. The only evidence we have had of that so far is that to which I have already referred, and it does not seem that counsel was asked to apply his mind specifically to this question. Also at this time a Councillor Jaque who took a strong view against the making of references of this kind produced an extremely able, if I may say so, memorandum airing that view. We have seen a copy of it. It was circulated to all members of the council, and it is quite obvious, and not disputed, that this question whether the contracts of letting for these 22 rooms should or should not be referred was dealt with in very considerable detail and with a great deal of care. We get, as I say, counsel's opinion, the matter adjourned on several occasions, until the decision was taken that the references should be made. The decision was taken on 1st December 1970, and it is to prohibit the tribunal from entering on those references that counsel for the applicants stands here today.

I ought to refer to the *Bell* case (1) which is the key really to all that has happened in regard to the power of a local authority to make references under s 72. It was a strange case, decided very early in the history of this legislation, where a local authority had decided on a purely arbitrary rule that if any two flats in a block of flats were referred to the tribunal and rent reductions followed, the authority would thereupon refer all the other flats in that particular block without any regard to the terms of the letting or the circumstances prevailing in the other flats. Pursuant to that resolution or that policy, when reductions of rent were obtained in a large block of flats called Park West, the local authority purported to refer all the remaining 550 odd flats, and this court in a powerful reserved judgment explained in some detail why such conduct was not acceptable or permissible under the statute. In my view, the real lesson which is to be learned from the *Bell* case is that a local authority,

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.



when exercising its right to refer, must consider each contract individually. The real vice of what was done in the *Bell* case, in my judgment, was this block reference without any attempt being made whatever to ascertain the circumstances of the individual contracts of letting which were being referred. So it was on that ground, as I read the judgment, that the references were held to be a nullity. But the court went on to give indications of such matters which should and should not be regarded as appropriate considerations for a local authority making a reference under s 72, and I cite three passages from the judgment of the court:

'No doubt, the reason why it was provided that cases might be referred by a local authority was because it was recognised that there might be tenants who would hesitate themselves to refer the case for fear of the consequences that might befall them, but it could never have been intended that local authorities could refer cases respecting which they had neither received complaint from the tenant nor had made any inquiry whether there was a *prima facie* case, or anything to indicate that there was any unfairness in the rent charged . . . It was never intended that this Act should provide for general rent fixing throughout a district. The purpose is to deal with individual cases where hardship exists or may be reasonably supposed to exist . . . It is one thing for a local authority to act for the protection of tenants who may be unable to take care of themselves, but it is quite another thing to act in the case of those who may be presumed to be capable and competent to act in their own interest and who may have the greatest dislike for any interference with their contract of tenancy.'

Basing himself on those extracts from the court's judgment and one or two others which I have not thought it necessary to read, counsel for the applicants makes three main submissions in support of his contention that these 22 references were nullities. He submits first of all that the discretion to refer cannot be exercised by a local authority without forming an opinion as to the prospects of success. He developed that a little later on in the argument by saying that the local authority may not refer a contract unless they think they have a prospect of securing a reduction of rent in consequence. He says here that on the town clerk's report he can show out of the mouth of the town clerk himself that information available at any rate on 7th September 1970 was such as to show that no real prospect of successful reference existed at all.

Secondly, and I think these are both alternative and cumulative, counsel submits that a local authority's discretion to refer ought not to be exercised unless there are circumstances shown which prevent or deter the particular tenant from making the reference himself. He says that in the present case it is quite evident that some at any rate of the tenants did not want their tenancies referred, and even though the factual situation is somewhat obscure on the affidavits he says that they proved a sufficient number of cases in which a desire not to be referred can be established to show that the local authority failed in this test. For my part I think that both those two propositions are too narrowly stated. As I have already said, the *Bell* case (1) was concerned primarily with the proposition that each individual contract must be individually examined by the local authority. That duty was performed in this case and there is no argument about that.

In regard to all these other matters, such as the prospect of success, if a reference is made, and the wishes of the tenants which may or may not be consistent with a reference made, those matters are highly relevant of course to any local authority considering the making of a reference, but their relevance in this court is for the light which they throw on the motive of the local authority in making the reference. The principles which govern this kind of discretion are the same familiar principles which

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.



one finds throughout the law relating to local authorities. To set aside a decision of this kind it must be shown either that the local authority took into account something which it ought to have ignored, or ignored something which it ought to have taken into account, or otherwise that it reached a decision which no reasonable local authority could have reached if it had been properly instructed on the law.

When one comes to consider such matters as the strength of the case, that is to say whether the extent of the evidence justified the belief that the rent tribunal would reduce the rent, or when one comes to consider a local authority's failure to follow the desires of particular tenants in regard to making a reference, the relevance of those matters is, as I say, the light which they throw on the local authority's motive, because in the end the question is: Were the local authority actuated by a proper motive or did they take into account matters which they ought to have disregarded. In my judgment, if one gets a case where there is overwhelming evidence that the rent is fair or low, overwhelming evidence that the rent tribunal is most unlikely to alter it, and yet the local authority insists on going ahead with a reference, that action on the local authority's part prompts the question: 'Why are they doing it?' In other words, it suggests—and may suggest conclusively in a strong enough case—that the motive of the local authority is not a genuine motive to carry out its power under the Act, and I approach this case with this principle in mind.

I think so far as the evidence before us on the strength of this case is concerned, that is to say, the evidence as to the high or exorbitant character of the rent, it is very much a borderline case. Even taking the town clerk's own report, he refers to his officers having formed the impression that the rents were a little high, and it seems to me that if one considers the strength of the case as it must have appeared to the local authority, it was perfectly proper for them to regard it as being a borderline case. It certainly is not a case where the prospects of success were so poor as to cast doubts on the sincerity of the local authority's motive.

The same principle, as I say, applies to the second submission. The Act does not say that a local authority must get the consent of the tenants before referring. If that had been the intention of Parliament it would have been so provided no doubt. If a local authority thinks that some of its tenants are hesitant to apply, there is certainly good ground for them to take the initiative and make the reference themselves. For my part I think there is much to be said for a point which counsel for the rent tribunal was making in the course of his argument, that in these rooming houses or bed-sitter houses as they have been variously described, if the local authority has decided that a large number, or large proportion, of the contracts of tenancies relating to the rooms ought to be referred, there will often be cases in which it is highly desirable to include a number of other rooms remaining in the house even though the tenants of those rooms are not so enthusiastic about the reference being made. Again looking at the evidence on the whole of this aspect of the case, I find nothing in the action of the local authority in going against the wishes of some of the tenants of such a nature as to cast doubts on the local authority's motive, and that, as I have said more than once, is the point to which one comes back all the time.

Counsel for the applicants' third argument is one highly special to the facts of this case. It is in two parts. He says that independently of his other arguments these references were *ultra vires* because the council's decision was significantly influenced by irrelevant or improper considerations, and the first of those he says is that the council were influenced by the fact that Mr Frey had refused permission for them to be entered. He says that the council, being frustrated in their desire to enter and being angry with Mr Frey, were influenced by that anger to decide to make these references against Mr Frey's interests. All that can be found to support that allegation is in an affidavit sworn by the chairman of the housing committee, a Mr Hilton, which

affidavit received commendation even from the applicants' side for its frankness and helpfulness. In para 6 Mr Hilton stated:

'The determination evinced by the [applicants] to prevent the council from investigating its properties and their occupants has, I am sure, influenced some members of the committee and of the council in their considerations.'

He does not say, it is to be observed, that the council corporately was so influenced; he says that he is sure that some members of the committee and of the council were so influenced. For my part I do not think that gets anywhere near far enough to justify the submission which counsel for the applicants makes on it. There is authority, to which we have been referred, which recognises that in democratic assemblies in the course of debates which there take place all kinds of considerations are put forward from time to time by individual members of the council or committee concerned, and I do not think that Mr Hilton's affidavit goes one inch beyond saying that some of the councillors were angered by Mr Frey's refusal to give them access to his premises and they may have been thus influenced against Mr Frey in the vote which they cast. If that is as far as it goes, it falls a long way short of the allegation that the council was influenced by an improper motive in this way.

The second half of his submission relates to what I have already referred to as the parallel enquiry which was going on in relation to inspection of the premises by the medical officer of health. Initially when Mr Frey refused to allow further inspections to take place for the purposes of s 73 he was told by the council that the medical officer of health had power to make inspections and that it was about time that the medical officer of health made such an inspection. This gave rise to a considerable correspondence between the solicitors acting for Mr Frey and the town clerk, in which consideration was given to the propriety of the medical officer of health using his powers at this time, and there resulted in what counsel for the applicants describes as an undertaking from the council, so he would say, which prevented them from using information obtained by the medical officer's inspections for the purposes of a reference under the Rent Act 1968. The high point of his argument appears in a letter dated 3rd July 1970, from the town clerk to the applicants' solicitors, in which there appears this passage:

'The inspections to be carried out by the medical officer of health have, in effect, nothing to do with any purported reference to the rent tribunal under s. 72 (1) of the Rent Act 1968. Similar inspections, I am told by the medical officer of health, have not been carried out for the last five years. As you are aware, he has statutory powers to carry out such investigations and I trust that he will receive [the applicants'] full co-operation. Perhaps I ought to emphasise that his inspections will have no reference to consideration of an appropriate rent.'

That is the high spot as far as the facts in relation to this argument are concerned, and it is contended that there the council is undertaking not to use material obtained by the medical officer of health for any purpose connected with the reference under the Rent Act 1968. Whether if such an undertaking is given it would be effective is a matter into which I do not propose to go in any kind of detail because I think the answer to this particular contention is that even if there was some undertaking binding in honour which is as much as it could have been, there is no breach of that undertaking shown before us. The alleged breach relates to the housing committee's meeting of 27th October at which, as I have already said, the committee had two reports before it. It had first a report of the medical officer of health following his inspections, and secondly the town clerk's report summarising counsel's opinion and dealing with Rent Act questions, and one sees from the minutes that on that occasion it was resolved that the medical officer of health be authorised to issue an appropriate

notice in respect of what one might describe as his department, the sanitary or public health side, but it was also resolved that the report and schedule submitted by the town clerk—and I interpose, for Rent Act purposes—be deferred for consideration at the next meeting of the committee, and indeed it was. The complaint is that by having those two reports simultaneously before the housing committee, the alleged undertaking was in some way broken. I must confess that I just cannot see how that argument is made out. The attitude of the council has been that they were two separate things, they were considered in fact on two separate days because the Rent Act issue was adjourned to a later meeting of the council, and I really cannot go with counsel for the applicants in his argument that they should not have been put on the same agenda or they should not have been dealt with by the same persons forming the housing committee, or that, as he put it, the town clerk should have warned the members of the committee not to use one section of the information for the purposes of the other. I really am unable to accept that even if an undertaking is given, that that amounts to a breach of it, nor can I see the slightest ground for thinking that the local authority's decision under s 72 was in any way prejudiced by the juxtaposition of the medical officer of health's report.

For all those reasons, I am satisfied that the application is not made out and I would dismiss it.

**O'CONNOR J:** I agree for the reasons which have been given by LORD WIDGERY. I only desire to add a few words on the second contention which was put forward on behalf of the applicants, namely, that the local authority's discretion to refer a contract ought not to be exercised unless there are circumstances that prevent or deter the tenant from referring the contract himself. I look back at *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd* (1) and for my part I am satisfied that the law was correctly stated by LORD GODDARD CJ when he said: 'It was never intended that this Act should provide for general rent fixing throughout a district.' I do not understand those words to mean that a number of contracts may not be referred at the same time. Such matters must depend on the facts and when one comes to consider lettings of individual rooms in converted houses in urban areas, if the requirements to be deduced from *Bell's* case and from the judgment which LORD WIDGERY has given are fulfilled, namely, that the proper enquiries have been made and there are reasonable grounds for thinking that the rents may be too high, even though only a little, so that the tribunal can properly consider them, it seems to me that, if there are one or two, or indeed a number, of tenants, who for one reason or another say expressly: 'We do not wish our contracts referred to the tribunal', of course it is a matter for the local authority to take into consideration, but it does not seem to me that their discretion to refer those contracts should be limited by that averment on the part of particular tenants or numbers of tenants. It may well be right in order that fairness should prevail, particularly the landlord that in the case, for instance, of a house in which five or six rooms are separately let, and in respect of them the necessary requirements are fulfilled, but one or two of the tenants object to their rents being referred, that the local authority can refer all the tenancies and not merely those where the tenants have made no objection.

**LAWSON J:** I agree with the judgments which have been delivered.

*Application dismissed.*

Solicitors: *M S Marks & Co; Town Clerk, London Borough of Camden.*

G.F.L.B.

## CHANCERY DIVISION

(CUMMING-BRUCE, J)

25th May, 10th June 1971

Re L (A C) (an infant)

*Infant—Care—Assumption by local authority of parental rights—Objection by parent—Allegation that objection out of time—Estoppel of authority—Need to appreciate ability of mother to care for child.*

The infant L was born on 11th May 1968, to the applicant who was the mother of two older illegitimate children, P and S. P had been received into care by the local authority when she was six months old and S had been kept by the mother who had looked after her with reasonable success. L was received into care by the authority on 20th May 1968. On 19th June 1968, a sub-committee of the authority's Children Committee passed a resolution, on the recommendation of the children officer, under s 2 (1) (b) of the Children's Act, 1948, vesting parental rights over L in the authority on the ground that the mother was suffering from a permanent disability rendering her incapable of caring for the infant. The children officer deposed that she had told the sub-committee of the situation in respect of P and S, particularly of P. On 20th June notice of the resolution was given to the mother who, on 21st June, served on the authority a notice of objection. On 5th July the authority laid a complaint before the justices in accordance with s 2 (3) of the Act of 1948. On 18th July an assistant solicitor of the authority told a meeting of the full Children Committee that the sub-committee's resolution of 19th June might be invalid owing to the committee's lack of delegated powers. The children officer informed the committee of the resolution of 20th June and the reasons for it. The committee thereupon passed a resolution delegating full authority to the sub-committee, and a second resolution that, the requirements of s 2 of the 1948 Act and of s 48 of the Children and Young Persons Act, 1963, having been proved to the committee's satisfaction, 'all the rights and powers of the parents or guardians of the child, particulars of whom are entered in the Assumption of Parental Rights Register . . . shall vest in' the authority. The relevant extract from this register stated wrongly that parental rights had been assumed in respect of the child S, but this was struck out at some later stage. On July 3 notice of this second resolution was served on the mother informing her that she could serve notice of objection within 14 days, but the mother's solicitor was told by the corporation that the first objection would be treated as due objection to the second resolution which was a mere formality. In the event notice of objection to the second resolution was served out of time and on that ground was refused by the authority. Accordingly, no complaint was laid before the justices under s 2 (3) of the 1948 Act, but after discussion the mother laid a complaint under s 4. On 8th September 1970, the justices dismissed the complaint. On 11th March 1971, the mother, having married L's father, issued a summons for an order that L be made a ward of court. On a summons by the authority for an order that the infant be de-warded,

**HELD:** as the authority had represented to the mother that the second resolution was a mere formality to which no written objection was necessary the authority was estopped from alleging that no written objection had been made in time; the authority had effectively prevented the mother from having the resolution considered by the justices under s 2 (3) of the Act of 1948, thus depriving her of the protection provided by that subsection; the infant should be protected by the exercise of the prerogative jurisdiction by reason of the doubts about the efficacy of the resolution of 19th June which illustrated a degree of uncertainty and confusion as to the source of the authority's powers of control over the infant; there was nothing to show that either committee appreciated the capability of the mother to look after one child, S, who had erroneously been represented in the register seen by both committees as having been the subject of the assumption of parental rights by the authority; accordingly the infant should not be de-warded before consideration of the case on its merits, and the summons would be dismissed.

**SUMMONS** by Plymouth Corporation for an order that an originating summons

issued by the parents of L, an infant in the care of the corporation, making L a ward of court be dismissed and that L be de-warded without a trial of the merits of the case.

*Leolin Price QC and R A Miller for the mother.*

*Margaret Puxon and Margaret Higgins for the corporation.*

*Cur adv vult*

25th May. **CUMMING-BRUCE J** read the following judgment: By a summons dated 11th May 1971, the corporation seeks an order that the originating summons herein be dismissed and the infant de-warded.

The background of the application is this. The infant was born in May 1968, and was received into care on 20th May 1968. A resolution was passed under s 2 (1) (b) of the Children Act, 1948, on 19th June 1968, and under s 2 (1) (b) of that Act or s 48 of the Children and Young Persons Act, 1963, on 18th July 1968, by delegated committees of the corporation, vesting parental rights over the infant in the corporation. Since then the child has remained in the care of the corporation. The mother objected to the vesting of her rights in the corporation, but for reasons with which I will deal later, no complaint under s 2 (3) of the 1948 Act has yet been heard by the justices. In November 1968 the mother issued a complaint under s 4 of the 1948 Act before the justices, but proceedings were not heard until 8th September 1970, by agreement with the mother. The justices then dismissed the complaint. She then issued an originating summons under the Law Reform (Miscellaneous Provisions) Act 1949, and made the child a ward of court. The corporation now seeks an order de-warding the child without a trial of the merits of the case. It adopts this procedure pursuant to the guidance given by the Court of Appeal in *Re T (A J J) (an infant)* (1), in particular, a passage at the end of **RUSSELL LJ**'s judgment. The reason for this guidance is that it has been well established since 1961 that the judge in whom the prerogative jurisdiction is vested will not exercise control in relation to duties or discretions clearly vested by statute in a local authority, and may, therefore, and in a wide range of cases normally will, order that the child cease to be a ward of court. The corporation contends that this is such a case and that there is, therefore, no occasion for an enquiry into the merits of the care and control of the child since these are by statute the responsibility of the corporation.

Counsel for the mother, however, submits that this case comes within the exceptional class described by **LORD EVERSHED MR** in *Re M (an infant)* (2), when he said:

'There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties.'

The course that the court should take in such a situation was considered in *Re S (an infant)* (3). There it was explained that the court's jurisdiction is not ousted by the legislation conferring powers and duties on the local authority. As **PEARSON LJ** put it:

'the particular facts in the particular case ought to be taken into account, and when they have been ascertained, not necessarily fully but sufficiently for the purpose of deciding this question, it may be possible to decide whether the suggested exercise of control by the court involves an invasion of the sphere of activity which Parliament has entrusted by statute to the local authority.'

(1) 134 JP 611; [1970] 2 All ER 865; [1970] Ch 688.

(2) 125 JP 278; [1961] 1 All ER 788; [1961] Ch 328.

(3) 129 JP 228; [1965] 1 All ER 865.



The evidence which the parties have put before me is, therefore, calculated to enable me to decide (a) whether the corporation has fulfilled its statutory obligations in accordance with law and with propriety, so that it is an appropriate exercise of the prerogative jurisdiction to renounce any invasion of the corporation's statutory powers and so de-ward the child forthwith; (b) whether there are any circumstances which should lead me to continue to protect the child by the prerogative jurisdiction in spite of the statutory transfer of parental rights to the corporation.

Counsel for the mother has taken three points, which I summarise without attempting to emulate the elegance of his submission. (1) Neither the resolution of 19th June nor the resolution of 18th July has legal efficacy to vest parental rights in the corporation because statutory procedures were not complied with. (2) The resolution of 18th July, which was not supported by a complaint, in spite of an objection by the mother, has lapsed, if it was ever good. (3) Both resolutions were bad because the relevant committees did not take into account the relevant considerations and took into account irrelevant matters. In this connection, he has submitted (a) that there was no or no sufficient evidence on which either committee could find that the mother was at the date of either resolution suffering from a permanent disability or mental disorder, rendering her incapable or unfit of caring for the child; (b) that there was confusion in both committees' minds about the facts. He submits that neither committee seems to have appreciated fully or at all that the mother was caring reasonably successfully for her second child, S, or to have addressed its mind to the question whether, if she could care for one child, she could not care for a second. Thus, counsel for the mother submits that there are such special circumstances as justify continuing the status of the child as a ward of court.

I deal first with the question whether the statutory procedures were complied with. Section 2 of the 1948 Act provides a code whereby for the protection of children the local authority may step in and by resolution effect a temporary vesting of parental rights, where it appears to them that there exist one or more of the six questions of fact specified in s 2 (1) (a) and (b) of the 1948 Act, as extended by s 48 (2) of the 1963 Act. Thereafter, the authority is under a duty to serve notice on the parent. If the parent serves written notice of objection on the authority in time, the resolution will lapse in 14 days unless the authority within 14 days complains to the juvenile court. If such a complaint is made, the resolution will not lapse until determination of the complaint and the court on the hearing may order that the resolution shall not lapse. There is a proviso to s 2 (3), which is of importance in the instant case, that the court shall not so order unless satisfied that the statutory questions of fact on which the resolution was founded are proved. Section 3 deals with the powers of the authority and enables it by s 3 (3) to allow the care of the child to be taken over by a parent when it appears to the authority to be for the benefit of the child. Section 3 (4) enables the authority to take the child back into its care, if it appears to it to be in the interests of the child. This is relevant as the corporation contemplated such a s 3 (4) transfer for a period in late 1968-69 and the procedure was adjusted to that intention. By s 4 (2) the resolution may be rescinded by a subsequent resolution if the authority think that it will be for the benefit of the child. By s 4 (3) the justices have jurisdiction on the complaint of the mother—in this case—to determine the resolution—

'if satisfied that there was no ground for the making of the resolution or that the resolution should in the interests of the child be determined.'

Thus the code provides for an urgent and temporary holding operation by the authority and confides to the justices jurisdiction to determine, either on complaint by the authority under s 2 (3), or on complaint by the mother under s 4 (3), whether



the resolution shall continue to have effect in spite of the objection of the parent, and no doubt a parent can invoke s 4 (3), whenever there has been a change of circumstances since the previous complaint.

In this case the corporation got into difficulties because there was doubt about the vices of the first resolution, and there was rather a muddle about the necessity for an objection in writing to the second resolution. The technical problem is whether the muddle really matters. What happened was this. Before the child was born, the mother applied for him to be taken into the care of the corporation. There is an unresolved issue of fact between the mother and the corporation on the question whether she then meant to place the child permanently in care after birth. On this and certain other conflicts of evidence there has been no cross-examination, for the good reason, no doubt, that the whole point of this summons was to economise by following the summary procedure proposed by RUSSELL LJ. On this issue, I think I should proceed on the assumption that the mother had no settled intention that the child should remain permanently in care. The child was born in May 1968. On 19th June, the children officer attended a meeting of the Family Case Work Sub-Committee and recommended a vesting resolution under s 2 (1) (b) of the 1948 Act on the ground that the mother had a permanent disability rendering her incapable of caring for the child. Notice of the resolution was given to the mother on 20th June. On 21st June she duly served written notice of objection under s 2 (2). On 5th July the corporation duly made a complaint to the juvenile court pursuant to s 2 (3), and told the mother and her solicitor. So far, so good. Then an assistant solicitor on the staff of the corporation decided that the sub-committee might not have had delegated powers giving it power to pass the resolution of 19th June. He advised the Children Committee accordingly at its meeting on 18th July and a resolution was passed delegating authority to the Case Work Sub-Committee to make resolutions under s 48 of the 1963 Act. At the same meeting, the Children Committee made the following resolution:

'PARENTAL RIGHTS Assumption. Resolved that the requirements of either section 2 of the Children Act, 1948, or section 48 of the Children and Young Persons Act, 1963, having been proven to the satisfaction of the Committee, all the rights and powers of the parents or guardians of the child, particulars of whom have been entered in the Assumption of Parental Rights Register ... and signed by the chairman, shall vest in the [corporation].'

The resolution does not disclose what had appeared to the committee, save by an omnibus reference to s 2 of the 1948 Act, or alternatively, s 48 of the Children and Young Persons Act 1963. Exhibited to the assistant solicitor's affidavit is the relevant extract from the register of children in respect of whom resolutions under s 2 of the Act had been passed. I have not been instructed whether this register is a statutory document and I do not know, and failed to enquire, whether the mother or her solicitor had access to that document. For what it is worth, it is recorded that the Children Committee had approved an application for the child to be received into care on a permanent basis in March (which may be wrong), in consideration of the fact that the mother suffered from a permanent disability rendering her incapable of caring for the child.

On 23rd July the mother received formal notice of the second resolution, and was told again that she might serve the objection within 14 days. In passing, I would say that I am disturbed by the content of this notice which does not give an inkling of the grounds of the resolution; it was not much help to the mother to refer her to the resolution itself as it was ambiguous. In this case, however, it is clear that the mother's solicitor substantially appreciated by contact with the corporation the

ground of the resolution. On the same day the children officer sent a letter to the mother. I will read it.

'Dear Miss . . . , For certain legal reasons which the town clerk has explained to your solicitors . . . , it was necessary for the Children Committee at its meeting last Thursday, to pass a new resolution with regard to [L], exactly the same as the one which I wrote to you about on 20th June. I enclose a formal letter giving you notice of the new resolution. As I say, the town clerk has been in touch with your solicitor, and they will now be arranging as soon as possible the court hearing which the town clerk mentioned to you in his letter of 5th July, so that a final decision can be made.'

She also wrote to the mother's solicitor on the same day:

'At the request of the town clerk, who has, I understand, spoken to you about this matter on the telephone, I enclose a copy of two letters I have today sent to [the mother] on the question of the new parental rights resolution passed by the Children Committee at its meeting last Thursday, 18th July.'

And the enclosures were the copy letter I have just read and the formal notice of the resolution. So the mother was told that the town clerk and her solicitor would 'be arranging as soon as possible the court hearing which the town clerk mentioned to you in his letter of 5th July'.

The mother's solicitor has sworn that after receipt of the notice of the second resolution he was assured by the corporation that the first objection would be treated as the due objection to the second resolution and that the corporation would arrange the hearing before the juvenile court in accordance with that objection. In the course of her reply, I permitted counsel for the corporation to inform me of further information about this, which the corporation's assistant solicitor wished to be placed before the court on her undertaking to have the further information put on affidavit. I was then told that it was the assistant solicitor's recollection that there was an understanding between the mother's solicitor and himself that the mother's solicitor would give formal notice of objection to the second resolution and that the assistant solicitor would then issue another complaint and the matter would go to the court for determination. In his affidavit, however, he puts it much more strongly, and deposes: 'I indicated the necessity for such a notice, as a matter of procedure, to the mother's solicitor by telephone in July 1968 at the time of the passing of the second resolution'. The mother's solicitor has had no opportunity to reply to this allegation. The assistant solicitor concedes that in the course of conversation between some officer of the children's department and the mother something was probably said to the effect that: 'We know you object to this resolution because you objected before'. The mother's solicitor did give notice of objection in writing to the second resolution on 9th September, the reason for which he has not explained. He had, of course, been told in the copy letter from the children's department dated 23rd July that the town clerk was in the course of arranging with him the court hearing of which notice had originally been given on 5th July, and he may be forgiven, in the absence of any written communication from the corporation, if he did not grasp that he was expected to give a second written notice of objection within the statutory time limit. When the corporation received his second notice of objection, the town clerk himself wrote on 23rd September the following letter:

'I would draw your attention to section 2 (2) of the Children Act, 1948, where you will see that an objection, to be valid, must be served on the local authority within one month of the notification of the assumption of parental rights. [The

mother] was informed of the Children Committee's resolution on the 24th July, and therefore [the mother's] objection is out of time and cannot be accepted.'

The reaction of the mother's solicitor to this letter was swift and entirely consistent with his having throughout an impression that the corporation was treating the second resolution as a formality, and was prepared to treat the first written objection as an effective objection to the second resolution. See in his memorandum:

'Re Miss . . . 24/9/1968. Attendance upon town clerk. You apologise for yesterday's letter and say that [the assistant solicitor] who has been dealing with the matter will issue a complaint in the juvenile court.'

There is no affidavit from the town clerk and I unhesitatingly trust the accuracy of the aide mémoire of the mother's solicitor, a contemporary document.

On this state of the evidence I am not prepared to accept as reliable the uncorroborated evidence of the assistant solicitor, sworn after the hearing had concluded, that he can actually remember telephoning to the mother's solicitor and telling him that he must issue a second written notice. If that had been the case, it is very unlikely that the mother's solicitor would have been so brazen as to extract an unwarranted apology from the town clerk. I find that the mother and her solicitor were led by the conduct of the corporation's officials to believe that the corporation regarded the second resolution as a mere formality, that, the written notice of objection to the first resolution would be accepted as a good objection to the second resolution as it was only a formality, and that all that remained was for the corporation to bring the matter before the justices by a complaint under s 2 (3), if not, indeed, to continue the proceedings already instituted, of which notice had been given in the letter of 5th July.

When the assistant solicitor returned from his holidays at the end of September, he was worried by the belief that the justices would decline jurisdiction under s 2 (3) as there had been no written objection in time. His anxiety may have been justified, but I am satisfied that by reason of its conduct the corporation was estopped from alleging that no written objection had been issued in time. The principle of *Robertson v Minister of Pensions* (1) applies. In spite of the observations of LORD SIMONDS and others in *Howell v Falmouth Boat Construction Ltd* (2) I regard myself at liberty to follow the approach given by LORD DENNING MR in *Wells v Minister of Housing and Local Government* (3).

'a public authority cannot be estopped from doing its . . . duty, but I do think it can be estopped from relying on technicalities . . .'

Here, the statutory obligation to serve the notice within a limited time was imposed on the subject, not on the authority.

The requirement of a second written notice of objection was represented by the corporation as being a mere technicality, and if the corporation had proceeded to serve a complaint after receipt of the objection of 9th September, I believe that an order of mandamus would have been made to the justices if they had declined jurisdiction. I am not blaming the corporation's assistant solicitor for his apprehensions about the reaction of the justices' clerk; for all I know, that learned clerk would have preferred the approach of LORD SIMONDS to that of LORD DENNING to estoppel in relation to statutory obligations, but, if so, he would have been wrong.

(1) [1948] 2 All ER 767; [1949] 1 KB 227.

(2) [1951] 2 All ER 278; [1956] 1 All ER 447; [1951] AC 837.

(3) 131 JP 431; [1967] 2 All ER 1041.

In the result, I find that by reason of the representation by the corporation that the second resolution was a formality to which no written objection was necessary within one month, the corporation effectively prevented the mother from a testing of the resolution under s 2 (3).

Counsel for the corporation has argued that that is of no practical importance because the assistant solicitor and the mother's solicitor got together to find a solution and to get the matter before the justices, and did so by the mechanism of a complaint by the mother made under s 4 (3). There is great force in this. It is a case in which the justices will be primarily concerned under either section with the welfare of the infant, and it is arguable that onus may not matter very much, but the onus is quite different. (Compare s 2 (3) with s 4 (3).) Under s 2 (3), on the complaint of the authority:

'the court . . . may . . . order that the resolution shall not lapse . . . Provided that the court . . . shall not so order unless satisfied that the child had been, and at the time when the resolution was passed remained, abandoned by the person who made the objection or that that person is unfit to have the care of the child by reason of mental disorder within the meaning of the Mental Health Act 1959 or by reason of his habits or mode of life.'

By s 4 (3) on the complaint by the parent, the court

'if satisfied that there was no ground for the making of the resolution or that the resolution should in the interest of the child be determined, may by order determine the resolution . . .'

In my view, there is a significant difference between the two statutory jurisdictions of the justices, and in my view, further, the statutory procedure has not been followed and the mother has been deprived of a real protection conferred on her by statute. I cannot assent to the submission of counsel for the corporation that the mother is estopped as well because her solicitor decided, in conjunction with the assistant solicitor of the corporation, that the next best solution was for the mother to proceed under s 4 (3) because the corporation had got into a muddle. My conclusion is that if the mother had instituted proceedings for habeas corpus on the ground that the parental rights had not vested in the corporation, she might well have succeeded and the statutory authority of the corporation to care for the child in spite of the mother's objection is in doubt.

This, of itself, is to my mind a sufficient reason for continuing the protection of the child as a ward of court, but there is another reason. The doubt that exists about the efficacy of the resolution of 18th July is illustrated by the course that these proceedings took before me. In opening, counsel conceded on behalf of the corporation that the resolution of 19th June was not a good resolution by reason of a defect in the standing orders. In reply, I understood her to say that that concession was withdrawn, that the first resolution was a good one and that it had never lapsed because the complaint made by the corporation under s 2 (3) had never been adjudicated because the corporation treated it as spent after the second resolution was made. If there is this degree of uncertainty and confusion about the source of the corporation's statutory power of control over the child, it is an added reason for protecting the child by the exercise of the prerogative jurisdiction.

There are further matters raised by counsel for the mother which I think I should deal with. I fully accept that the way that the corporation discharges its statutory duties and exercises its statutory discretion is not normally to be subjected to judicial criticism. The committee had to decide whether it appeared to it that the mother suffered from a permanent disability rendering her incapable of caring for the child,

or alternatively, whether she suffered from a mental disorder which rendered her unfit to have care of a child. As far as I can make out from the chairman's statement, the committee founded their resolution on s 2 (1) (b), 'permanent disability rendering her incapable'. I have had the advantage of the affidavit of the children officer, explaining the basis of her recommendation to the committee. I reject the submission of counsel for the mother that the committee was under an obligation to receive the evidence of a registered medical practitioner before making their resolution. That seems to me to fly in the face of long-established principles: see, for example, LORD SHAW OF DUNFERMLINE's classical observations in *Board of Education v Rice* (1). As long as the committee act bona fide, apply their minds to the right question and take only relevant considerations into account, it is for them to decide how to set about collecting and receiving information.

There are, however, two considerations which give me concern. A major feature of the case at first sight is that the mother was, in spite of her infirmity, proving capable of looking after her second daughter. The problem seems to have been whether she was capable of looking after L, the infant who is the subject of these proceedings. There is nothing to suggest in anything before me that either committee appreciated this. The brief reference in the children officer's statement exhibited to her affidavit that she 'gave further explanation . . . of the situation regarding her other two children and particularly P . . .' is very odd as unless there is confusion I would have expected the children officer to have explained particularly the situation of S and distinguish the situation of L. I think I am also entitled to be concerned by the unexplained deletions of the extraordinary mistake about S on the register entry. The end of the first paragraph reads:

[The mother] has, since her discharge, produced three illegitimate children—the eldest, [P], was received into the care of this authority six months after birth and parental rights were assumed in respect of the second child, [S].

Somebody at some stage has deleted all the words of the last line after 'birth'. This is the more significant as the same grave error had appeared on the register in respect of the resolution of 19th June, which strongly suggests that the error was not corrected before 18th July and was still operating then on the minds of the committee. There is enough here to justify me in the view that prima facie there was confusion in the minds of both committees on the vital fact that in spite of her infirmity the mother was capable of looking after, at any rate, one child.

It is also material to observe that the two committees were differently constituted and that there are strong indications that the second committee under the same chairman were merely endorsing the decision of the earlier sub-committee without really examining the merits of the problem as was their duty.

Counsel for the corporation submitted that if the corporation was estopped, so also was the mother by her conduct from November 1968 onwards. She made a complaint; it was adjourned as the corporation offered to let her have the child in her care under supervision, retaining the power of recovery, but the mother for 18 months was not prepared to receive the child and is said to have made little effort to develop a personal relationship with him. Now the situation has changed. The child has become adjusted to his second foster parents and it is said, and said with obvious force, that to uproot him now would be a disaster. All of this calls for consideration if the merits are considered, but on the evidence of the mother's practical difficulties in providing a home for the boy in 1968 or 1969, I am not prepared to hold that she is by conduct estopped from asserting now her parental rights nor am I moved by the fact that at the complaint before the justices she did not



attack the validity of the statutory transfer of control in the way she has done in these proceedings.

For those reasons, on this summons I hold that the child should not be de-warded before consideration of the case on the merits, and the summons should be dismissed. I would only add this. I have been largely concerned in this judgment with examining with some punctiliousness the precise statutory procedure and the question whether they were properly followed, and whether, if they were not, the breach really mattered. Nothing in this judgment casts any imputation on the motives or conscientiousness of the officers of the corporation, although there are grounds for disquiet about the matters I have dealt with. I have not, of course, gone into the merits of the case but I have heard enough about it to enable me to appreciate that on any view there was a situation which imposed on the corporation and its officers anxious and urgent consideration for the appropriate action for the protection of the child and if they went wrong, as I hold they did in the matter of procedure, it was partly due to the difficulties that ensued as a result of a very technical difficulty arising on the standing orders controlling the delegated powers of the Family Case Sub-Committee.

*Summons dismissed.*

Solicitors: *Shaen, Roscoe & Bracewell*, for *Leslie D Lipson*, Plymouth; *H R Haydon*, Town Clerk, Plymouth.

P.P.

#### PRIVY COUNCIL

(LORD REID, LORD HODSON, LORD WILBERFORCE, LORD DIPLOCK AND LORD CROSS OF CHELSEA)

28th, 29th, 30th June, 1st July, 8th October 1971

#### RATTEN v REGINAM

*Criminal Law—Evidence—Hearsay—Evidence of words spoken by another person—Telephone conversation.*

The mere fact that the evidence of a witness includes evidence of words spoken by another person who is not called, eg, of a telephone conversation, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on as establishing some fact narrated by the words.

*Criminal Law—Evidence—Res gestae—Admissibility—Test.*

In considering whether evidence should be admitted as being part of the *res gestae* the test should be whether there was a possibility of concoction or fabrication. As regards statements made after the event the judge, by preliminary ruling, must satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. The same must in principle be true of statements made before the event. The test should not be the uncertain one whether the making of the statement should be regarded as part of the event or transaction which may be often difficult to show, but if the drama leading up to the climax has commenced and assumed such intensity and pressure that the utterance can be safely regarded as a true reflection of what was unrolling or actually happening it ought to be received.



APPEAL by Leith McDonald Ratten from an order of the Supreme Court of Victoria dismissing his application for leave to appeal against his conviction in the Supreme Court of Victoria on a charge of the murder of his wife, for which he was sentenced to death.

*J G le Quesne QC, J M Lazarus (of the Victoria Bar) and S G Davies for the appellant. The Solicitor-General for Victoria (B L Murray QC), Mervyn Heald QC and S N McKinnon for the Crown.*

**LORD WILBERFORCE:** The appellant was convicted on 20th August 1970, after a trial before WINNEKE CJ and a jury, of the murder of his wife. His application to the Full Court of the Supreme Court of Victoria for leave to appeal was dismissed on 16th of September 1970. By special leave he now appeals to the Board.

The appellant lived with his wife, the deceased, and three young children, in Echuca, a small country town in the State of Victoria. The deceased was eight months pregnant. The appellant, for over a year, had been carrying on a liaison with another woman, and it was suggested by the prosecution, although not admitted by the appellant, that his relations with her had reached a critical state.

The death of the deceased took place in the kitchen of her house on 7th May 1970 as the result of a gunshot wound. The evidence established the time of certain events as follows: (i) At 1.09 pm the appellant's father, S R Ratten, telephoned to the appellant from Melbourne; the call was a trunk call and so was timed and the time recorded. It lasted 2.9 minutes. The conversation was perfectly normal. Mr S R Ratten heard the voice of the deceased woman in the background apparently making comments of a normal character. (ii) At about 1.15 pm a telephone call was made from the house and answered at the local exchange. The facts regarding this call are critical and will be examined later. (iii) At about 1.20 pm a police officer, calling from the local police station, telephoned the appellant's house and spoke to the appellant. By this time the appellant's wife had been shot. Thus the shooting of the deceased, from which she died almost immediately, must have taken place between 1.12 pm and about 1.20 pm.

The death of the deceased was caused by a wound from a shotgun held by the appellant. The appellant's account was that the discharge was accidental and occurred while he was cleaning his gun. There were in the kitchen, when the police arrived soon after the shooting, two double barrelled shotguns and a rifle, with cleaning materials. The gun from which the shot was fired was an old one, not normally used by the appellant, which had been sent in February/March 1970 to a gunsmith for examination. It was returned unloaded and placed in the appellant's garage where it remained until brought into the kitchen on 7th May 1970. The appellant was unable to explain how it came to be loaded. It was in fact found by the police to have been loaded in each of its two barrels and both barrels had been fired. The right barrel had misfired, but there was an imprint of the firing pin on the cartridge. The left barrel was discharged. The appellant was thoroughly experienced in the use of firearms.

It is clear that on the facts summarised above there was a prima facie case against the appellant, and the case against him would depend on whether the prosecution could satisfy the jury, on this circumstantial evidence, that the killing was deliberate or whether the jury would accept his account of an accident. It was relevant and important to enquire what was the action of the appellant immediately after the shooting. His evidence, which he first gave in a signed statement to the police on 8th May 1970, was that he immediately telephoned for an ambulance and that shortly afterwards the police telephoned him, on which he asked them to come immediately. He denied that any telephone call had been made by his wife, and also

denied that he had telephoned for the police. It should be added that he gave evidence from the witness box at the trial, maintaining his account of events.

In these circumstances, and in order to rebut the appellant's account, the prosecution sought to introduce evidence from a telephonist at the local exchange as to the call made from the house at about 1.15 pm. The evidence as given by the telephonist (Miss Janet L Flowers) was as follows:

'I plugged into a number at Echuca, 1494, and I said—I opened the speak key and I said to the person: "Number please" and the reply I got was: "Get me the police please". I kept the speak key open as the person was hysterical.

His HONOUR—You what? WITNESS—I kept the speak key open as the person was in an hysterical state [later, the witness added that the person sobbed] and I connected the call to Echuca 41 which is the police station. As I was connecting the call the person gave her address as 59, Mitchell Street.'

The witness then said that the caller hung up but that she (the witness) after consulting her superior spoke to the police and told them that they were wanted at 59 Mitchell Street. It was in consequence of this that, as narrated above, the police telephoned to the house at about 1.20 pm and spoke to the appellant. Echuca 1494 was the number of the appellant's house.

There were a number of matters to be considered as to the evidence relating to this telephone call. The first, and probably the most critical, was whether it was made by the deceased woman at all. The quotation given above from the witness' examination-in-chief showed that she was permitted to give her evidence in her own words which, as is normally the case where a person testifies to a matter of sense perception, combined elements of fact and of inference from fact. The conclusion, which the witness expressed, that the speaker was a woman, was derived by inference from the fact, which she later stated, that the voice was high pitched and of high inflexion. This inference clearly called for critical examination. In the first place there were inherent difficulties in accepting that the deceased woman should have made the call—apparently without interference—so shortly before the shooting—as to which the prosecution could offer no explanation. Secondly, and even more significantly, the reliability of the inference, that the voice was that of the deceased, was affected by the fact that the police officer who very shortly afterwards spoke on the telephone to a person who was undoubtedly the appellant, described his voice as hysterical, with a high inflexion—substantially the same description as was used by the telephonist. The telephonist was cross-examined by counsel for the appellant, and the learned chief justice directed the jury as to the significance of her evidence and on the question whether they should accept it as establishing that the voice was that of the deceased woman. The matter was again debated in the Full Court and their judgment contains a careful passage in which the adequacy of the direction by the trial judge was examined and endorsed. In view of this it was not possible for counsel for the appellant further to attack the direction, on this point, before the Board, and he, rightly, did not do so. Their Lordships must therefore proceed with the appeal on the basis that the jury was properly directed that, on the evidence, they might find that the telephone call, at 1.15 pm or thereabouts, was made by the deceased woman.

The next question related to the further facts sought to be proved concerning the telephone call. The objection taken against this evidence was that it was hearsay and that it did not come within any of the recognised exceptions to the rule against hearsay evidence. In their Lordships' opinion the evidence was not hearsay evidence and was admissible as evidence of fact relevant to an issue.

The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words

spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimentially', i.e. as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam v Public Prosecutor* (1):

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.'

A fuller statement of the same principle is provided by Dean Wigmore in para 1766 of his work on Evidence. He emphasises, as their Lordships would emphasise, that the test of admissibility, in the case last mentioned, is relevance to an issue.

The evidence relating to the act of telephoning by the deceased was, in their Lordships' view, factual and relevant. It can be analysed into the following elements.

- (1) At about 1.15 pm the number Echuca 1494 rang. I plugged into that number.
- (2) I opened the speak key and said: 'Number please'.
- (3) A female voice answered.
- (4) That voice was hysterical and sobbed.
- (5) The voice said: 'Get me the police please.'

The factual items numbered (1)-(3) were relevant in order to show that, contrary to the evidence of the appellant, a call was made, only some three to five minutes before the fatal shooting, by a woman. It not being suggested that there was anybody in the house other than the appellant, his wife and small children, this woman, the caller, could only have been the deceased. Items (4) and (5) were relevant as possibly showing (if the jury thought fit to draw the inference) that the deceased woman was at this time in a state of emotion or fear (cf *Aveson v Lord Kinnaid* (2) per LORD ELLENBOROUGH CJ). They were relevant and necessary evidence in order to explain and complete the fact of the call being made. A telephone call is a composite act, made up of manual operations together with the utterance of words (cf *McGregor v Stokes* (3) and remarks of SALMOND J therein quoted). To confine the evidence to the first would be to deprive the act of most of its significance. The act had content when it was known that the call was made in a state of emotion. The knowledge that the caller desired the police to be called, helped to indicate the nature of the emotion—anxiety or fear at an existing or impending emergency. It was a matter for the jury to decide what light (if any) this evidence, in the absence of any explanation from the appellant, who was in the house, threw on what situation was occurring, or developing at the time.

If, then, this evidence had been presented in this way, as evidence purely of relevant facts, its admissibility could hardly have been plausibly challenged. But the appellant submits that in fact this was not so. It is said that the evidence was tendered and admitted as evidence of an assertion by the deceased that she was being attacked by the appellant, and that it was, so far, hearsay evidence, being put forward as evidence of the truth of facts asserted by his statement. It is claimed that the learned chief justice so presented the evidence to the jury and that, therefore, its admissibility, as hearsay, may be challenged.

Their Lordships, as already stated, do not consider that there is any hearsay element in the evidence, nor in their opinion was it so presented by the trial judge,

(1) [1956] 1 WLR 965.

(2) (1805), 6 East 188.

(3) [1952] VLR 347; [1952] ALR 565.

but they think it right to deal with the appellant's submission on the assumption that there is, i.e. that the words said to have been used involve an assertion of the truth of some facts stated in them and that they may have been so understood by the jury. The Crown defended the admissibility of the words as part of the 'res gestae' a contention which led to the citation of numerous authorities.

The expression 'res gestae', like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:

1. When a situation of fact (e.g. a killing) is being considered, the question may arise: When does the situation begin and when does it end? It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing, in a broader sense, what was happening. Thus in *O'Leary v Regem* (1) evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As DIXON J said:

'Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the *res gestae* or part of the *res gestae*, i.e. are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*. A classical instance of this is the much debated case of *R v Bedingfield* (2), and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason why this is so is that concentration tends to be focused on the opaque or at least imprecise Latin phrase rather than on the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been the victim of assault or accident.

The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location

(1) (1946), 73 CLR 566.

(2) (1879), 14 Cox CC 341.

being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings.

A few illustrations may be given. One of the earliest, and as often happens also the clearest, is that of HOLT CJ at nisi prius in *Thompson v Trevanion* (1). He allowed that 'what the wife said immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage' might be given in evidence, a statement often quoted and approved. *R v Bedingfield* (2) is more useful as a focus for discussion than for the decision on the facts. Their Lordships understand later indications of approval (*R v Christie* (3) and *Teper v Reginam* (4)) to relate to the principle established, for, although in a historical sense the emergence of the victim could be described as a different 'res' from the cutting of her throat, there could hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.

In a lower key the evidence of the words of the careless pedestrian in *O'Hara v Central SMT* (5) was admitted on the principle of spontaneity. The Lord President (LORD NORMAND) said that there must be close association: the words should be at least de recenti and not after an interval which would allow time for reflection and concocting a story. LORD FLEMING said:

'Obviously statements made after there has been time for deliberation are not likely to be entirely spontaneous, and may, indeed, be made for the express purpose of concealing the truth',

and LORD MONCRIEFF refers to the 'share in the event' which is taken by the person reported to have made the statement. He contrasts an exclamation 'forced out of a witness by the emotion generated by an event' with a subsequent narrative. The Lord President reaffirmed the principle stated in this case in an appeal to this Board in *Teper v Reginam* (4), stressing the necessity for close association in time, place and circumstances between the statement and the crucial events.

In Australia, a leading authority is *Adelaide Chemical and Fertiliser Co Ltd v Carlyle* (6) in which the High Court considered the admissibility of a statement made soon after the breaking of a sulphuric acid jar over his legs by the injured man. This question was not decisive to the decision, but was discussed by STARKE and DIXON JJ with numerous citations. Both emphasise and illustrate the uncertainty of decided cases

(1) (1693), Holt KB 286.

(2) (1879), 14 Cox CC 341.

(3) 78 JP 321; [1914-15] All ER Rep 63; [1914] AC 545.

(4) 116 JP 502; [1952] 2 All ER 447; [1952] AC 480.

(5) 1941 SC 363.

(6) (1940), 64 CLR 514.



and legal writers on the question of admissibility of statements of this type and on the question what they may be admitted to prove. DIXON J with some caution reaches the conclusion that although English law, in the general view of lawyers, admits statements only as parts or details of a transaction not yet complete, while in America, greater recognition is given to the guarantee of truth provided by spontaneity and the lack of time to devise or contrive, yet English decisions do show some reliance on the greater trustworthiness of statements made at once without reflection. In an earlier case in the High Court (*Brown v R* (1)) where evidence was excluded, ISAACS and POWERS JJ in their joint judgment put the exclusion on the ground that it was a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main narration but arising as an independent and additional transaction.

In *People v De Simone* (2) the Court of Appeals of New York admitted evidence that a passer-by immediately after a shooting had shouted: 'He ran over Houston Street.' COLLINS J referred to deeds and acts which are

'forced or brought into utterance or existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it.'

The evidence was, expressly, not admitted as part of the *res gestae*, because it was not so interwoven or connected with the principal event (i.e. the shooting which the person did not see) as to be regarded as part of it.

These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.

Before applying it to the facts of the present case, there is one other matter to be considered, namely the nature of the proof required to establish the involvement of the speaker in the pressure of the drama, or the concatenation of events leading up to the crisis. On principle it would not appear right that the necessary association should be shown only by the statement itself, otherwise the statement would be lifting itself into the area of admissibility. There is little authority on this point. In *R v Taylor* (3) where witnesses said they had heard scuffles and thuds during which the deceased cried out: 'John, please don't hit me any more. You will kill me', FANNIN AJ said that it would be unrealistic to require the examination of the question (sc of close relationship) without reference to the terms of the statement sought to be proved.

'Often the only evidence as to how near in time the making of the statement was to the act it relates to, and the actual relationship between the two, will be contained in the statement itself.'

Facts differ so greatly that it is impossible to lay down any precise general rule: it is difficult to imagine a case where there is no evidence at all of connection between statement and principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge. Their Lordships would be disposed to agree that, amongst other things, he may take the statement itself into account.

(1) (1913), 17 CLR 570.

(2) (1919), 121 NE 761.

(3) 1961 (3) SA 616.

In the present case, in their Lordships' judgment, there was ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. They were closely associated in place and in time. The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the appellant with his gun. Even on the assumption that there was an element of hearsay in the words used, they were safely admitted. The jury was, additionally, directed with great care as to the use to which they might be put. On all counts, therefore, their Lordships can find no error in law in the admission of the evidence. They should add that they see no reason why the judge should have excluded it as prejudicial in the exercise of discretion.

One other matter was raised. It was said that the learned Chief Justice did not properly direct the jury as to the alternative possibility of bringing in a verdict of manslaughter. Their Lordships are clearly of opinion that this contention is without substance. The chief justice directed the jury that they must first consider whether appellant was guilty of murder and that only if, and when, they found him not guilty of murder should they go on to consider whether he was guilty of manslaughter. This procedure was entirely correct and no objection was taken to a direction in this form at the trial. No ground of appeal relating to this aspect of the direction was stated to the Full Court. On the detailed formulation of the direction, if objection may be taken to one sentence in the summing-up relating to the requirement of unanimity, their Lordships are of opinion that this was amply put right and that there was no possibility that the jury might have been misled. In any event, the point taken is not of a character which this Board can entertain.

Their Lordships have previously announced that they must humbly advise Her Majesty that this appeal be dismissed.

*Appeal dismissed.*

*Solicitors: Coward Chance; Freshfields.*

G.F.L.B.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, O'CONNOR AND LAWSON, JJ)

29th July 1971

ATWAL v MASSEY

*Criminal Law—Theft—Handling stolen goods—Mental element—Test to be applied a subjective one—Proof that circumstances would have put a reasonable man on enquiry insufficient—Theft Act, 1968, s 22 (1).*

By s 22 (1) of the Theft Act, 1968: 'A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.'

To establish the mental element required for conviction of the offence of handling stolen goods, contrary to s 22 (1) of the Theft Act, 1968, it is not sufficient to show that the goods were received in circumstances which would have put a reasonable man on enquiry. The question is a subjective one, and the prosecution must prove that the defendant was aware of the theft, or that he believed the goods to be stolen, or that, suspecting them to be stolen, he deliberately shut his eyes to the circumstances.

CASE STATED by Stratford-upon-Avon justices.

On 28th January 1971 an information was preferred by the respondent, Roy Massey, against the appellant, Jaswand Singh Atwal, charging him with handling stolen goods contrary to s 22 of the Theft Act 1968, in that, knowing or believing an electric kettle value £7.80 to be stolen goods, he handled it.

On the hearing of the information at Stratford-upon-Avon Magistrates' Court on 17th February 1971 the justices found that, although there were discrepancies in the evidence, the appellant from the circumstances in which he had collected the kettle ought to have known that it had been stolen. Accordingly, they found that the case against him was proved, convicted him, and fined him £10. The appellant appealed. The question for the opinion of the High Court was whether the fact that he ought to have known that the kettle had been stolen was sufficient to render him guilty of an offence under s 22.

S C Desch for the appellant.

E M Hill for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the petty sessional division of Stratford-upon-Avon who on 17th February 1971 convicted the appellant of an offence of handling stolen goods, contrary to s 22 of the Theft Act 1968, in that knowing or believing an electric kettle to be stolen goods he received the said goods. The justices found as a fact that the kettle in question was stolen. They found that the appellant received it and took it into his possession, and there is really no argument about that. They found that he obtained possession of the kettle after it had been stolen by one Alan Mott who left the kettle by a gate at the junction of the Birmingham road and the Snitterfield road near Stratford-upon-Avon for collection by the appellant. They found that he paid for the kettle.

Of course the whole case reeked with suspicion. In an ordinary transaction for the sale of an electric kettle the collection and delivery of the goods would not have taken this somewhat unusual form, but it was for the justices to decide as a matter of fact whether the appellant at the time when he received the kettle knew that it was stolen or believed it to be stolen and took it dishonestly under the terms of the section. What the justices find in their opinion is that

'although there were discrepancies in the evidence the appellant from the circumstances under which he collected the kettle ought to have known that the kettle was stolen,'

and accordingly they convicted him. The question they have asked us is:

'whether the fact that the appellant ought to have known that the kettle was stolen is sufficient to render him guilty of an offence under s 22 of the Theft Act 1968 which requires proof that the defendant handled stolen goods knowing or believing them to be stolen . . .'

The position can be stated quite simply. If when the justices say that the appellant ought to have known that the kettle was stolen they mean that any reasonable man would have realised that it was stolen, then that is not the right test. It is not sufficient to establish an offence under s 22 that the goods were received in circumstances which would have put a reasonable man on his enquiry. The question is a subjective one: Was the appellant aware of the theft, or did he believe the goods to be stolen, or did he, suspecting the goods to be stolen, deliberately shut his eyes to the circumstances. It may be that the justices meant the word 'ought' to have the second meaning, namely, that he suspected but closed his eyes, but we do not think that we ought to speculate on such a possibility, rather we ought to deal with this matter on the words used by the justices in the Case.

Counsel for the respondent sensibly recognises that it is too small a matter to justify our sending it back for further investigation, and in those circumstances the only alternative is to treat it on the footing that the justices were wrong and applied the wrong test. Thus the appeal should be allowed and the conviction quashed.

**O'CONNOR J:** I agree.

**LAWSON J:** I agree.

*Conviction quashed*

Solicitors: *Cameron, Kemm, Nordon & Co* for Blythe, Owen-George & Co, Leamington Spa; *P R Kimber, for James Gibbs & Co, Stratford-upon-Avon.*

T.R.F.B.

## COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING MR, PHILLIMORE AND ORR LJJ)

23rd, 24th June 1971

Re P A (an infant)

*Adoption—Guardian ad litem—Duty to make confidential report—Validity of r 9 (2) of Adoption (County Court) Rules, 1959.*

Rule 9 (2) of the Adoption (County Court) Rules, 1959, which provides: "On completing his investigations the guardian ad litem [appointed by the court under s 9 (7) of the Adoption Act, 1958, for the purposes of an application for an adoption order] shall make a confidential report in writing to the court" is not ultra vires, but is within the powers of the rule-making authority under s 9 (3) of the Act.

APPEAL from a decision of Clerkenwell County Court by which the county court judge refused to exercise his discretion to dispense with the consent of the mother to the making of an adoption order in respect of the infant in favour of the applicants.

*L J Blom-Cooper QC and Anita Ryan for the applicants.  
Patrick Back QC and M R Hickman for the mother.*

**LORD DENNING MR:** This is the case of a little girl who is now some 13 months old. The question is whether she should stay with adopting parents, who are excellent in every way, or whether she should go back to her natural mother.

The mother, who is unmarried, when she was expecting the child, being seven months pregnant, thought it would be right to have the child adopted. She made enquiries in that behalf from the local children's authorities. The child was born in hospital on 6th May 1970. She was put out for a week with foster parents. Then the mother had the baby back for some five weeks with her in her own mother's home, that is, the grandmother's home. But then these things happened. The unmarried mother had an aunt who knew of a young couple who were very anxious to adopt a child. This young couple had been married in 1964. Unfortunately for them, they were unable to have a child of their own. They put their names down on an appropriate list, and, enquiries being made, they turned out to be entirely suitable. They went to see the baby on 21st June 1970. The unmarried mother herself gave the child over to the young wife. She actually suggested that she should finish feeding the baby, which she did. Then she handed over the baby, with baby clothes, bottles, and everything like that to the wife. The unmarried mother said to her: 'Don't worry. I do not change my mind.'

Then the question arose about the forms. They were obtained and the unmarried mother was invited to sign them. But she could not make up her mind. I am afraid that the aunt rather badgered her to sign them. She badgered her too much. So the unmarried mother did not sign the forms at that stage. But a few weeks later she did go to a woman magistrate. The magistrate handled the matter very carefully. Eventually the unmarried mother decided to sign the forms. The unmarried mother—with her own mother there too—told the magistrate that she was now quite sure that adoption was in the baby's best interests, that she had no intention of changing her mind, and that she was certain that this was the right thing. This was early in December 1970. But the unmarried mother kept the forms. She did not hand them over until 10th January 1971. Then they were handed over to or for the adopting parents. They were handed over in an envelope. It contained



the signed forms of consent, but also a covering letter from the grandmother—i.e. the mother of the unmarried mother—which stated:

'Here are the forms that you have all pestered [the mother] to sign, knowing, that she didn't want to part with [P]. The third party wouldn't take No for an answer, also your father talked her round to think again saying it would be wicked of [the mother] to take her baby from you. All thoughts were on your side but nobody thought of [the mother's] feelings.'

It is quite plain that the grandmother was very reluctant to let the child be adopted. Moreover, immediately thereafter the adopting parents made application to the court for approval of the adoption. But within a short time—only three weeks afterwards—the unmarried mother made objection to the adoption. She was entitled to object because her consent contained in the forms was not final. She was at liberty to withdraw unless the court held that she was withholding her consent unreasonably. Those are the words of s 5 (1) (b) of the Adoption Act 1958.

The application came on before the county court judge at the end of March 1971. He had before him reports from the children's officers. There was a report from the guardian ad litem. He had the evidence of the parties. He went into it most carefully. By this time there was a new factor. The unmarried mother by this time had become engaged to be married. The judge saw the young man whom she wished to marry. The judge said he was a thoroughly sensible young man:

'I have little doubt he will make a loving husband and father and would provide a secure and happy home for the [mother] and the infant.'

The judge came to the conclusion that the mother was not unreasonably withholding her consent, and so he refused to make the adoption order. If this decision stands, it means that the baby must go back to her own natural mother.

The adopting parents are very upset and appeal to this court. I would like to say this on their behalf. They are an excellent young couple, in their twenties, unfortunately unable to have a child of their own. They lavished much love and care on this baby. They got a cot and pram, and many things for her. They are bringing up the child beautifully. If the welfare of the child was the paramount consideration, there would be much to be said for the baby remaining with the adopting parents. In a report which was made by the guardian ad litem—a confidential report to which I will refer later—there is a note saying that:

'consideration should be given to the obvious security afforded to the child in the present place and the demonstrated uncertainty involved in any return of the infant to her mother.'

So, if Parliament had entrusted the entire welfare of the child to the courts, it may be that the right decision would be for the child to remain where she is. But that is not what Parliament has enacted. The natural mother is entitled to withhold her consent so long as she is not unreasonable in so doing. The question whether a mother is reasonable or unreasonable was considered recently by the House of Lords in *Re W (an infant)* (1). That case shows that we are not to look solely at the welfare of the child. We are to see whether the unmarried mother is unreasonably withholding her consent. That is to be judged, not by her own feelings, but by what a reasonable mother in her place would do in all the circumstances of the case.

One circumstance which influenced the judge was that he thought the unmarried mother in her heart of hearts wanted to keep the child. She never at any time really

(1) 135 JP 259; [1971] 2 All ER 49.

wanted to have the infant adopted. Counsel for the applicants challenged that finding, but there was much evidence to support it. The unmarried mother was very reluctant to sign the form. The aunt pressed her on several occasions. Finally the grandmother's letter impressed the judge. His finding on this point cannot be upset. The other circumstance which influenced the judge is the fact that the unmarried mother is now engaged to be married. It is proposed that the baby should go to her mother and grandmother until the marriage, and then to the newly married couple. The young man is entirely reliable.

Seeing that the unmarried mother is able to put forward such good prospects to the court, it cannot be said that she is unreasonably withholding her consent. She is withholding it reasonably in the hope and expectation that she herself will be able to form a secure home for the child.

I would add a further point. This baby is only just one year old. It may be somewhat upset by being moved to another home. But that upset will be only temporary. Soon she will benefit from the love and care of her natural mother, and later, if all goes according to plan, her foster father. She may perhaps be better off than she would have been with the adopting parents. In my opinion the judge's finding cannot be disturbed. The mother is not unreasonably withholding her consent.

There is only one further point. It is a point of law about the report of the guardian ad litem. Counsel for the applicants submits that r 9 (2) of the Adoption (County Court) Rules 1959 is ultra vires. Rule 9 (2) provides:

'On completing his investigations the guardian ad litem shall make a confidential report in writing to the court.'

Counsel for the applicants referred us to *Re G (T J) (an infant)* (1) where DONOVAN LJ reserved the question whether that rule was ultra vires or not. It seems to me that the rule is within the powers of the rule-making authority. I would throw no doubt on it. Seeing that the report is 'confidential', it follows that the parties have not an absolute right to see it. It is in the discretion of the judge to let them see it. It is parallel to a report by the Official Solicitor: see the decision of the House of Lords in *Official Solicitor v K* (2).

In this case the judge did not let the parties see it. But we have seen it and shown it to them. Counsel for the applicants says that it is a pity that the judge did not let them see it. He says that it contained material on which the mother, and the young man whom she proposes to marry, could be cross-examined. It might have been better if the judge had let the parties see it, but I do not think his failure to do so vitiates his decision. He no doubt had it in mind and took into account all that it contained. It was a matter for his discretion, and I can see no reason to interfere with it. I would, therefore, dismiss the appeal.

**PHILLIMORE LJ:** I agree. If there is any ground of criticism of the judgment of the learned county court judge, it is perhaps in some observations at the very end of it with regard to the applicants. He rather suggested that when they discovered that the natural mother was vacillating, they ought to have gone to see her and asked her straight out whether she wanted the baby back, and by not doing so they had brought some of the difficulties they now face on themselves. I think that was rather harsh and not perhaps entirely fair to them. I do not think there is any real criticism of them to be made. But, having said that, it is quite clear that there was

(1) 127 JP 144; [1963] 1 All ER 20.

(2) [1963] 3 All ER 191; [1965] AC 201.

ample evidence before the judge on which he could find, as he did find, that the natural mother never really wanted to have this child adopted. Counsel for the applicants very fairly said that she had a lot of pressure put on her, and indeed if this case illustrates anything, it illustrates how very wrong it is for people to put undue pressure on the natural mother to induce her to have a child adopted. After all, in the last months of her pregnancy and in the early months after the birth she is not in a very good position to make a balanced and sound judgment. She may need time and it is much better that she should have it rather than that a mistake should be made. This young mother had her aunt urging her to have the child adopted. Once the child had been handed over to the applicants, the father of the applicants also intervened to put pressure on the mother. On the other side she had her own mother apparently urging her to keep it and then, of course, there were the welfare officers urging her at least to make up her mind. It is not perhaps surprising that in the end she did sign this form, and then, having signed it and when these proceedings began, she became engaged. It seems to me that that must have been a big factor in her withdrawing the consent which she had given. In all the circumstances here and in the light of the high opinion that the judge formed of the natural mother, of her home and of this young man whom she is to marry, it is very difficult to say that she was in any way unreasonable in withdrawing her consent. In my judgment this decision was clearly right on the material before the county court judge, and this appeal must accordingly be dismissed.

ORR LJ: I agree.

*Appeal dismissed.*

Solicitors: Craigen, Wilders & Sorrell; Birrell & Stewart.

G.F.L.B.

### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING MR, PHILLIMORE AND MEGAW LJ)

28th, 29th July 1971

TEHRANI AND ANOTHER v ROSTRON

*Gaming—Club—Registration—Refusal or cancellation—Appeal to quarter sessions—Finality of decision—Gaming Act, 1968, sched 7, para. 4.*

By para 4 of sched 7 to the Gaming Act, 1968, the judgment of a court of quarter sessions on an appeal against the refusal of a licensing authority to register or renew the registration of a club under Part III of the Act "shall be final".

When Parliament says that a decision of an inferior tribunal is to be "final" it does so on the assumption that the tribunal will observe the law. Parliament only gives the impress of "finality" to the decision on the condition that it is reached in accordance with law. Accordingly, if a tribunal goes wrong in law and the error appears on the face of the record, the High Court will interfere by certiorari or on a Case Stated to quash the decision.

*Gaming—Club—Registration—Right of proprietary club to be registered—Gaming Act, 1968, Part III, sched. 7.*

On the true construction of Part III of and sched. 7 to the Gaming Act, 1968, a gaming licensing authority has jurisdiction to grant registration under Part III for the use of gaming machines to any club whether it be a members' club or a proprietary club.

*Gaming—Club—Registration—Refusal or cancellation—Grounds—Discretion of licensing authority—Gaming Act, 1968, sched. 7, paras. 8, 18.*

By para. 8 of sched. 7 to the Gaming Act, 1968: "The [gaming] licensing authority may refuse to register . . . a club under Part III of this Act if it appears to the authority that the club—(a) is not a bona fide members club, or (b) has less than 25 members, or (c) is of a merely temporary character. By para 18: " . . . the licensing authority may cancel the registration of the club . . . under Part II of this Act if they are satisfied—(a) that the relevant premises are frequented wholly or mainly by persons under 18, or (b) that . . . the club is not a bona fide members' club, or has less than 25 members, or is of a merely temporary character, or (c) that a person has been convicted" of certain offences under the Act.

Quarter sessions dismissed an appeal by the proprietors of a club against a decision of justices sitting as a gaming licensing committee cancelling the registration of the club under Part III of the Act. The recorder found that the proprietors were fit and proper people to run the club, that it was properly conducted and the gaming machines on the premises were properly run and supervised, and that the club premises were satisfactory, but he took the view that a proprietary club could change hands overnight and so might become controlled by undesirable people, and on that ground he exercised the discretion conferred on him by para 8 (supra) by dismissing the appeal.

HELD by LORD DENNING MR, and MEGAW, LJ, PHILLIMORE, LJ, dissenting: in view of the terms of paras 8 and 18 the recorder had exercised his discretion judicially.

APPEAL by Mohammed Ali Yazdian Tehrani and Mohammed Yazdian Tehrani, from a decision of the Divisional Court, reported 135 JP 350, dismissing their appeal from Brighton Quarter Sessions, who had dismissed their appeal from the decision of Brighton justices sitting as a gaming licensing committee to cancel the registration under Part III of the Gaming Act 1968 of the appellants' club.

*R J S Harvey QC and R M Shawcross for the appellants.*

*D H Farquharson for the respondent.*

**LORD DENNING MR:** This case raises a point of considerable importance in the use of gaming machines. Two gentlemen, Mohammed Ali Yazdian Tehrani and Mohammed Yazdian Tehrani, live in Brighton. They are proprietors of a club called the Kolbeh Club. It is a social club which has its premises in Silwood Street and the basement of 8 Montpelier Road, Brighton. The club has more than 25 members and is of a permanent character. The proprietors of the club desire to install two gaming machines in the club. I expect they are 'one-armed bandits'. For this purpose on 26th May 1970 they applied to the gaming licensing committee for the club to be registered under Part III of the Gaming Act 1968. That is the part of the Act which specifically deals with gaming machines. The application was granted. On 29th May the police applied for the registration to be cancelled on the ground that it was not a bona fide members' club. On 26th June 1970 the justices, sitting as the gaming licensing committee, did cancel the registration. The proprietors then appealed to the recorder of Brighton. He dismissed their appeal, but stated a Case for the opinion of the court. The Divisional Court dismissed the appeal. Now the two proprietors appeal to this court asking for their club to be registered.

Before I deal with the merits of the appeal, I must mention a preliminary point to which counsel for the appellants drew our attention. There is a provision in the 1968 Act which says that 'the judgment of the court of quarter sessions on the appeal shall be final'. It is in Sch 7, para 11 (4). Counsel for the appellants suggested that this provision rendered any appeal from the recorder incompetent and that he had no power to state a Case for the High Court. For this purpose he drew our

attention to a case in the House of Lords: *Kydd v Liverpool Watch Committee* (1), and the subsequent case of *Piper v St Marylebone Licensing Justices* (2). But I must say at once that I do not think we should accede to this preliminary objection. Much has happened since those cases were decided. The courts have given more thought to the meaning of the legislature when it says that a decision of this or that tribunal is to be 'final'. The modern cases establish this principle. When Parliament says that a decision of an inferior tribunal is to be 'final' it does so on the assumption that the tribunal will observe the law. Parliament only gives the impress of 'finality' to the decision on the condition that it is reached in accordance with law: and the Queen's courts will see to it that this condition is fulfilled. Accordingly, if a tribunal goes wrong in law and the error appears on the face of the record, the High Court will interfere by certiorari to quash the decision. It is not to be deterred by the enactment that the decision is 'final'. The decision may be final on the facts, but it is not final on the law. This was settled by *Re Gilmore's Application* (3), where all the cases are collected. Likewise if a board or a Minister is entrusted with a decision affecting private rights, then, even though it is said to be 'final', the High Court can ensure that it is correct in point of law. It can do so by making a declaration as to the law by which the authority must abide. That was settled by *Pyx Granite Co Ltd v Ministry of Housing and Local Government* (4), and particularly by the speech of VISCOUNT SIMONDS.

Counsel for the appellants agreed that, in the present case, if quarter sessions went wrong in law, the High Court would intervene by certiorari or a declaration. But he suggests that there was no power to state a Case. This suggestion is a mere procedure point. It only goes to the machinery by which the High Court can intervene. If a point of law can be resolved by certiorari or declaration, I do not see why it should not also be resolved by Case Stated. But in any case the point is bad, even as a matter of procedure. That appears from the Summary Jurisdiction Act 1879, s 40, which provides:

'A writ of certiorari or other writ shall not be required for the removal of any conviction, order, or other determination, in relation to which a Special Case is stated by a court of general or quarter sessions for obtaining the judgment or determination of a superior court.'

As I read that section, it means that in all cases where an order of quarter sessions can be removed into the High Court by certiorari, it is open to quarter sessions to state a Case for the opinion of the High Court. Seeing that the point of law can admittedly be raised by means of certiorari, it can also be raised by way of Case Stated. I may add this. In any event in the special circumstances this preliminary objection ought not to be maintained. When the Case Stated was before the Divisional Court, no objection was taken to their jurisdiction to hear it. The appellants came to this court asking for the time for appeal to be extended. On that occasion the court was told it raised an important point of law which it was very desirable in the public interest to have determined. The parties asked for the appeal to be expedited. No objection was taken then to our jurisdiction to hear it. The appeal was expedited especially to get this point of law decided. It would be intolerable if the appeal were now to be thrown out on a preliminary point. I decline to do it.

I proceed to consider the merits of the appeal. The point put shortly is this. Can a proprietary club have gaming machines? Put longer, it is this. Is it permissible

(1) 72 JP 395; [1908] AC 327.

(2) 92 JP 87; [1928] 2 KB 221; [1928] All ER Rep 485.

(3) [1957] 1 All ER 796; [1957] 1 QB 574.

(4) 123 JP 429; [1959] 3 All ER 1; [1960] AC 260.



for a proprietary club to be registered so that it can have gaming machines on the premises? It is clear that a members' club can be registered for gaming machines. But it is said that a proprietary club cannot be so registered. We are told that recorders up and down the country have been at variance on this matter. Some have held that they have jurisdiction to register proprietary clubs and in their discretion they have allowed them to have gaming machines. This has happened in many places in the Midlands. But other recorders have held that they have no jurisdiction to register proprietary clubs with the result that they cannot have gaming machines.

In the present case the recorder of Brighton held that he had jurisdiction to grant registration to a proprietary club, but in his discretion he declined to register this club. On appeal by Case Stated, the Divisional Court held that the recorder had no jurisdiction to register a proprietary club, and so the question of discretion did not arise. The proprietors appeal by leave to this court. There are two points. First, had the recorder any jurisdiction to grant registration to a proprietary club? Secondly, if he had, did he exercise his discretion judicially?

At the outset it is necessary to understand the structure of the Gaming Act 1968. It set out to remedy the defects in the previous law. The broad policy was to permit gaming in licensed premises but to prohibit it elsewhere. The Act is divided into three parts. Part I makes all gaming unlawful except in accordance with the permissions contained in the Act. Part II deals with gaming for money by games of chance such as roulette, baccarat and so forth. It does not deal with gaming machines. It sets up a licensing system by which persons and premises may be licensed for gaming in specified cities and towns. The licensing system is controlled by the Gaming Board. The fee for a licence is £1,000. Part II also gives permission for members' clubs to play bridge and whist for money. They must be registered for the purpose and pay a fee of £20. Part III deals with gaming machines. It states that any premises licensed for gaming under Part II and any members' club registered under Part II can have two gaming machines at no further fee. But it also sets up a registration system for 'clubs' who desire to have one or two gaming machines, but do not wish to have any other form of gaming. This registration system is controlled by the licensing justices. The club can have only two gaming machines and no more. The money in the slot must not exceed in a time. The winner gets the money from the machine and no other prize. And the public must not have access to the premises. The fee for such a registration is £10.

The question in this case is whether Part III (which enables 'clubs' to be registered for two gaming machines and no more) is confined to members' clubs or whether it extends to proprietary clubs also. The operative words refer to 'clubs' generally without qualification. Thus s 30 provides:

'The provisions of schedule 7 to this Act shall have effect with respect to the registration of clubs . . .'

Schedule 7 refers throughout to the registration of 'a club'. Thus para 3 (1) states that an application for registration of 'a club' may be made at any time.

Seeing that the operative word throughout Part III and the schedule is 'clubs' or 'club', without qualification, I think it must include both a members' club and also a proprietary club. The word 'club' is not defined in the Act, nor in any other Act, so far as I know. But it has a meaning well understood in the law. It denotes a society of persons associated together for the promotion of some common object or objects, such as social intercourse, art, science, literature, politics or sport. In law it is also well known that a 'club' may be one of two kinds: a members' club or a proprietary club. In a members' club the members are themselves the owners,

probably through trustees or a committee, of the premises and the food and drink. They conduct it for their own benefit, not with a view to profit. In a proprietary club, the proprietor owns the premises and the food and drink. He conducts it with a view to profit, but he entrusts a good deal of the organising of it to the members or a committee of members.

The legislature has passed several enactments affecting 'clubs', especially in regard to the supply of intoxicating liquor. The law in regard to these is consolidated in the Licensing Act 1964. It is plain throughout that Act that the word 'club' or 'clubs' is used to include both members' clubs and proprietary clubs. The definition section, s 201 (1), does not define 'club', but it defines 'secretary' in such a way as to show that 'club' includes both a members' club and a proprietary club. The 1964 Act was obviously in front of the draftsman of the Gaming Act 1968. He refers to it in s 6 (2), and there are many phrases which are taken in the self-same words from the 1964 Act. I have no doubt that the word 'club' in the 1968 Act has the same meaning as the word 'club' in the 1964 Act. It includes both members' clubs and proprietary clubs.

This view is supported by a reference to the details of the 1968 Act. These show that when Parliament intended to restrict any provisions to members' clubs (and not to extend them to proprietary clubs) it did so expressly. Thus Part II provides that a 'club' may be registered for gaming, but it goes on to make it clear that only members' clubs may be so registered. Schedule 3 is headed 'Registration of Members' Clubs under Part II in England and Wales', and para 7 (1) states in terms that the licensing authority shall refuse to register a club if it appears that the club is not a bona fide members' club. And para 7 (2) shows that the gaming in the club must only be bridge and whist.

In striking contrast to Part II we come to Part III which deals with gaming machines. Schedule 7 is headed simply 'Registration under Part III in England and Wales'. Paragraph 8 provides, significantly:

'The licensing authority may refuse to register . . . a club . . . if it appears . . . that the club—(a) is not a bona fide members' club, or (b) has less than twenty-five members, or (c) is of a merely temporary character.'

The contrast between 'shall' in Sch 3 and 'may' in Sch 7 makes the position plain beyond doubt. The licensing authority, when dealing with an application for gaming machines, may refuse it or cancel it if it is not a bona fide members' club, but it is bound to do so.

Section 40 (4) is another instance where Parliament has deliberately confined a provision to members' clubs. This shows that when it was intended to confine it, it did so.

So I hold that, on the true construction of the Act, the licensing authority has jurisdiction to grant registration under Part III for gaming machines to any club, no matter whether it be a members' club or a proprietary club. I cannot agree with the Divisional Court that no proprietary club can be registered for gaming machines. If that were so, it would lead to most surprising results. It would mean that, in the big cities and towns where licences are granted for gaming, a proprietary club could only have gaming machines in it if it had a full gaming licence for which it would have to pay £1,000, but no other proprietary club would have even one or two gaming machines, either in those big cities or towns or in any other part of England. That cannot have been intended.

My answer to the first question is therefore: A licensing authority can grant registration for gaming machines in proprietary clubs as well as members' clubs. The recorder was correct in ruling that he had jurisdiction.

The second question is whether the recorder exercised his discretion judicially. He found:

'(a) That this was a proprietary club in which there are two gaming machines. (b) That the appellants were fit and proper people to run this club. (c) That the club was properly conducted and the gaming machines were properly run and supervised. (d) That the club premises were suitable and satisfactory. (e) That the appellants were prepared to apply the profits from the gaming machines solely for the benefit of club members.'

But, having found those points in favour of the appellants, he nevertheless dismissed the appeal for these reasons:

'(a) the said club was a proprietary club; (b) a proprietary club could change hands overnight and therefore might be controlled by undesirable people; (c) I should require a lot of persuasion to exercise my discretion to register a proprietary club under Part III of the said Act.'

In considering this question of discretion, it is important to observe that Sch 7 gives some very definite guidance to the licensing authority. It *shall* refuse to register a club in some cases, as for instance, if it is frequented mainly by persons under 18 (see para 7). It *may* refuse in others, as for instance, if it is not a bona fide members' club or has less than 25 members or is of a merely temporary character (see para 8). From which it is reasonable to infer that, in all cases save those mentioned, it ought to grant registration. Likewise with cancellation. It *may* cancel in some cases (see para 18), leaving the inference that it ought not to cancel in others. Hence I would infer that the licensing authority ought to grant registration to a bona fide members' club which has more than 25 members and is of a permanent character, and is not frequented by persons under 18, and against which there are no convictions. But it *may* refuse registration to a club, or it *may* cancel a registration, if the club '(a) is not a bona fide members' club, or (b) has less than 25 members, or (c) is of a merely temporary character' (see paras 8 and 18 (b)).

Those three grounds (a), (b) and (c) seem to me definite grounds for disqualification. Suppose a club has only 20 members. The licensing authority could refuse to register it without further reason. So also if it is of a merely temporary character or if it is not a bona fide members' club. If any one of those grounds exists, and the licensing authority in its discretion decides to disqualify for that ground, I do not see that its decision can be upset except by appeal to the recorder. If the recorder dismisses the appeal, his decision is by the schedule made 'final', and I do not see that it can be upset by the High Court. Of course, if he went wrong in law, the High Court could interfere, but I do not see how he can be said to go wrong in law simply by doing what Parliament says he may do, namely, refuse the registration or cancel it—on one of the very grounds specifically named by Parliament. It is not a question here of the recorder overruling the licensing authority, as he did in *Sagnata Investments Ltd v Norwich Corp'n* (1). Here he affirmed the decision of the licensing authority: and I should hesitate long before setting aside their combined discretion. No doubt the recorder laid down a general policy in regard to proprietary clubs, but he made it clear that he was always ready to hear and consider what an appellant had to say. That was a perfectly legitimate course for him to adopt, as I stated in the *Sagnata* case. I understand that other licensing authorities and other recorders have adopted a different policy. They grant registration more freely to proprietary clubs. That is all well and good. It is entirely justifiable.

But this is essentially a local matter for the authorities of the place to decide. It is a matter of their discretion with which the courts should not interfere.

In answer to the second question I would hold that the recorder did exercise his discretion judicially.

**PHILLIMORE LJ:** Counsel for the appellants felt that he was bound to take the first point, namely, the preliminary point that this court had no jurisdiction. So far as that is concerned, I entirely agree with the judgment of LORD DENNING MR. I do not think that in this particular case, where the point was not taken before the Divisional Court and where a special application was made to us for leave to appeal out of time and to expedite the appeal, it was open to the appellants to take the point at this stage. In any case, I think that LORD DENNING is perfectly right and that there is an appeal by Case Stated, just, of course, as the appellants could have moved for certiorari. I do not think that the provision in para 11 (4) of Sch 7 to the Gaming Act 1968 that the appeal to quarter sessions should be final is sufficient to exclude the jurisdiction of the Divisional Court or of this court on appeal.

I would merely refer very briefly to a passage from the argument in *Ecclesiastical Comrs for England v Sackville Estates Ltd* (1). There passages were referred to from the judgments of LORD HANWORTH MR and SCRUTTON LJ, saying that the court will look jealously at any statutory provision which is said to take away its jurisdiction and that unless clear words are used, the onus of showing that the plaintiff's right of action has been taken away rests on the defendant; and to another passage from SCRUTTON LJ in his judgment in *Lowther v Clifford* (2), where he said:

'I am entitled, in my view, to require a clear expression of an intention to deprive one of the King's subjects of his right to sue in the King's courts'

Of course, it would be absolutely lamentable if in a matter which affects innumerable establishments throughout the country the decision of any court of quarter sessions should be final, because it would mean that you would have a different law in one part of the country from that in another. You might have a complete state of chaos. The important point of a right of appeal in a matter such as this is to attain uniformity throughout the country.

In this particular case the recorder held that a proprietary club could apply under Part III of the Act for leave to have two one-armed bandits, as they are called, but he held that he had a discretion to refuse the application, and indeed proceeded to exercise that discretion by refusing it on the ground that such permission should not be given to a proprietary club by reason of its nature. The Divisional Court concluded that the recorder was wrong in thinking that he had any power to grant registration to a proprietary club to have such a machine on its premises, and accordingly that the recorder had no need to exercise his discretion. I am satisfied, in agreement with LORD DENNING MR, that the Divisional Court was wrong. I think the recorder had power to register this club to have one-armed bandits, limited, save in exceptional circumstances, to two in number. I also think—and here I have the misfortune to differ from LORD DENNING—that he failed to exercise his discretion judicially, and indeed that the decision which he reached was palpably wrong.

It is important to look at the scheme of the Act. It is, of course, designed to bring any form of gaming under strict control. As I see it, s 11 is the vital section, because it deals with gaming in the full sense of the word. It covers roulette, chemin de fer, black jack, and so on. In Sch 2 the provisions of s 11 are applied to proprietary clubs,

(1) [1937] 2 All ER 720; [1937] 2 KB 600.

(2) 90 JP 113; [1927] 1 KB 130; [1926] All ER Rep 290.

and very strict they are. Clubs have to be licensed. In Sch 3 they are applied to members' clubs, and it is worth observing that the heading of Sch 3 is: 'Registration of members' clubs under Part II in England and Wales.' The Act then proceeds under Part III to deal with the various kinds of machines by means of which gaming is carried on. The details are covered by Sch 7, but it is to be observed that, in contrast to Sch 3, which deals with gaming by members' clubs, Sch 7 is entitled 'Registration under Part III in England and Wales'. The question is whether this part of the Act, namely, s 30 and Sch 7, were intended to deal with proprietary clubs, or whether the Divisional Court was right in thinking that since Sch 2, which deals with proprietary clubs in connection with Part II of this Act, spoke of licensing, Sch 7, since it refers to registration, must have been intended to deal with members' clubs only. It is worth contemplating for a moment the results of this line of argument. It means that no proprietary club could apply merely for registration for the club to be permitted to hold two one-armed bandits. No such club could apply unless it applied for a full gaming licence under Sch 2, in which case the two one-armed bandits could be added to the licence. You can only apply under Sch 2 if your club is within a specified area. The areas are conveniently set out in Eddy and Loewe on The New Law of Gaming. They comprise a number of large towns and I think three of the London boroughs; and, of course, only a very limited number of licences are granted in those specified areas. Thus in the vast majority of the country, if the Divisional Court is right, no proprietary club, however respectable or harmless, could apply. If it was in a specified area and accordingly could apply, its chances would be poor since licences in those areas are closely limited. What is more, under the provisions of s 48 of the Act, if a club applies for a full gaming licence—and that is what a proprietary club would have to do if the Divisional Court is right—it has to pay a fee of £1,000, which seems rather excessive if all that the club wants are two one-armed bandits. The practical result of the Divisional Court's decision seems to me to be so unfair and unreasonable that I find it impossible to believe that Parliament could have intended it. After all, there are many eminently respectable proprietary clubs of one sort or another throughout the country. In some cases indeed the owner takes little part in the running of the club; he leaves it to the members and does not even seek to make a profit. I have already indicated that the rival schedule, namely Sch 7, in contrast to Sch 3, does not refer to members' clubs. Throughout the schedule reference is to 'clubs' or to 'a club', which obviously would include a proprietary club.

There are exceptions, namely, in para 8 of Sch 7 with consequential exceptions in para 18 (b). Paragraph 8 refers to members' clubs in connection with certain grounds for refusal to register, and para 18 with grounds for cancelling registration. Here the proceedings did not involve an application to register, but they arose out of an application by the police to cancel an order to register made by the justices a few days before. As I see it, the proceedings were governed by para 18 of Sch 7, to which LORD DENNING MR has referred and to which I would also refer in detail. It provides:

'On any . . . application [for cancellation of registration] the licensing authority may cancel [and the word is "may"] the registration of the club or institute under Part III of this Act if they are satisfied—(a) that the relevant premises are frequented wholly or mainly by persons under eighteen, or (b) that, in the case of a club, the club is not a bona fide members' club, or has less than twenty-five members, or is of a merely temporary character, or (c) that a person has been convicted as mentioned in paragraph 9 of this schedule. and (in any such case) that in the circumstances the registration ought to be cancelled.'



So there it is. The grounds are limited, and, as it seems to me, grounds (a) and (c) could certainly apply to a proprietary club, whether or not ground (b) was intended to do so. It seems to me quite clear that Sch 7, quite apart from its title and its references to clubs or a club, is intended to deal with clubs of every sort, and accordingly allows proprietary clubs to register.

That takes me to the final point, the question of discretion. The recorder finds the following facts:

- '(a) That this was a proprietary club in which there are two gaming machines.
- (b) That the appellants were fit and proper persons to run this club. (c) That the club was properly conducted and the gaming machines were properly run and supervised. (d) That the club premises were suitable and satisfactory.
- (e) That the appellants were prepared to apply the profits from the gaming machines solely for the benefit of club members.'

However, in the exercise of his discretion, he dismissed the appeal from cancellation of registration for the following reasons:

- '(a) the said club was a proprietary club; (b) a proprietary club could change hands overnight and therefore might be controlled by undesirable people; (c) I should require a lot of persuasion to exercise my discretion to register a proprietary club under Part III of the said Act.'

He then referred to another case in which he set out those same reasons at greater length. He found every question of fact in favour of this particular club, and then exercised his discretion against it. I do not think that the mere fact that this was a proprietary club gave him any power to do this in the light of para 18. In my judgment he exercised his discretion completely wrongly and contrary to the provisions, or, at any rate, the indications to be derived from the provisions, of Sch 7 which does not condemn a proprietary club as such and indeed allows it to be registered. If all that could be said is that a proprietary club may be registered and so allowed to have two one-armed bandits, how can the recorder be entitled to decide that since it is a proprietary club it is not entitled to have anything of the sort, albeit it is entirely respectable? I could understand the recorder's decision if he had based it on one of the grounds referred to in para 18, but, as I have indicated, he has not done so. The reference to the club not being a bona fide members' club in para 18 of Sch 7 must, I should have thought, in any case refer to a club which has procured registration on the ground that it is a bona fide members' club. It seems to me that while obviously he has got a discretion, it is limited by the provisions of para 18 (b). He has not used it on any of the grounds set out in that section; he has simply said: 'I am not going to allow any proprietary club to have these machines in Brighton.' That seems to me to be a decision flatly against the decisions of Parliament and as I think it must be wrong. Accordingly I would allow the appeal.

**MEGAW LJ:** First, as to the preliminary point depending on the wording of para 11 (4) of Sch 7 to the Gaming Act 1968, I agree with the view expressed by LORD DENNING MR.

Turning to the principal substantive point of the appeal, I confess that I have found difficulty in arriving at a conclusion as to what Parliament really intended on this issue as to the registration of clubs for the purpose of Part III of the Act. There is no definition of 'a club' in the Act. However, it is not open to doubt that at any rate in some of the provisions of the Act the word 'club' cannot be confined to a members' club. It includes a proprietary club. That must be so, for example, in respect of the use of the word in the proviso to s 3 (3) of the Act, having regard to the other provisions of Part I of the Act.

When one comes to Part II of the Act, the words 'a club' in the phrase 'a club or a miners' welfare institute' would, I think, in themselves and of themselves, not be limited to a particular kind of club, namely, a members' club. In the end, the provisions of Part II relating to clubs are limited in effect to members' clubs. But this is because of the words of para 7 of Sch 3. That schedule operates in relation to Part II of the Act because s 11 (2) so provides. Paragraph 7 (1) states that the licensing authority *shall refuse* to register a club under Part II 'if it appears to the authority that the club—(a) is not a bona fide members' club . . .' It is that unqualified mandatory requirement of refusal of registration when the club is not genuinely a members' club which operates to limit the relevant clubs, for the purposes of Part II, to members' clubs and thus excludes proprietary clubs.

The main issue in this appeal is whether the same limitation applies in respect of Part III of the Act. Section 30 provides that Sch 7 shall have effect with respect to the registration of clubs and miners' welfare institutes under Part III of the Act. I do not think that it is permissible, as a matter of construction, to argue that because Sch 3 has thus limited the generality of the phrase in respect of clubs for the purposes of Part II, therefore the phrase, when used in s 30, should be regarded even *prima facie* as having the same limitation for the purposes of Part III. To determine that question, one must look at Sch 7 and see whether it produces the same result as, or a different result from, para 7 of Sch 3.

When one looks at the heading of Sch 7 there is immediately seen a pointer to at least the possibility of a different result. Whereas Sch 3, no doubt anticipating the provisions of para 7, is headed 'Registration of members' clubs under Part II in England and Wales', Sch 7 is headed 'Registration under Part III in England and Wales'. This, of course, is by no means conclusive, but no satisfactory explanation has been suggested for the omission of the words 'of members' clubs' in the heading of Sch 7 unless the intention was to reflect a difference of content in the two schedules.

When one comes to para 8 of Sch 7 one finds that, while in other respects the wording corresponds with the wording of para 7 (1) of Sch 3, the words 'shall refuse' have become 'may refuse'. It cannot, I think, be suggested that the change is accidental. The preceding paragraph (that is, para 7 of Sch 7), which is a part of the code of grounds for refusal to register, uses the words 'shall refuse'. Nor, for the same reason, can it validly be argued that 'may' when used in this context in para 8 means 'shall' or 'must'. It follows, therefore, that it must be assumed that the legislature deliberately made para 8 permissive in terms instead of mandatory.

The result must be that the legislature intended that the licensing authority should be permitted to register a club even though it did not comply with para 8 (a) or (b) or (c). I find it difficult to accept that the legislature intended by para 8 (a) merely to give the licensing authority power to register a club which purported to be a members' club, but which was not bona fide, or genuinely, such a club. I think it is more probable, particularly when one takes into account the contrast in the wording of the headings of the two schedules, that the legislature intended to permit the licensing authority to register a club which is not a members' club. In other words, the licensing authority may refuse, but it is not obliged to refuse, to register a proprietary club.

Accordingly, with all respect, in agreement on this point with LORD DENNING MR and PHILLIMORE LJ, I differ from the Divisional Court on that issue of construction, as a matter of construction and not because I feel in any way appalled or even disturbed by the practical consequences which the decision of the Divisional Court might have. I do not find satisfaction in that conclusion. If it be right that there is a discretion to register proprietary clubs, I should have thought it would have been desirable that some criteria at least should have been laid down in the Act in respect

of such clubs for the purposes of Part III. This would at least have given a greater chance of some measure of uniformity in the application of that part of the Act.

The wording of para 8, as it appears to me, makes it quite clear that the licensing authority has a complete and absolute discretion to refuse to register a proprietary club merely because it is a proprietary club. That absolute discretion must apply in respect of para 8 (b) and (c). If a club has less than 25 members, the licensing authority may refuse to register on that ground alone. If it is merely of a temporary character, registration may be refused on that ground alone. I see no reason to draw a distinction in respect of para 8 (a). There is, of course, an appeal to quarter sessions by reason of para 11 of Sch 7. Under para 11 (4), the court of quarter sessions has an identical absolute discretion in respect of each and all of these matters.

In the present case we are dealing, not with a refusal to register under para 8, but with an application to cancel a registration under para 18 of Sch 7. Paragraph 18 (b) sets out the same three matters as are comprised in para 8 (a), (b) and (c). There is, however, added at the end the words: 'and (in any such case) that in the circumstances the registration ought to be cancelled.' It follows that the licensing authority, on an application to cancel a registration, and the court of quarter sessions on an appeal against such a cancellation (which is the present case), is entitled to look at the circumstances, and indeed, if there are circumstances which may be relevant, is bound to look at them. But, as I see it, it is entirely open to the licensing authority, and to quarter sessions on appeal, having looked at the circumstances, to decide in its discretion that the mere fact that the club is not a bona fide members' club is paramount; i.e., that, whatever the other circumstances may be, the consideration which ought to prevail is the fact that the club is not a bona fide members' club.

That, as I understand it, is precisely how the learned recorder approached and decided this case. I do not think that that discretion exercised in that way can successfully be challenged. Accordingly I would hold that in that respect this appeal fails.

*Appeal dismissed.*

Solicitors: *Maltz, Mitchell & Co; T E Lavelle, Lewes.*

G.F.L.B.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY CJ, BRIDGE AND SHAW JJ)

4th October 1971

R v COLESHILL JUSTICES. Ex parte DAVIES AND ANOTHER

*Magistrates—Committal for trial—Young person—Justices to be of opinion that there is sufficient evidence to put defendant on trial—Adequacy of written statements tendered as constituting case for prosecution—Criminal Justice Act, 1967, s 1—Children and Young Persons Act, 1969, s 6 (1).*

By s 6 (1) of the Children and Young Persons Act, 1969: 'Where a person under the age of 17 appears or is brought before a magistrates' court on an information charging him with an offence, other than homicide, which is an indictable offence within the meaning of the Magistrates' Courts Act, 1952, he shall be tried summarily unless—(a) he is a young person and the offence is such as is mentioned in sub-s (2) of s 53 of the [Children and Young Persons Act, 1933] (under which young persons convicted on indictment of certain grave crimes may be sentenced to be detained for long periods) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of the subsection; or (b) he is charged jointly with a person who has attained the age of 17 and the court considers it necessary in the interests of justice to commit them both for trial; and accordingly in a case falling within para (a) or para (b) of this subsection the court shall, if it is of opinion that there is sufficient evidence to put the accused on trial, commit him for trial.'

The applicants, who were both under 17, came before justices with five others, some of whom were over 17. The committal procedure followed by the justices was that prescribed by s 1 of the Criminal Justice Act, 1967, i.e. written statements were tendered to the court as constituting the case for the prosecution. All the accused were represented by counsel or solicitors and no submission was made that the written statements did not disclose a *prima facie* case. The justices committed all the accused for trial under s 1, without consideration of the evidence, and so certified. On applications on behalf of the two applicants for certiorari to quash the conviction,

**Held:** the concluding words of s 6 (1) made it clear that it was a condition precedent to committal for trial of a young person that the justices should be of opinion that there was sufficient evidence to put him on trial, and they could not form such an opinion without consideration of the evidence; accordingly, the procedure for committal without consideration of the evidence under s 1 of the Act of 1967 could not apply to the committal for trial of a young person to whom s 6 (1) of the 1969 Act applied; and so certiorari must issue to quash the committals.

**MOTIONS** on behalf of Paul Anthony Davies and Stephen Whitehouse for orders of certiorari to remove into the High Court to be quashed orders made by Coleshill justices that each of the applicants should be committed in custody for trial at Warwick Assizes on four charges. The ground of the applications was that the justices committed the applicant Davies, aged 14, and the applicant Whitehouse, aged 16, for trial without consideration of the evidence as required by s 6 (1) of the Children and Young Persons Act, 1969, and, therefore, the committals were invalid.

*F M Drake QC and D R D Hamilton for the applicants.*

*D H Wild and J Hunt for the Crown.*

*Gordon Slynn and N D Bratza for the governor of Brockhill Remand Centre.*

**BRIDGE J:** In these proceedings counsel moves on behalf of two young men named Davies and Whitehouse for orders of certiorari to quash their committal for trial to Warwick Assizes by the Coleshill justices on 16th July 1971 on charges of aggravated burglary. The applicants are both aged under 17 and they came before the Coleshill justices with five others, some at least of whom were aged over 17. The

committal procedure followed by the justices was that prescribed by s 1 of the Criminal Justice Act 1967. All the accused were represented by counsel or solicitors. None of them desired to submit that the written statements which had been tendered to the court as constituting the case for the prosecution disclosed no prima facie case. The justices committed all the accused for trial under s 1, without consideration of the evidence, and so certified.

Since 1st January 1971 there has been in force s 6 (1) of the Children and Young Persons Act 1969, which provides as follows:

'Where a person under the age of seventeen appears or is brought before a magistrates' court on an information charging him with an offence, other than homicide, which is an indictable offence within the meaning of the Magistrates' Courts Act 1952, he shall be tried summarily unless—(a) he is a young person and the offence is such as is mentioned in subsection (2) of section 53 of the Act of 1933 (under which young persons convicted on indictment of certain grave crimes may be sentenced to be detained for long periods) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of that subsection; or (b) he is charged jointly with a person who has attained the age of seventeen and the court considers it necessary in the interests of justice to commit them both for trial; and accordingly in a case falling within paragraph (a) or paragraph (b) of this subsection the court shall, if it is of opinion that there is sufficient evidence to put the accused on trial, commit him for trial . . .'

It is common ground that none of the counsel or solicitors who appeared before the Colleshill justices in this case made any reference, nor is there anything to indicate that the justices called their own attention, to these provisions. But, as has been rightly said on behalf of the Crown, there is equally no affirmative indication before us that the justices did not apply their minds to the provisions of that section.

The submission on behalf of the applicants by counsel is a very short one. He says first, that under neither para (a) nor para (b) of s 6 (1) of the Children and Young Persons Act 1969 can justices be in a position to make the decision which is a condition precedent to their jurisdiction to commit for trial unless they have examined the evidence in the case. He says, secondly, that the concluding words of s 6 (1) make it clear in any event that the power to commit for trial is one which only can be exercised if the justices are affirmatively of opinion that there is sufficient evidence to put the accused on trial and that justices cannot form such an opinion without consideration of the evidence. Accordingly, he submits, on both those grounds it is plain that the procedure under s 1 of the Criminal Justice Act 1967, which permits justices to commit for trial without consideration of the evidence, is not available on the committal for trial of a young person under the age of 17 years.

The arguments the other way have been put before us by counsel for the Crown and by counsel for the governor of the remand centre where the applicants were held in custody as respondent to an application for habeas corpus on their behalf. That application has now become academic, since they have been admitted to bail. I hope neither counsel will think it discourteous to them if I omit to distinguish between their several arguments, and seek in a few words to condense and summarise what I understand to be the effect of the case argued on their side.

Historically it is pointed out that s 6 is not the first section which fettered the justices' discretion to commit young persons for trial; a similar restriction on committal for trial of persons under the age of 14 used to be found in s 21 of the Magistrates' Courts Act 1952. Under s 7 of the Magistrates' Courts Act 1952 which governed the procedure on committal for trial before the coming into force of the Criminal Justice Act 1967, justices in every case had to consider the evidence and be satisfied that



there was sufficient evidence to put a person on trial before they could make a committal order.

The basic argument in support of the validity of the justices' order in the present case rests on the proposition that, if it had been intended, when s 1 of the Criminal Justice Act 1967 was enacted, to exclude from the ambit of the new convenient procedure which that section introduced a large category of cases such as committals for trial of persons under the age of 14 or 17, Parliament would have said so. Another way of putting the same argument is to say that one would expect to find a similar express exclusion in the language of s 6, if s 6 intends to exclude committal for trial of young persons from the ambit of s 1 of the 1967 Act.

It is conceded that justices could not properly exercise their jurisdiction under s 6 (1) (a) to decide that committal was necessary to give the court adequate powers of punishment in accordance with that provision, without consideration of the evidence. But it is said that the justices can reach a proper conclusion under s 6 (1) (b) that it is necessary in the interests of justice to commit young persons for trial jointly with others without consideration of the evidence. It is argued that it is sufficient for them to know the nature of the charge and the number of witnesses.

For my part, I am very far from satisfied that that is so. In practical terms I cannot conceive that justices would think it proper in any case to make an order under this provision without any consideration of the evidence, even though there might be a case where it was so obviously appropriate to commit for trial that they might consider the evidence very shortly, sufficiently only to discover the general nature of the case. But even if there could be an appropriate case for a decision without any consideration of the evidence that committal in the interests of justice was necessary, I am unable to escape from the conclusion that the point before the court is determined by the concluding words of the subsection.

The argument of counsel for the governor as regards those words is, if I have understood it, to this effect: here is a mandatory requirement to commit for trial a young person whose case is being dealt with under s 6 (1) (a) or (b) and the conditional clause 'if [the court] is of opinion that there is sufficient evidence to put the accused on trial' is merely protective, i.e. merely to make it clear that the mandatory requirement for committal shall not operate if the justices, in a case where they have considered the evidence, have concluded that the evidence is insufficient. In other words, if the argument may be summarised very shortly, counsel is saying in effect that we should read this provision as if it said: 'Unless the court is of opinion that there is insufficient evidence to put the accused on trial.'

I am quite unable to accept that argument. The language of the Act is on its face perfectly clear. It is a condition precedent to committal for trial of a young person under s 6 (1) that the justices should be of opinion that there is sufficient evidence to put him on trial; they cannot, in my judgment, possibly form such an opinion without consideration of the evidence, and accordingly it is clear that the procedure for committal without consideration of evidence under s 1 of the 1967 Act does not and cannot apply to the committal for trial of a young person to whom s 6 (1) of the 1969 Act applies. In my judgment the order of certiorari should go to quash these committals.

**SHAW J:** I agree.

**LORD WIDGERY CJ:** I also agree.

*Order for certiorari*

*Solicitors: Jonas & Cooper, Birmingham; E G Seagroatt, Birmingham; Treasury Solicitor.*

T.R.F.B.

COURT OF APPEAL (CIVIL DIVISION)

(DAVIES, EDMUND DAVIES AND BUCKLEY LJ)

13th, 14th, 15th, July 1971

SNOW v SNOW

*Husband and Wife—Summary proceedings—Maintenance of child—"Child of the family"—*

*Acceptance—Objective test—Circumstances constituting acceptance—Time of acceptance*

*—Withdrawal—Liability of another person—Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 16 (1).*

By s 16 (1) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, "child of the family", in relation to the parties to a marriage, means—(a) any child of both parties; and (b) any other child of either party who has been accepted as one of the family by the other party."

Per BAGNALL, J., and EDMUND DAVIES, L.J.: (i) If there is to be acceptance of a child as a child of the family by a non-parent, the true parent must be offering the child, as his or her child and not the child of the other party, for acceptance by that other party as one of the family. (ii) Subject to one qualification, the question must be asked and answered at the time of the marriage. (iii) An intention proleptically to accept a child of the family, however strongly expressed, if it be expressed before the marriage, may be withdrawn if there is an intervening change of mind. (iv) Acceptance on the occasion of marriage is final and may not be withdrawn because of the subsequent behaviour either of the true parent or of the child or children. (v) The question whether responsibility for maintenance of a child has been assumed by an acceptor must be ascertained by reference to an objective and not a subjective test. In the absence of a clear contrary intention expressed by the acceptor the payment of the expenses of a family unit which includes the child in question leads to a conclusion that there has been an assumption of responsibility notwithstanding that other resources may be available to contribute to the maintenance of the child. (vi) The liability of another person to contribute to the maintenance of the child is not confined to liability under a judgment or order, but extends to any liability enforceable at law.

Per DAVIES, L.J.: There are some expressions of opinion in some of the authorities that have been referred to in this case that suggest that for there to be an acceptance of a child as a "child of the family" there must be an offer. With the greatest respect to those who have entertained those views, I do not agree. I do not believe that the words "accepted as a child of the family" in the definition have anything to do with the realm of the law of contract. This is not a case of "offer and acceptance" at all. "Accepted", in my view, if one dares to substitute a word in the Act, means in this context "treated as" or "taken in as" a child of the family. I should have thought that in the majority of cases, the bridegroom knowing that the bride already had a child or children, they would get married and the children would automatically go into the home where the now husband and wife were living, and "acceptance" in that instance would be taken for granted without any discussion or agreement or contract about it.

*Appeal—Concession of fact in court below—Withdrawal in appellate court—Undesirability.*

Per EDMUND DAVIES L.J.: When a concession of fact is made by one party and the trial proceeds thereon it is doubtful whether an appellate court should allow that concession to be withdrawn before them even by agreement between the parties, for the result must be that the proceedings of the lower court will thereafter be scrutinised from a standpoint different from that which the lower court rightly adopted in view of the concession.

APPLICATION for leave to appeal against a decision of a Divisional Court of the Probate, Divorce & Admiralty Division (SIR JOCELYN SIMON, P., & BAGNALL, J.) dismissing an appeal by the husband against an order made under s 2 (1) (h) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, by Torbay justices that he should pay £1 15s a week for the maintenance of his two step-children.

The following cases were referred to in the Divisional Court in addition to those cited in the Court of Appeal:

*Bond v Bond* 128 JP 568; [1964] 3 All ER 346; [1967] P 39.  
*Caller v Caller (by her guardian)* 130 JP 309; [1966] 2 All ER 754; [1968] P 39.  
*Dixon v Dixon* 132 JP 123; [1967] 3 All ER 659.  
*Durayappah v Fernando* [1967] 2 All ER 152; [1967] 2 AC 337.  
*Kirkwood v Kirkwood* 134 JP 422; [1970] 2 All ER 161.  
*MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169; [1962] AC 152.  
*R v R* [1968] 2 All ER 608; [1968] P 414.  
*Roberts v Roberts* 126 JP 438; [1962] 2 All ER 967; [1962] P 212.  
*Roberts v Roberts* 133 JP 8; [1968] 3 All ER 479; [1970] P 1.  
*Royle v Royle* 73 JP 40; [1909] P 24.  
*Smith v Smith and Brown* [1962] 3 All ER 369.

The husband appeared in person.

C Wilson-Smith for the wife.

**EDMUND DAVIES LJ:** The facts relating to these melancholy proceedings are these. The husband met a lady at Brixham in September 1968. She was about 43 years of age and the husband about 45. She lived at Brixham. Her previous marriage had been dissolved because she had left her former husband and gone to live with a gentleman named Hogg. She had had a number of children by her first marriage. She had two children by Mr Hogg—H and D—and those are the children who are the subject-matter of this present application. The parties having met, courtship developed, and in October, the month following their first meeting, the husband proposed marriage to the wife. She accepted and, as a result of the proposal and before marriage, in November she moved to the house which the husband owned at Walton-on-Thames, taking with her the two children to whom I have referred and a child of the first marriage. Before the parties in fact got married, the husband was giving the wife £8 a week for the purpose of running the house, and they had it in mind that he would sell his Walton-on-Thames house and that they would buy a place at Brixham, where they might take in bed-and-breakfast guests.

They married on 14th December 1968. At that time the financial position appears to have been this: Mr Hogg had been making the wife voluntary allowances amounting to about £3 a week in respect of the children until November, no affiliation proceedings having been taken against him. The wife had no income of her own. As to the husband, when he appeared before the justices on 28th May 1970, he said that his gross income was about £1,800 a year, made up of a salary and some private means.

Some five days after the marriage, that is on 19th December 1968, the husband made a claim on the appropriate form for children's allowances under the income tax legislation, on the basis that they were his step-children, as in truth they had become. That claim was the subject-matter of correspondence.

The cohabitation was of short duration. Brief though it was, the wife had several times gone away from Walton-on-Thames to Brixham with the children. Finally, on 5th or 6th March 1969, she left for the last time, taking the children with her. So at most the cohabitation lasted something like 14 weeks. During that period, about half of the time had been spent by the wife in Brixham. There was a charade of an attempt at reconciliation made by the wife in July 1969, but we need not go into that: the magistrates regarded the wife's attempt as being nothing but a put-up affair, backed by no kind of sincerity on her part. On 6th November 1969 the wife made a complaint before the Torbay justices, alleging that her husband had deserted

her on 5th March and that since that time he had 'wilfully neglected to provide reasonable maintenance' for her 'and the two children of the family'—meaning thereby H and D.

One of the grounds of appeal taken by the husband before us can at this stage conveniently be referred to. It is ground (3) out of his six grounds: 'That at no time before the hearing at Torbay magistrates' court was it alleged that I had accepted the children as children of the family.' But it is to be observed that the complaint form alleges in terms that 'the [husband] had wilfully neglected to provide reasonable maintenance for the [wife] and the two children of the family'. To my way of thinking, those very words import the definition of 'children of the family' which is to be found in s 16 (1) of the Act of 1960. The definition is in these terms:

"'child of the family', in relation to the parties to a marriage, means—(a) any child of both parties; and (b) any other child of either party who has been accepted as one of the family by the other party.'

So there was implicit in the very wording of the complaint an allegation that the husband had accepted H and D as 'children of the family'. He was, I should add, professionally represented by counsel and solicitor at the first two sittings of the justices. So much for that ground of complaint.

During the course of the first hearing by the justices on 11th March 1970, and apparently after the evidence had been completed, counsel for the husband specifically said, in relation to the children:

'I accept that at the date of the marriage, which is the important date, they were children of the family, but the question of quantum remains.'

But when the matter reached the Divisional Court the husband, who was then appearing in person, sought to resile from that concession which had been made below by his learned counsel. Counsel who then appeared for the wife—as he does today, although we have not found it necessary to call on him—did not oppose that application, and the Divisional Court acceded to it.

Perhaps I may here be permitted to express, for my own part, my doubt about the desirability of that course having been adopted. I do so with the greatest respect, but, to my way of thinking, when a concession of fact is made by one party and the trial proceeds thereon it is doubtful whether an appellate court should allow that concession to be withdrawn before them even by agreement between the parties, for the result must be that the proceedings of the lower court will thereafter be scrutinised from a standpoint different from that which the lower court rightly adopted in view of the concession. It seems to me an unsatisfactory basis on which an appellate court should proceed to review the decision of the trial court. Having said that, for the purposes of this application I am prepared to proceed on the basis that the Divisional Court itself adopted; but I do not, I frankly confess, like it.

At the end of the hearing on 11th March the justices made an interim order against the husband until 28th May, to which date the hearing was adjourned. The adjournment was granted—and this in fairness to the justices ought to be said—only on the basis that the sole remaining task was that of assessing the quantum of the order which should be made against the husband in respect of H and D, i.e. having regard to the concession made by counsel to which I have already made reference. It was also intimated at that stage that the justices were going to dismiss the wife's claim that the husband had deserted her and wilfully neglected to maintain her. The object of the adjournment was in order to give the wife an opportunity of taking proceedings under the Affiliation Proceedings Act 1957 against Mr Hogg.

## CASES IN THIS VOLUME TO DATE

<b>ADOPTION</b> - Guardian ad litem - Duty to make confidential report - Validity of r 9 (2) of Adoption (County Court) Rules, 1959. <i>Re P A (an infant)</i> .. .. .	CA	37
<b>CRIMINAL LAW</b> - Assisting offender - Time when offence should be charged - Issue to be raised before evidence relating to principal offence closed - Issue arising unexpectedly in course of proceedings - Procedure proper to be adopted - Criminal Law Act, 1967, s 4 (1), (2). <i>R v Cross. R v Channon</i> .. .. .	CA	5
<b>CRIMINAL LAW</b> - Evidence - Hearsay - Evidence of words spoken by another person - Telephone conversation. <i>Ratten v Reginam</i> .. .. .	PC	27
<b>CRIMINAL LAW</b> - Evidence - Res gestae - Admissibility - Test. <i>Ratten v Reginam</i> .. .. .	PC	27
<b>CRIMINAL LAW</b> - Theft - Handling stolen goods - Mental element - Test to be applied a subjective one - Proof that circumstances would have put a reasonable man on enquiry insufficient - Theft Act, 1968, s 22 (1). <i>Atwal v Massey</i> .. .. .	QBD	35
<b>ELECTIONS</b> - Local government - Failure by returning officer to hold recount when requested - Irregularity not affecting result - Ballot papers - Validity - Paper marked with cross otherwise than in proper place - Paper with name of the candidate left standing and names of other candidates struck out - Representation of the People Act, 1949, s 37 (1) - Local Elections Rules, r 42, r 43 (3). <i>Levers v Morris</i> .. .. .	QBD	62
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Appeal to quarter sessions - Finality of decision - Gaming Act, 1968, sched 7, para 4. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Grounds - Discretion of licensing authority - Gaming Act, 1968, sched 7, paras 8, 18. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Right of proprietary club to be registered - Gaming Act, 1968, Part III, sched 7. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>HUSBAND AND WIFE</b> - Summary proceedings - Maintenance of child - 'Child of the family' - Acceptance - Objective test - Circumstances constituting acceptance - Time of acceptance - Withdrawal - Liability of another person - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <i>Snow v Snow</i> .. .. .	CA	54
<b>INFANT</b> - Care - Assumption by local authority of parental rights - Objection by parent - Allegation that objection out of time - Estoppel of authority - Need to appreciate ability of mother to care for child. <i>Re L (A C) (an infant)</i> .. .. .	ChD	19
<b>LICENSING</b> - Permitted hours - Exemption order - Special occasion - Local football match - Match occurring nearly every week - Discretion of justices - Licensing Act 1964 (c 26), s 74 (4). <i>R v Llandiloes (Lower) Justices. Ex parte Thorogood</i> .. .. .	QBD	67
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <i>R v Coleshill Justices. Ex parte Davies</i> .. .. .	QBD	51
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Need of tenants' consent to reference - Reference of number of contracts together - Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .. .. .	QBD	11
<b>TRADE DESCRIPTIONS</b> - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <i>Naish v Gore</i> .. .. .	QBD	1



# CHIEF OF THE ARMY TO DAIRY

1. The first of the most important factors in the production of milk is the health of the dairy cow. A healthy cow will produce more milk than a sick cow. The health of the cow is determined by the quality of the feed and the care of the animal. The feed should be of high quality and should be given in the proper amounts. The cow should be kept clean and free from parasites. The milking should be done in a clean and hygienic manner. The milk should be stored in a cool place and should be used as soon as possible.

2. The second factor is the breed of the cow. Some breeds are known to produce more milk than others. The Friesian breed is one of the best for milk production. The cow should be selected for its ability to produce milk and for its resistance to disease.

3. The third factor is the environment. The cow should be kept in a clean and dry environment. The milking should be done in a clean and hygienic manner. The milk should be stored in a cool place and should be used as soon as possible.

4. The fourth factor is the management of the dairy. The dairy should be managed in a way that ensures the health and productivity of the cows. The feed should be of high quality and should be given in the proper amounts. The cows should be kept clean and free from parasites. The milking should be done in a clean and hygienic manner. The milk should be stored in a cool place and should be used as soon as possible.

5. The fifth factor is the quality of the milk. The milk should be of high quality and should be free from any impurities. The milk should be stored in a cool place and should be used as soon as possible.

6. The sixth factor is the distribution of the milk. The milk should be distributed in a way that ensures that it is available to the people who need it. The milk should be stored in a cool place and should be used as soon as possible.

7. The seventh factor is the price of the milk. The price of the milk should be fair and should be based on the cost of production. The milk should be stored in a cool place and should be used as soon as possible.

8. The eighth factor is the quality of the milk. The milk should be of high quality and should be free from any impurities. The milk should be stored in a cool place and should be used as soon as possible.

9. The ninth factor is the distribution of the milk. The milk should be distributed in a way that ensures that it is available to the people who need it. The milk should be stored in a cool place and should be used as soon as possible.

10. The tenth factor is the price of the milk. The price of the milk should be fair and should be based on the cost of production. The milk should be stored in a cool place and should be used as soon as possible.

On 28th May there was the adjourned hearing of the matter. It was preceded by the hearing of the wife's complaint under the 1957 Act for an affiliation order. Mr Hogg did not appear, but he was represented by a solicitor. The wife was present and was professionally represented. The affiliation complaint against Mr Hogg was disposed of by an order for the payment by him of £1 5s in respect of each of these two children of whom he was the natural father.

Then the justices dealt with the case which they had adjourned. Having heard some evidence of the means and financial commitments of the husband, they ordered the husband, as I have already said, to pay £1 a week for H and 15s a week for D. It was a very modest order. There is no room for doubt that in making it the justices bore in mind the fact that the children had just been made the subject of an order obtained by the wife against their father.

The husband being dissatisfied with the justices' decision, went to the Divisional Court. He presented to that court no less than 12 different grounds of appeal. They were developed, BAGNALL J said, with 'impartiality, ability and thoroughness'. Certainly the husband has before us not been lacking in thoroughness, nor has he lacked complete respect for the court. He feels very deeply about this matter, and if he has developed his points at inordinate length it is perhaps understandable in a layman who has a fixation about this case and who indeed has had a most unfortunate experience.

The relevant legislation begins with s 1 of the 1960 Act which provides for the application by a married woman to a magistrates' court for a matrimonial order. Section 2 (1) provides:

'Subject to the proviso to s 1 (3) . . . on hearing a complaint under the said s 1 by either of the parties to a marriage the court may make an order (in this Act referred to as a "matrimonial order") containing any one or more of the following provisions, namely . . . (h) a provision for the making by the defendant or by the complainant or by each of them, for the maintenance of any child of the family of weekly payments . . .'

The phrase 'child of the family' is defined by s 16 (1) in the terms to which I have already referred. Then comes s 2 (5):

'In considering whether any, and if so what, provision should be included in a matrimonial order by virtue of paragraph (h) of subsection (1) of this section for payments by one of the parties in respect of a child who is not a child of that party, the court shall have regard to the extent, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance, and to the liability of any person other than a party to the marriage to maintain the child.'

Then s 4 (1) provides that the court may make such order as it thinks proper in all the circumstances of the case.

BAGNALL J, who gave the first judgment in the Divisional Court, said that this fasciculus of legislation gave rise to four questions. First, did the husband accept the children as 'children of the family'? Secondly, did he assume responsibility for their maintenance and, if so, to what extent? Thirdly, what, if any, was the liability of Mr Hogg to maintain those two children? And fourthly and finally, having regard to all the circumstances should the husband pay any, and if so what, sum by way of maintenance to either or both of the children?

The justices had set out their conclusions and their reasons under seven headings. Since they had seen and heard the parties, it is, I think, important to deal with some of their conclusions. I begin with conclusion 6.

'We came to the unanimous conclusion that [H] and [D] were "children of the family" for the following reasons:—(a) The husband had entered into the marriage knowing everything about the children including the fact that Mr. Hogg was their father. Nothing was concealed from the husband which might later entitle him to reject them. (b) The wife had given evidence which was not in dispute that he had stated his intention to adopt them, that he wished their surname to be "Snow" and that they should refer to him as their step-father. Nor did he dispute her evidence that he had approached a Building Society stating he had married and had a wife and two children to support and, further, he had said that they would inherit certain property he owned at Putney. (c) Mr. Hogg having ceased at about the time of the marriage to make voluntary payments for the children (the wife saying this was in November, 1968) the husband became the sole provider and he, an extremely meticulous and careful man, knew very well that he was the sole provider. We did not believe his evidence to the contrary. (d) He gave the elder child, [H], pocket-money and money for going to the cinema. (e) The husband hoped to benefit by the children's allowances for purposes of income-tax. (f) The husband's contention was that, although [H] and [D] were "children of the family" at the beginning of the marriage, they ceased to be such when his wife objected to his method of managing them and when she took them out of his control. In this context his evidence in chief was: "I wanted to be a father to the children, this was before and after the marriage . . . Before marriage I had say in the children's welfare, gradually getting less." . . . (g) At the beginning of his cross-examination on the 11th March he gave more detailed evidence of his relationship with the children and concluded: "I am saying that my wife took the children out of my control. It was a gradual process and one could say that they were in control of me before the marriage and out of control when we parted. By taking them on visits to Brixham she broke the continuity, and I more or less had to start all over again each time. I tried each time to start again." . . . (h) The husband correctly drew our attention to s 2 (5) of the [1960] Act, but contended that this totally released him, on the facts of the case, from any continuing responsibility for the two children.'

That submission the husband has made again this morning. He says that no order should have been made against him at all.

The husband sought to attack the justices' decision before the Divisional Court under four main heads. The first (and he has adhered to this ground with inexhaustible enthusiasm in this court) is that there was not sufficient mutuality between the husband and the wife on the question of the status of the children to lead to a decision that he accepted them as part of the family. In addition, he complains that the justices wrongly took into account, on the question of acceptance or no acceptance, the fact that, as they found, the husband had assumed responsibility for the maintenance of the children.

As to this element of mutuality, great reliance is placed by the husband on the decision in *P (R) v P (P)* (1) where LAWTON J in effect held that there could be no acceptance within the meaning of the Act unless both parties to the marriage agreed that that should be so. In that particular case the learned judge held that, as the wife clearly never agreed to her children becoming 'children of the family', the husband could not in law be regarded as having 'accepted' them as such. The ratio decidendi of LAWTON J was:

'She made it quite clear to him . . . that he was to have no authority over those children, they were her children and she was going to control them.'

(1) [1969] 3 All ER 777.

But are the circumstances in *P (R) v P (P)* analogous to the circumstances of the present case? In my judgment, that question must be answered in the negative. The husband said:

'It was my intention from the outset that [H] and [D] would be part of the Snow family. I did try and exercise parental control . . . Before we were married my wife was very much with me for the children but after marriage it became different . . . Right at the beginning before we were married when I disciplined [D], my wife was on my side but this sort of thing gradually became less after we came back from Brixham . . . 28th December was the first time we were alone as a family unit.'

And finally he told this court: 'As far as the children were concerned I was in charge, and this situation gradually changed until there was opposition from my wife at the end of the marriage.'

This marriage led to cohabitation lasting a mere 14 weeks. The crucial test, as will later emerge, is: What was the position at the date of the celebration of the marriage? For my part, I think that the general body of the evidence points to the circumstances here being quite significantly different from those in *P (R) v P (P)*. It does not emerge, to my way of thinking, that the justices were wrong in the conclusion to which they came that there was an acceptance by both parties, however fleetingly it was allowed to operate owing to the desertion of the wife, which was quite absent from *P (R) v P (P)*.

BAGNALL J most helpfully examined the relevant authorities, and expressed his conclusion as to the principles involved under six heads which I, for my part, would like to adopt. He said:

'On those authorities it seems to me that the following principles are established. (1) If there is to be acceptance of a child as a child of the family by a non-parent the true parent must be offering the child, as his or her child and not the child of the other party, for acceptance by that other party as one of the family. (2) Subject to one qualification, the question must be asked and answered at the time of the marriage, and the proper terms of the question are those stated by SALMON LJ in *Bowlas v Bowlas* (1) . . . (3) An intention proleptically to accept a child of the family, however strongly expressed, if it be expressed before the marriage, may be withdrawn if there is an intervening change of mind. (4) Acceptance on the occasion of marriage is final and may not be withdrawn because of the subsequent behaviour either of the true parent or of the child or children. (5) The question whether responsibility for maintenance of a child has been assumed by an acceptor must be ascertained by reference to an objective and not a subjective test. In the absence of a clear contrary intention expressed by the acceptor the payment of the expenses of a family unit which includes the child in question leads to a conclusion that there has been an assumption of responsibility notwithstanding that other resources may be available to contribute to the maintenance of the child . . . (6) The liability of another person to contribute to the maintenance of the child is not confined to liability under a judgment or order, but extends to any liability enforceable at law'

BAGNALL J came to the conclusion that the justices had correctly applied those principles emerging from the decisions to the evidence adduced before them.

SIR JOCELYN SIMON P summarised the whole case by saying:

'The first issue is, then: Were these children accepted by the husband? The husband says: "No, I did not accept them. I wanted to accept them, but I was

not allowed to accept them, because my wife denied me the ordinary influence which was due to me as the children's stepfather": see *P (R) v P (P)* (1). Alternatively, the husband says, there was a conditional acceptance—conditional on his being allowed to assume his proper rights as a stepfather, and that condition was not fulfilled.'

Then SIR JOCELYN SIMON went on to deal with the question: If the husband was denied his rights or his influence, when did that occur? He came to the conclusion that the point was beyond doubt. He referred to the husband's own evidence, 'It was my intention from the outset that [H] and [D] would be part of the family', and finally expressed the view that the justices had not 'in any significant respect misdirected themselves'.

And so, the Divisional Court having dismissed the appeal to them on the grounds I have stated, the husband now applies to this court for leave to appeal against that decision, advancing, as I have already said, six grounds before us. I hope he will acquit me of any discourtesy when I say that I have no intention of going through each of those grounds in turn although I have sought to bear them all in mind, and, naturally, those points which, with such politeness, he has urged before this court. It is, in my judgment, impossible to come to any conclusion on the evidence other than that he had in fact 'accepted' the children as the children of the family and that he had 'assumed responsibility' for them.

The only matter in this case which has caused me to pause is the husband's submission regarding the operation of s 2 (5) of the 1960 Act. As I follow him, what he is saying is this. He accepts that s 2 (5) proceeds on the basis that the child or children have been accepted as 'children of the family' and that it has regard only to whether a monetary order should be made in respect of them. The relevant words (I repeat) are:

'the court shall have regard to the extent, if any, to which that party [in this case the husband] had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance, and to the liability of any person other than a party to the marriage to maintain the child.'

He, as I understand him, goes as far as this. He says that the natural father of these two children was known and identified and indeed had, through his legal representative, been before the court: the liability of Mr Hogg was a liability in law to maintain these children to the full; and, although the magistrates in fact made an order against Mr Hogg that he pay £1 5s only in respect of H and of D, that ought not to operate on this question of 'extent' raised by s 2 (5). The assumption should be made (as I gather) that Mr Hogg would discharge in full his liability to maintain his children and, accordingly, no order of any kind should have been made against the husband.

This is an insupportable argument. It produces this ridiculous position, as DAVIES LJ and I put to the husband in the course of argument. Suppose that Mr Hogg was a tramp, and was known by everybody to be a tramp, here is the husband, with his £1,800 annual income, nevertheless, since the natural father was known and identified and was in law liable for the maintenance of his children, no order should be made against the husband of the children's mother, who had accepted them as the children of the family. The submission, he must allow me to say, verges on the absurd. It would rob this provision, in a very large number of cases, indeed if not in all cases, of any operative effect, and I simply cannot accede to it. The justices were entitled to have regard to the fact that Mr Hogg had had an order for £1 5s made against him in respect of his legal liability for his natural children. They were entitled—



indeed they were obliged by s 4 (1) of the Act, as I read it—to have regard to the fact that they had made that limited order when they came to consider the liability of the husband. I cannot, for my part, fault the justices at all in that regard.

I ought to have said that of the six grounds which are contained in the husband's notice of appeal to this court, three of them are a reiteration of points already raised in the Divisional Court; the remaining three are complaints of error in the Divisional Court, and I find the complaints baseless.

The conclusions to which I have come really can be summarised with considerable brevity. I am firmly of the view that the only possible conclusion on the evidence is that at the time of his marriage the husband did accept the two children as the children of the family, that he did assume responsibility for them, and that, in the light of the order made against Mr Hogg, that made against the husband in the present case of £1 for one child and 15s for the other was perfectly reasonable and had regard, as s 4 (1) requires, to 'all the circumstances of the case'. I can see no vestige of ground for thinking that leave to appeal against the Divisional Court's decision should be granted, and for my part I would refuse it.

**DAVIES LJ:** I entirely agree with the view that EDMUND DAVIES LJ has expressed and with the reasons which he has given for coming to his conclusion. I would only add a few words on two short points. First, as to the meaning of the definition of 'child of the family' in s 16 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

"'child of the family'", in relation to the parties to a marriage, means—(a) any child of both parties; and (b) any other child of either party who has been accepted as one of the family by the other party.'

There are some expressions of opinion in some of the authorities that have been referred to in this case that suggest that for there to be an acceptance of a child as a 'child of the family' there must be an offer. With the greatest respect to those who have entertained those views, I do not agree. I do not believe that the words 'accepted as a child of the family' in the definition have anything to do with the realm of the law of contract. This is not a case of 'offer and acceptance' at all. 'Accepted', in my view, if one dares to substitute a word in the Act, means in this context 'treated as' a child of the family, or 'taken in' as a child of the family. One only has to contemplate the kind of circumstances in which it might arise. I suppose in the exceptional case, if a marriage is going to take place and one of the parties, say the woman who is going to be married, has a son, eventually to become a stepson, there might be a discussion. The mother might say (and this is an example that I gave in the course of the argument): 'Well, what about Billy?'; and the man whom she was going to marry might say: 'It's all right: he will come in with us and I will take care of him.' That would, of course, be an agreement. But I should have thought that in the majority of cases discussions of that sort would not take place at all. What would happen would be that, the bridegroom knowing that the bride already had a child or children, they would get married and the children would automatically go into the home where the now husband and wife were living, and 'acceptance' in that instance would be taken for granted without any discussion or agreement or contract about it at all.

I am to some extent perhaps fortified in the view which I have expressed by the fact that in s 27 (1) of the Matrimonial Proceedings and Property Act 1970 one finds this definition:

"'child of the family'", in relation to the parties to a marriage, means—(a) a child of both of those parties; and (b) any other child, not being a child who has

been boarded-out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.'

The only other point that I would specifically mention is to express my agreement with EDMUND DAVIES LJ in the distinction which he drew between *P (R) v P (P) (1)* and the instant case. *P v P* was a very exceptional case. EDMUND DAVIES LJ has read a quotation from it, and I would supplement it by only one sentence from the same judgment of LAWTON J where he said: 'I think that was [the wife's] attitude from the first, that the children did not concern him.' The wife in that case emphasised that attitude when the divorce petition was served on her and she said that the children were not any concern of the husband's at all.

That is entirely different, of course, from the present case where the children did move in, albeit for this very short time, and were accepted and treated as his children by the husband. He acted as their father, disciplining them and correcting them and so on for the short period of cohabitation. Therefore I have no doubt at all that this case is entirely different from the one with which LAWTON J had to deal. I agree that leave to appeal should be refused.

BUCKLEY LJ: I agree.

*Application dismissed.*

Solicitors: Beale & Co. for Eastleys, Paignton (for the wife).

G.F.L.B.

### QUEEN'S BENCH DIVISION

(WALLER AND DONALDSON, JJ)

22nd, 28th July 1971

#### LEVERS v MORRIS AND ANOTHER

*Elections—Local government—Failure by returning officer to hold recount when requested—Irregularity not affecting result—Ballot papers—Validity—Paper marked with cross otherwise than in proper place—Paper with name of candidate left standing and names of other candidates struck out—Representation of the People Act, 1949, s 37 (1)—Local Elections Rules, r 42, r 43 (3).*

During the holding of a local government election the presiding officer handed to the returning officer a number of doubtful papers for scrutiny. In the result the returning officer allowed one ballot paper for the respondent candidate which had on it a cross over instead of opposite the name of the respondent, and disallowed another paper for the petitioner candidate on which lines had been drawn through the names of the two other candidates, the name of the petitioner being left blank. After these rulings a count took place which showed 660 votes for the respondent, 659 for the petitioner, and 635 for the third candidate. The petitioner requested a recount, the request was heard by the presiding officer, but not by the returning officer. After some discussion the returning officer informed the candidates and their agents that he would not declare the poll that night and would take further advice. All the candidates then returned home. Soon afterwards and without giving the candidates any further opportunity for discussion, the returning officer declared the result of the poll as 660 votes for the respondent and 659 for the petitioner. The petitioner petitioned the High Court, praying that it might be determined that the respondent was not duly elected and that the petitioner was duly elected and ought to have been returned, or, in the alternative, that the election was void. A judge of the High Court directed a re-count to be made by the senior Queen's Bench master. The recount showed that the original count was correct for the voting

papers adjudged. It was agreed between the parties that the master's report should be treated as a Special Case and that the Divisional Court should be asked to deal with the petition under s 126 of the Representation of the People Act, 1949.

HELD: (i) the failure of the returning officer to hold a recount, though a breach of r 47 of the Parliamentary Elections Rules applied by r 42 of the Local Elections Rules, did not invalidate the election, for the rules were directory only; the validity of a local government election was determined by s 37 (1) of the Act of 1949, which was an enabling section setting out circumstances in which, despite irregularity, a new election need not be held; in the present case there had been no substantial irregularity which might have affected the result and the absence of a recount made no difference at all; the election was, accordingly, to be treated as valid.

(ii) under r 43 (3) of the Local Elections Rules the voting paper on which lines had been drawn through the names of the other candidates and the name of the petitioner had been left blank should not have been disallowed, but should have been counted as a vote for the petitioner, as this was an election in which only one candidate could be elected and the paper showed a clear intention to vote for the petitioner.

(iii) the ballot paper which had on it a cross above instead of opposite the name of the respondent had rightly been accepted as the vote clearly appeared to be for the respondent; accordingly the true count of the votes should have been 660 for the respondent and 660 for the petitioner, and under s 122 (6) of the Act of 1949 the court could direct that the decision between the parties be made by lot.

SPECIAL CASE stated under s 126 of the Representation of the People Act, 1949.

The appellant, John Levers, a candidate at a local government election, presented a petition praying that it might be determined that the first respondent, Lawrence Peter Morris, was not duly elected and that the petitioner was duly elected, or in the alternative that the election was void. The second respondent to the petition was the returning officer, Hubert Thomas Howe.

Questions arose on the hearing of the petition, and it was agreed that a report by the Senior Queen's Bench master should be treated as a Special Case stated for the opinion of the court.

*A B Dawson* for the petitioner Levers.

*J G Hull* for the respondent Morris.

*H Green* for the respondent returning officer.

*G B Best* for the Director of Public Prosecutions.

*Cur adv vult*

28th July. **WALLER J** read this judgment of the court: On 13th May 1971 there was a local government election for the Cowick ward of the county borough of Exeter. After the close of the polling stations the count was commenced shortly after 9.00 pm. In the course of the count the presiding officer handed to the returning officer a number of doubtful papers for scrutiny. In the result the returning officer allowed one paper for the respondent Morris, which is now disputed, and disallowed another voting paper for the petitioner, which disallowance is now also disputed. Having made these decisions the count showed 660 votes for the respondent Morris and 659 for the petitioner, with 635 votes for the third candidate, Berry.

There is some confusion as to precisely what happened after this. It is however clear that the petitioner made a request for a re-count and that the presiding officer heard that request. It is probable that it was made within earshot of the returning officer, but the returning officer never heard it. There was some discussion as to what the next step should be. The possibility of the toss of a coin was mentioned. Finally the returning officer informed the candidates and their agents that he would not declare the poll that night and would take further advice and hoped that it

would be determined the next day. All the candidates went home. Shortly afterwards, and without giving them any further opportunity to discuss that problem the returning officer declared the result of the poll as 660 votes for the respondent Morris and 659 votes for the petitioner.

On 3rd June 1971 the petitioner petitioned this court praying that:

'It may be determined that Lawrence Peter Morris was not duly elected, and that the said petitioner John Levers was duly elected and ought to have been returned, or in the alternative that the election was void.'

The grounds of the petition were that one vote cast for the respondent Morris should have been declared void and one rejected ballot paper should have been allowed as a vote for the petitioner. The petitioner also claimed that the election had not been conducted in accordance with the rules because no opportunity for a re-count had been given. Nor had there been a re-count.

On 21st June 1971 MELFORD STEVENSON J directed a re-count to be made by the prescribed officer, namely, Master W Russell Lawrence, senior Queen's Bench master. This re-count showed that the original count was correct for the voting papers adjudged admissible, namely, 660 for the respondent Morris, 659 for the petitioner, and 635 for Mr Berry. It was agreed between all the parties that the master's report should be treated as a Special Case and that this court should be asked to deal with the petition under s 126 of the Representation of the People Act 1949.

The issues before the court are: (i) Was the failure to hold a re-count a breach of r 47 of the Parliamentary Elections Rules which is applied by r 42 of the Local Elections Rules, and, if so, ought the court to order a fresh election? (ii) Was the vote in favour of the respondent Morris rightly admitted? (iii) Was the paper which was rejected a vote for the petitioner?

The first question to be decided is the question of the re-count. It is contended for the petitioner that there was a failure to comply with r 47 which deals with re-counts. Rule 47 provides:

'(1) A candidate or his election agent may, if present when the counting or any re-count of the votes is completed, require the returning officer to have the votes re-counted or again re-counted but the returning officer may refuse to do so if in his opinion the request is unreasonable. (2) No step shall be taken on the completion of the counting or any re-count of votes until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by this rule.'

It is contended therefore that the election was not so conducted as to be substantially in accordance with the law. Counsel for the petitioner relies on s 37 (1) of the Representation of the People Act 1949 and submits that the election should be held to be void and that by virtue of s 118 (1) a new election should be held to supply the vacancy.

The respondent Morris concedes that there was a failure to comply with r 47, but submits that the avoidance provisions do not apply, that the rules are merely directory and that a failure to re-count does not in any way invalidate an election. The method of and grounds for questioning a local election are laid down by s 112 which provides:

'An election under the local government Act may be questioned on the ground that the person whose election is questioned—(a) was at the time of the election disqualified; or (b) was not duly elected, or on the ground that the election was avoided by corrupt or illegal practices or on the grounds provided by s 142 or s 143 of this Act, and shall not be questioned on any of those grounds except by an election petition.'

As already mentioned this court has agreed to hear this petition as a Special Case under s 126 (1).

There is no question in this case of anybody having been prevented from voting or of anybody voting who was not entitled to do so. Accordingly the duty imposed on the court can be discharged by looking at the votes which have been cast, by deciding whether any votes are invalid and by saying whether the respondent Morris 'or any and what other person was duly elected' to use the words of s 125 (1) which by necessary implication must apply to this hearing.

Is this the proper approach to the question? In *Woodward v Sarsons* (1) the election court had to consider whether under the old law an election had to be declared void by reason of non-observance or non-compliance with the rules which were contained in a schedule to the Ballot Act 1872. LORD COLERIDGE CJ said:

'In order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part, which contains certain sections, and two schedules which contain certain rules and forms; and by s. 28, "the schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act". The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions". Comparing the sections and the rules it will be seen that for the most part, if not invariably, the rules pointed out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that "the forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit, shall be used". And on the ballot paper, as given in the schedule, is, "Directions as to printing ballot paper", and "Form of directions for guidance of voters in voting", etc. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments as distinguished from the absolute enactments in the sections of the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act,—and which must be determined before determining what effect such breach has upon a vote or on the election—the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.'

These rules, although they did not contain a rule like r 47 providing for a re-count, do cover many of the matters dealt with by the rules in Sch 2 to the Representation of the People Act 1949. In the Ballot Act 1872, by s 28:

'The schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act.'

In the Representation of the People Act 1949, by s 27 (1):

'Subject to the provisions of this Act, an election of councillors of a borough shall be conducted in accordance with the local elections rules in the second schedule to this Act.'

We can see no valid distinction between the approach to be made to the rules under the 1949 Act and the approach adopted in the judgment to which we have referred. As we have said, the petitioner relies on s 37 (1). Section 37 is the last of the ss 26-37 which are headed 'Conduct of local government elections'. These sections deal with

(1) (1875), 39 JP 776; LR 10 CP 733; [1874-80] All ER Rep 262.



the appointment of returning officers, voting, notices, etc, and then follows s 37 (1) which provides as follows:

'No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.'

In our opinion this section is not to be construed as the enabling section affirmatively setting out circumstances in which a new election should be held. It is wider in its terms than the equivalent section (s 13) in the Ballot Act 1872, but is similar in effect in that it is negatively stated to limit occasions when an election must be declared invalid. In other words it is an enabling section setting out circumstances in which, despite irregularity, a new election need not be held.

If this were a case where numbers of voters had been prevented from voting to where there was some substantial irregularity which might have affected the result, then it would have been necessary to order a new election. Here the absence of a re-count made no difference at all. It was in fact an accurate count of the votes allowed by the returning officer. It has twice been checked under the authority of this court. Accordingly, however, regrettable the muddle might have been it is now possible in the light of the two re-counts by the court to determine the true number of votes cast for each candidate.

The second contention made on behalf of the petitioner is that the voting paper which was rejected should be accepted as a vote for the petitioner. The rule which governs the rejection of ballot papers is r 43 of the Local Elections Rules. Rule 43 (3) provides:

'A ballot paper on which a vote is marked—(a) elsewhere than in the proper place; or (b) otherwise than by means of a cross; or (c) by more than one mark; shall not by reason thereof be deemed to be void . . . if an intention that the vote shall be for one or other of the candidates clearly appears, and the way the paper is marked does not of itself identify the voter and it is not shown that he can be identified thereby.'

In this particular case the voting paper which it is claimed should have been regarded as a vote for the petitioner had one line put straight through the name 'Morris' and one line straight through the name 'Berry' with the name 'Levers' left blank. If this had been an election at which more than one candidate might be elected it is possible that in those circumstances there would be room for confusion. This was not such an election and we are clear that this ballot paper showed a clear intention that the vote should be for the petitioner. Accordingly we find that this ballot paper should not have been rejected and should have been counted for the petitioner.

The third contention made on behalf of the petitioner is that a ballot paper which was counted for the respondent Morris should have been rejected. This was a ballot paper which had on it a cross but the cross instead of being opposite the name of 'Morris' was over the words themselves. We have looked at this paper and we agree entirely with the returning officer that it was a vote that clearly appeared to be for the respondent Morris; accordingly we find that the returning officer rightly accepted this vote.

The result of our conclusions on whether these two ballot papers were rightly dealt with by the returning officer is that the true count of the votes should have been 660 for the respondent Morris and 660 for the petitioner.

Accordingly it becomes our duty to apply s 122 (6) of the Representation of the People Act 1949, which provides:

'If the petition relates to an election conducted under . . . local elections rules and it appears that there is an equality of votes between any candidates at the election, and that the addition of a vote would entitle any of these candidates to be declared elected, then—(a) any decision under the provisions as to equality of votes in the parliamentary or local elections rules as the case may be, shall, in so far as it determines the question between those candidates, be effective also for the purposes of this petition; and (b) in so far as that question is not determined by such a decision the court shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote.'

That is the position which exists here and we direct that the decision shall be made between the petitioner and the respondent Morris by lot.

Lots were drawn and, as a result, the respondent Morris was declared duly elected.

*Declaration accordingly.*

Solicitors: Amery-Parkes & Co, for G D Cann & Hallett, Exeter; Pettit & Westlake, for Ashford, Penny & Harward, Exeter; Theodore Goddard & Co, for Crosse & Crosse, Exeter; Director of Public Prosecutions.

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BRIDGE AND SHAW, JJ)

October 5th 1971

R v LLANIDLOES (LOWER) JUSTICES. Ex parte THOROGOOD

*Licensing—Permitted hours—Exemption order—Special occasion—Local football match—Match occurring nearly every week—Discretion of justices—Licensing Act, 1964, s 74 (4).*

The respondent was the holder of a full justices' on-licence in respect of certain premises. She obtained from the licensing justices an order of exemption under s 74 (4) of the Licensing Act, 1964, to allow the addition to the permitted hours of the hours between 5 and 6 pm on Saturday, October 9, 1971. The ground for the application was that there was a requirement for facilities for refreshment on the part of the players and officials of the local football club during the hours in question after a home match. Between February 14 and May 9, 1970, the respondent had been granted special orders of exemption in the respect of twelve such occasions on the same ground, and between September 6, 1970, and April 4, 1971, in respect of 34 such occasions. The justices found that the occasion in respect of which the application was made was a 'special occasion' within the meaning of s 74 (4) of the Licensing Act, 1964, and granted the application. The chief inspector of police applied for an order of certiorari to quash the justices' order on the ground that the occasion was not a 'special occasion'.

**HELD:** the courts had refrained from laying down any definition of what was a 'special occasion', and had shown a recurring tendency to take the view that justices were the best judges of local requirements, and, while this was a very borderline case, the football matches were occasions quite independent of the activity of the licensee and had not got quite the element of regularity and frequency of the dances in *Lemon v Sargent*

(1967), 111 Sol Jo 852; therefore, dubitante, the general practice would be followed and the application would be refused.

MOTION by Ronald John Thorogood for an order of certiorari to quash an exemption order made under the provisions of s 74 (4) of the Licensing Act 1964 by the Llanidloes (Lower) justices sitting at Llandinam on 8th September 1971 and granted to Anna Corfield, licensee of the Red Lion Hotel at Caersws.

*Alan Jones* for the applicant.

The respondent did not appear.

**LORD WIDGERY CJ:** In these proceedings counsel for the applicant moves for an order of certiorari addressed to the justices sitting at Llandinam in the county of Montgomery as licensing justices, who on 8th September 1971 granted to one Anna Corfield an order of exemption under s 74 (4) Licensing Act 1964 for the premises known as the Red Lion Hotel at Caersws in the county of Montgomery, in respect of which premises Anna Corfield is the holder of a full justices' on-licence, to allow the addition of the hours between 5.00 pm and 6.00 pm on 9th October to the permitted hours. The ground on which such relief is sought, the applicant being Ronald John Thorogood, a chief inspector of police, is that the occasion, namely 9th October 1971, is not a special occasion within the meaning of s 74 (4).

Section 74 (1) provides for the granting by licensing justices of what is known as a general order of exemption where licensed premises are situated in the immediate neighbourhood of a public market or place where people follow a lawful trade or calling. The general exemption, as its name suggests, is in respect of an exemption from the confines of the licensing hours either generally or for such days as may be specified in the order. A general order of exemption is thus clearly in respect of a continuing or repeated requirement within the terms of the section.

Section 74 (4), which is relevant to this case, provides:

'Justices of the peace may—(a) on an application by the holder of a justices' on-licence for any premises . . . make an order (in this Act referred to as a special order of exemption) adding such hours as may be specified in the order to the permitted hours in those premises on such special occasion or occasions as may be so specified.'

The facts of this case as detailed in the affidavit in support of the application are that for a very long period Anna Corfield as licensee of this particular public house has applied for and obtained special orders of exemption on Saturdays to cover the period between 5.00 pm and 6.00 pm. The occasion which has justified each of those grants has been that the Caersws Football Club has been playing at home on that day, and that there was a requirement for facilities for refreshment on the part of players and officials during the hour in question. The affidavit discloses that this kind of thing, if I may so describe it, has been going on with frequency and some measure of regularity. Thus between 14th February 1970 and 9th May 1970 the justices granted such orders of exemption in respect of 12 occasions. I observe that those have been very nearly every Saturday during the period. Furthermore between 6th September 1970 and 4th April 1971 the justices granted such orders of exemption in respect of 34 occasions. During that period the applicant has represented to the justices that these weekly football matches are not special occasions so as to justify the grant of the special order of exemption, but the justices have taken a different view. On 8th September 1971, following their now established practice, the justices granted special orders of exemption in respect of six Saturdays, the last of which is 9th October 1971. That last date is chosen as the field on which to challenge this practice.

The whole question is whether the football matches, occurring as they do, indeed recurring as they do, on almost every Saturday through the winter, can as a matter of construction amount to special occasions within the meaning of s 74 (4). This is a subject which has given rise to a great deal of debate over the years, and there has been a recurring tendency for this court to take the view that justices are the best judges of local requirements, and to show a very wide tolerance to justices in their interpretation of the meaning of the word 'special' in these circumstances. There are a great many cases in which that has been the basis of the court's decision, namely that local considerations are best measured by local people.

But the most useful judgment as I find it on this whole subject is itself the most recent. It is a judgment which unfortunately was not reported at the time, and which I venture to think deserves to be reported for the assistance which it has given me in this particular case. It is *Lemon v Sargent* (1), heard on 19th October 1967. The court consisted of LORD PARKER CJ, SALMON LJ and myself. The applicant there was the licensee of a hotel at Folkestone who had established a practice for a very long period indeed (some 16 years) of holding dances every Wednesday and Saturday throughout the year, such dances being partly for the enjoyment of the residents in the hotel, but also catering for local people who wished to dance and wished to enjoy the facilities provided. For 16 years the licensee had successfully applied for a special order of exemption in respect of these dances every Wednesday and every Saturday right through the year over this extensive period, and eventually, rather as in the present case, the chief constable challenged in this court the propriety of such an occasion being regarded as special for the purposes of s 74.

LORD PARKER CJ, having read the relevant part of s 74 (4), said this:

'It is clear that provided there is a special occasion or occasions, justices have a complete, unfettered discretion in the matter. It is further clear that before they exercise any jurisdiction, they must find that there is a special occasion, and again that is a matter of fact and degree for the justices. But, of course, they cannot give themselves jurisdiction by a decision that something is a special occasion which in law cannot be a special occasion. Accordingly, the sole question here is whether there was any evidence which entitled the justices to hold, as they did, that the occasion of each of these dances was in law a special occasion.

'For my part, one has only to state the facts of the case in the short summary way in which I have stated them to come to the conclusion that it is quite impossible to say that these dances on each Wednesday and Saturday throughout the year were special occasions within the meaning of the Act. There have been a mass of authorities dealing with what can and cannot be a special occasion for the purposes of the Licensing Acts, and for the purposes of the Road Licensing Acts. The courts in their wisdom have, I think, refrained from attempting to lay down any definitions as to what is a special occasion. The cases in general show what is not a special occasion. However, certain matters are clear on the cases, first that of course, as is natural, a dance can be a special occasion; secondly, the fact that a dance maybe occurs on three or four consecutive nights would not prevent those from being special occasions. Nor would they cease to be special occasions because they occurred with some measure of repetition. It has been held that a special order can be made in respect of Christmas Day and the New Year, albeit, of course, they recur every year. But equally there is no case which goes to suggest the two factors which stick out a mile in this case; one is the frequency with which these occur, Wednesdays and Saturdays; and secondly, that those Wednesdays and Saturdays are not connected with any local or national occasion, but merely become special occasions, if they be a

(1) (1967), 111 Sol Jo 852.

special occasion, by reason of the fact that the organiser has chosen to give dances on those days. I am quite satisfied that a dance cannot be turned into a special occasion for the purposes of the Licensing Acts merely because the organiser chooses to give the dance, and it is wholly unconnected with any special event in the locality. I am also clear that the degree of repetition here, the frequency, also prevents these from being special occasions.'

Having been a party to that judgment, I entirely accept and agree with every word there said by LORD PARKER CJ. and that judgment discloses the principle on which we ought to approach the present case. LORD PARKER is putting forward two grounds, each of which in my judgment he is saying would be sufficient to prevent the dances then in question from being special occasions. The first ground is that they are not related to any local or national event. There was no special occasion in respect of the giving of the dance itself, and he says, and I entirely agree, that one cannot create a special occasion by deciding to hold a dance and calling that a special occasion which merits the grant of the special order of exemption. Equally, as I understand it, he is putting forward as a ground for rejecting the claim of special occasion in that case that the occurrences were so regular and frequent, every Wednesday and every Saturday right through the whole year.

As counsel for the applicant points out, the present application was not subject to the first of those vices. There was an occasion quite independent of the activity of the licensee, the occasion being the football match which was held on each of the days to which the application related. So far as that ground is concerned, the present case does not disclose comparable circumstances. As to the frequency with which the occasions repeat themselves, it is quite clear as a matter of degree that the occasions on which the Caersws Football Club plays at home have not got quite the element of regularity or frequency of the dances in *Lemon v Sargent*.

Speaking for myself, I had considerable difficulty in deciding whether this is a case in which we ought to say that the frequency of the occasion was sufficient to prevent it from being special. I would wish to make no secret of the fact that I think that in this case the licensee has gone to the very borderline, if not quite somewhat beyond, in the number of applications which she has seen fit to make, but in the end I think this is perhaps just within the borderline area in which we should follow the general practice of not interfering with the decision of the local Bench unless we are bound to do so, and, accordingly, not without some misgivings, I think the justices have just justified what was done in this case, and I would accordingly refuse the application.

**BRIDGE J:** I agree.

**SHAW J:** I also agree

*Application refused.*

Solicitors: *Beachcroft & Co*, for *D A Roberts Thomas*, Carmarthen.

T.R.F.B.

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#### CORRECTION

*Naish v Gore*, ante p. 1. For 'Probate, Divorce and Admiralty Division' read 'Queen's Bench Division.'

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**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, EDMUND DAVIES AND STEPHENSON, LJJ)

4th October 1971

**R v LEICESTER GAMING LICENSING COMMITTEE.**  
**Ex parte SHINE AND ANOTHER**

*Gaming—Licensing of club—Application—Notice—Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2).*

A notice of an application for the grant of a gaming licence published in pursuance of para. 6 (2) of sched. 2 to the Gaming Act, 1968, must, to be valid, specify no more than the matters set out in para. 6 (2). Any inaccuracy in the notice or the insertion of additional matter, unless minimal, will invalidate the notice under para. 6 (4).

*R v Dacorum Licensing Committee. Ex parte EMI Cinemas and Leisure, Ltd (1971), 135 JP 610 distinguished.*

Decision of Divisional Court (1971), 135 JP 473, affirmed.

APPEAL by the applicants, Mark Shine and Leonard Louis Davis, against an order of a Queen's Bench Divisional Court dismissing a motion by the applicants for an order of mandamus to require the Leicester Gaming Licensing Committee to hear and determine their application for the grant of a licence under the Gaming Act 1968 for a club named the Rubicon Club.

*John Lloyd-Eley QC and J F Kingham for the applicants.*

The respondent gaming licensing committee did not appear.

**LORD DENNING MR:** Two or three years ago Mr Mark Shine and Mr Leonard Louis Davis had a gaming house in Northampton, but, under the Gaming Act 1968, gaming houses were not allowed in Northampton. They were, however, allowed in Leicester, so Mr Shine and Mr Davis decided to apply for a licence to run a gaming house at Leicester.

To do this they had to do two things. First they had to satisfy the Gaming Board that they were suitable people who would keep proper control over the premises, and so forth. They did this, and got a certificate of consent from the Gaming Board. Secondly, they had to get a licence from the local gaming licensing committee. The procedure is laid down in the schedules to the Gaming Act 1968. They had to make application to the clerk in the prescribed form. According to this form, they had to state the name of the club, its description, the premises, the hours during which it would be open for gaming, the kind of games to be played, and so forth. Mr Shine and Mr Davis, by their solicitor, made that application to the clerk. But then they had to give public notice of that application. They had to put a notice in the newspaper so that people could object if they wanted to. For that purpose they had to comply with para 6 (2) and (4) of Sch 2 to the Act which provides:

'(2) A notice published in pursuance of this paragraph shall specify the name of the applicant, the name of the club and the location of the relevant premises, shall indicate whether the application is for a bingo club licence or for a licence under this Act other than a bingo club licence, and shall state that any person who desires to object to the grant of the licence should send to the clerk to the licensing authority, before 15th April, two copies of a brief statement in writing of the grounds of his objection . . . (4) A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

Paragraph 6 (4) shows that the notice had to contain the particulars required by para 6 (2), and nothing else. I am afraid this is where Mr Shine and Mr Davis, or their then advisers, made a mistake. They prepared a notice of 4th March 1971 and put it in the 'Leicester Mercury' on 11th March. In this notice they quite properly stated their own names and the name of the club—the Rubicon Club; they stated quite properly the place where the club was to be carried on—32 Charles Street, Leicester; they indicated quite properly that it was to be, not a bingo club, but a gaming house, and they stated quite properly that anyone who wished to object could do so. But they did not stop there, as they should have done. They added many more particulars. They added the particulars which were required to be in the application to the clerk, but were not required to be in the notice in the newspaper. For instance, they stated the hours of gaming were to be 10.00 pm to 4.00 am. They stated that the kind of games to be played were roulette, black jack and craps. And so forth. It is obvious that the person who prepared the notice for the newspaper copied the application to the clerk, thinking that it would do. He did not realise that these other matters had to be in the application to the clerk, but not in the advertisement in the newspaper.

The question is whether the inclusion of those added matters renders the notice invalid. Counsel for the applicants acknowledges that this mistake might mean that they were guilty of a technical offence against the advertising provisions of the Act, for s 42 only allows an advertisement for a gaming house if it is displayed on the premises or if it is one of the statutory notices. He says that it was at most a technical offence for which they should get an absolute discharge and that it does not affect the validity of a notice as a notice. He says that this notice contained all that was required, and thus satisfied para 6 (2) and that it was not rendered invalid by the insertion of other matters.

The complete answer to this argument is para 6 (4) itself. I have already read it. It is mandatory. It says that the notice shall not include any additional matter. I think the notice, to be valid, must comply with that sub-paragraph. This notice does not. It was no doubt a mistake, a mischance. But it does not comply with the Act. It is, therefore, invalid. It cannot form the basis of any jurisdiction in the licensing authority.

Counsel for the applicants drew our attention to a recent case of *R v Dacorum Gaming Licensing Committee, ex parte EMI Cinemas and Leisure Ltd* (1). In that case there was a mistake simply in one letter. The notice given by the applicants said that the club was the 'ABC Social Club'. The applicants asked the newspaper to insert that description as the name of the club. But, by a mistake in the printing department, the newspaper printed 'ABE Social Club' instead of 'ABC Social Club'. There was an E instead of a C. LORD WIDGERY CJ said that it was purely a typographical error and that it did not invalidate the notice. I entirely agree. We cannot carry formalism to such lengths as that. In the present case the mistake is not so minimal. This notice contains information of a kind prohibited by the Act—because it might be regarded as a form of advertising—such as the hours of opening, the games to be played, and so forth. Those are matters which ought not to be there, and are in contravention of the schedule. I think the notice is invalid. I agree with both the committee themselves and the Divisional Court. I would dismiss this application.

**EDMUND DAVIES LJ:** I also agree. The initial statutory approach to this matter is that there shall be no advertisements relating to gaming, for s 42 (1) of the Gaming Act 1968 provides:

'Except as provided by this section, no person shall issue, or cause to be issued, any advertisement—(a) informing the public that any premises in Great Britain are premises on which gaming takes place or is to take place . . .'

Then a partial let-out is provided by s 42 (2), and, for present purposes more importantly by s 42 (3), which provides:

'Subsection (1) of this section does not apply to . . . (b) the publication or display of a notice, where the notice is required to be published or displayed by any provision of schedules 2 to 4 to this Act and the publication or display is so made as to comply with the requirements of that provision . . .'

Accordingly, the statute requires one to approach the relaxation of the initial prohibition with some degree of strictness. This is underlined by para 6 (4) of Sch 2, which provides:

'A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

A more unqualified prohibition than that cannot be imagined. When one looks back at the provisions under para 6 (2), one finds the five matters which the advertisement there referred to is required to contain—five matters and no more. It is common ground that, by a misfortune which is readily understandable, the advertisement in the present case contained a great deal of information which, while innocuous, nevertheless falls clearly outside para 6 (2). I see no escape from the conclusion that in those circumstances there was a failure to insert in the newspaper an advertisement which complied with and was restricted to those matters designated in the statute. I therefore respectfully share the view of LORD DENNING MR that the Divisional Court, like the committee, were right in holding that the committee had no jurisdiction to entertain the application.

STEPHENSON LJ: I also agree.

*Appeal dismissed.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk.*

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, THESIGER AND SWANWICK, JJ)

8th October, 1971

R v PAYNE. R v SPILLANE

*Criminal Law—Trial—Shorthand note—Absence of official shorthand writer—Duty of judge, counsel and officers of court—Steps to ensure that unchallengeable record is made and judge's direction to jury is adequately recorded—Criminal Appeal Rules, 1968, r 18 (3).*

Where it is found that there is a possibility of no fully qualified shorthand writer or proper apparatus for mechanical recording being available in court, it is the duty of counsel and the officers of the court to draw the attention of the judge to the position so that he can give a direction under r 18 (3) of the Criminal Appeal Rules, 1968. It is the judge's duty to do everything, if it is necessary to proceed without a qualified shorthand writer or adequate mechanical recording, by means of his own note and the co-operation of counsel to ensure that an unchallengeable record will be available. If there is any doubt about it, the judge must take steps to ensure that his direction to the jury will be adequately recorded. Where it is realised that a purported transcript of the summing-up is quite inadequate, the matter should at once be brought to the attention of the judge.

APPEALS by John Payne and John Raymond Spillane against conviction and sentence at Surrey Quarter Sessions.

The appellant Payne was charged in count 6 of an indictment with assaulting Pc Newman in the execution of his duty, and the appellant Spillane was charged in count 1 with assaulting that police constable, in count 3 with assaulting another police constable, and in count 4 with inflicting grievous bodily harm on the latter constable. Their defence was that the officers in question were in plain clothes and they did not know that they were police officers but that, when the officers arrested them, they thought they were thugs.

R G Marshall-Andrews for the appellants.

A de P J M Bueno for the Crown.

MEGAW LJ delivered this judgment of the court: This is a most unfortunate case which has led to very grave difficulties which have arisen because of the absence of any proper shorthand note of the summing-up by the chairman. Let it be said at once that no blame of any sort attaches to the chairman for the existence of this state of affairs.

At the beginning of the trial no shorthand writer was present. The chairman, being informed of the fact, said that he would take a careful note of the evidence. He did so. When it came to his summing-up to the jury, the chairman was aware that a shorthand writer was then in court. He did not know, and was in no way at fault in not realising, that the shorthand writer who was present had been supplied by a local agency and was not competent to take a proper shorthand note of the summing-up. The summing-up lasted one hour, but the shorthand transcript ran to only three pages. Both appellants were convicted. The appellant Payne was sentenced to Borstal training and the appellant Spillane to concurrent terms of imprisonment—18 months on counts 1 and 3 and two years on count 4. Both appellants appealed against conviction and sentence. On appeal there was a conflict of recollection between counsel for the Crown and the chairman, on the one hand, and counsel for the appellants, on the other, whether a particular passage in *Kenlin v Gardiner* (1) dealing with arrest and detention had been cited in the summing-up.

(1) [1966] 3 All ER 931.

It was accepted that, in relation to the appellant Spillane, it was important that the summing-up should have contained a direction citing, or based on the contents of, that particular passage.

In view of the absence of any proper note of the summing-up, the document which purported to be a transcript of the summing-up was a total travesty of what was said. Accordingly, in respect of the appellant Spillane, although the evidence against him was strong on the question of his arrest and detention, his conviction will be quashed. The case of the appellant Payne was different. The plain and straightforward issue was whether or not he had struck the police officer concerned the two blows alleged. The jury clearly believed the evidence of the police officers that he had. Accordingly, there was no material error or irregularity in his case and his appeal against conviction will be dismissed, but the court will vary his sentence to one of probation for three years.

It is necessary, before parting with this appeal, to say more about the question of the shorthand note. It will be apparent from what has been said that what has happened in this case is truly lamentable. It is something which may have led conceivably to what might be regarded as a serious miscarriage of justice. It is not for this court to apportion blame, and indeed this court would not think it right to assign blame to anybody in relation to what has happened in this case. Nobody realised that the person who was known to be taking a shorthand note of the summing-up was, as is now apparent, incompetent so to do, nor, as has already been said, is that person herself to be blamed, because it may well be that she took on this assignment without realising the special qualifications needed for the job or the importance of it or her own inadequacy of performance. What it does point to, however, is the necessity for the greatest possible care in any circumstances where it is known that there is no shorthand writer present, or a proper apparatus for mechanical recording where applicable, or where there is a possibility that a shorthand writer who is present may not be fully competent for the job. The greatest possible care must be taken to ensure that there is another and an adequate and, so far as possible, an unchallengeable note. That applies also in relation to the taking of the evidence. Attention should be directed to r 18 of the Criminal Appeal Rules 1968. It is unnecessary to read it in full now, but it is provided in r 18 (3):

'Where it is not practicable for . . . proceedings [in respect of which an appeal lies] to be recorded by means of shorthand notes or by mechanical means, the judge of the court of trial shall direct how and to what extent the proceedings shall be recorded.'

It is the duty of counsel, if counsel has any reason to suppose that position has arisen or may arise, to call the judge's attention to the necessity for making such a direction. It is the duty of the officers of the court similarly to draw the attention of the judge to it. It is the judge's duty to do everything practicable in the circumstances, if it is necessary to proceed without a shorthand writer or adequate mechanical recording, to ensure by means of his own note, and by requesting the co-operation of counsel for all parties concerned, that there is an adequate note which will, so far as is humanly possible, not be subject to dispute or challengeable on material matters.

So far as summing-up to the jury is concerned, if in any circumstances by reason of an emergency it should be necessary to proceed without a competent shorthand writer or adequate mechanical recording—which it is to be hoped will be only in the rarest cases—the judge must be apprised of the position. It is the duty of those concerned to make sure that if somebody is brought in who is not one of the official shorthand writers of the court, the most careful possible steps are taken to see that that person is likely to be competent. If there is any doubt about it, the judge must



take steps to do what he can to make sure that his directions to the jury shall be adequately recorded. He will find ways and means in which that can be done depending on the circumstances. In some cases it may be possible to make a fairly full note before he starts to speak. In other cases it may be possible to make a note after he has finished and while the matter is fresh in his mind. In every such case counsel should be invited to make their note of the summing-up and also, if they see occasion to do so, they should feel that they are entirely free at the end of the summing-up to raise any query about any point on which they are in doubt or are dissatisfied.

We have gone into this at some length, because of the very great difficulties and the very great possibility of miscarriage of justice if the provision which is traditional in these courts of a full and accurate note of both the evidence and the summing-up is for any reason not available. It will be obvious that it is something that must be watched under present conditions with the greatest of care, and the greatest possible care should be taken to ensure that justice is not interfered with by means of difficulties of this sort. We repeat that no blame could possibly be attached to the chairman for what happened in this case. We would add, without attributing blame to anyone else in relation to what happened in this case, that it is unfortunate that steps were not taken much earlier, when it was realised that the purported transcript of the summing-up was hopelessly inadequate, to have the matter brought at once to the notice of the chairman, instead of, as happened here, only within the last few days before the appeal was due to be heard—at a time some months after the date of the summing-up. If such an unfortunate occurrence should happen again, it is greatly to be hoped that immediate and urgent steps will be taken, as soon as the position is realised or suspected.

*Orders accordingly.*

Solicitors: *Lloyd & Davey, Ashted; Wontner & Sons.*

T.R.F.B.

## COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, LJ, THESIGER AND SWANWICK, JJ)

11th October 1971

R v HALSE

*Criminal Law—Sentence—Youthful offender—Suspended sentence—Conviction during period of suspension—Sentence of 12 months' imprisonment and suspended sentence activated to run consecutively—Overall term amounting to eighteen months—Criminal Justice Act, 1961, s 3 (1) (3).*

By s 3 (1) of the Criminal Justice Act, 1961: '... a sentence of imprisonment shall not be passed by any court on a person within the limits of age which qualify for a sentence of Borstal training except—(a) for a term not exceeding six months; or (b) (where the court has power to pass such a sentence) for a term of not less than three years ... (3) In relation to a person who has served ... a previous sentence of Borstal training, subs (1) of this section shall have effect as if for the reference to three years there were substituted a reference to eighteen months ...'

The appellant, who was aged 18 and had previously served a period of Borstal training, was given a suspended sentence of six months' imprisonment. During the period of suspension she committed a further offence and was sentenced to twelve months' imprisonment, the suspended sentence being brought into effect and ordered to run consecutively. She appealed against this sentence on the ground that, under the provision of s 3 of the Criminal Justice Act, 1961, the court had power to impose only a sentence not exceeding six months or not less than 18 months' imprisonment.

**HELD:** the sentence for the substantive offence was technically wrong in that it did not comply with s 3 of the Act of 1961 and could not be saved by the fact that a suspended sentence would be brought into effect to run consecutively, so that the total sentence amounted to eighteen months and so, if regarded as a whole, was one which was permissible under s 3; but the court, exercising its powers under s 11 (3) of the Criminal Appeal Act, 1968, would increase the sentence for the substantive offence to one of eighteen months and order that the suspended sentence should run concurrently, with the result that the overall sentence would remain the same.

**APPEAL** by Yvonne Halse against a sentence imposed on her at Durham Assizes after she had pleaded guilty to robbery. She was then sentenced to 12 months' imprisonment, and a suspended sentence of six months then in operation was ordered to be activated and to run consecutively with the 12 months, making 18 months in all.

G D Bavidge for the appellant.

O Wrightson for the Crown.

**MEGAW LJ** delivered this judgment of the court: The matters with which this Court is concerned in this appeal began on 1st July 1970 when, at the Hartlepool Magistrates' Court, the appellant was convicted of theft with another offence taken into consideration. At that time her age was 18 years. She was sentenced to six months' imprisonment which was suspended for two years and she was also fined.

On 27th April 1971—that is during the currency of that suspended sentence—at Durham Assizes the appellant together with her co-accused, a man named McAllister and another woman called Browning, pleaded guilty to an offence of robbery. For that offence the appellant was sentenced to 12 months' imprisonment and the suspended sentence of six months' imprisonment was ordered to take effect consecutively, making 18 months in all.

It is necessary to state something briefly about the facts of the substantive offence. That occurred on the evening of 2nd April 1971. At that time a soldier was travelling home on leave. He went into a hotel in Hartlepool for a drink and there he met the

appellant whom he had known previously. She had gone to the hotel with McAllister and Miss Browning and the three of them realised that the soldier had a certain amount of money in his possession, so they decided that they would rob him. The appellant acted as a decoy to entice him out of the hotel and up an alley-way. McAllister and Miss Browning followed them to a suitably convenient spot where McAllister jumped on the soldier and after a struggle robbed him of a wallet containing £14, a return railway ticket, a leave pass and a coloured photograph. Of the proceeds of that robbery the appellant was given some £4. The soldier complained to the police, who then visited the hotel in question and there saw the appellant and Miss Browning who tried to escape. At the police station the appellant made a confession in writing.

It is unfortunate that the appellant, now aged 19 years and some three or four months, has a record of conflict with the law which began in the juvenile court in March 1967 and again in July 1967 when, for initial offences, she was given a conditional discharge on both occasions. Again, in October 1967, for housebreaking with a large number of offences taken into consideration, she was put on probation for a period of two years and no action was taken on the breach of the conditional discharge. In March 1968 she was in trouble again, this time for assault occasioning actual bodily harm, housebreaking, larceny and so forth, again with offences taken into consideration, and she was then sent to an approved school. In November 1968 she was sentenced to Borstal training; in September 1969 for assault occasioning actual bodily harm she was fined; in May 1970 for breach of the peace she was bound over for two years, and in July 1970 for theft there was imposed the suspended sentence of six months' imprisonment to which reference has been made. One other offence was taken into consideration on that occasion. No one could seriously doubt that in those circumstances a sentence totalling 18 months' imprisonment was right, proper and, indeed, it might be said, necessary. However, once again the technicalities of the law as to sentencing create difficulty. The provisions of s 3 of the Criminal Justice Act 1961 make it imperative that in relation to someone of the age and record of the appellant a sentence of imprisonment, if it is to be imposed, must be either six months or less or 18 months or more. Anything between six months and 18 months is an irregular and illegal sentence.

It has been held by this court in *R v Pike* (1), in which judgment was given on 11th June 1971, that where the sentence for the substantive offence falls within the prohibited limits (that is, prohibited by s 3 of the 1961 Act), it is not saved by the fact that a suspended sentence is brought into effect to run consecutively so that the total sentence is one which would, if regarded as a whole, be permissible under s 3 of the 1961 Act. That is the effect of the decision of this court in *R v Pike*. It is inferentially confirmed as being the correct view of the law by another decision of this court in *R v Birch* (2) in which judgment was delivered on 27th April 1971. In those circumstances it follows that the sentence imposed here for the substantive offence of 12 months' imprisonment is technically wrong and cannot be upheld.

The question then arises: What ought this court to do in the circumstances? There can be no doubt but that under s 11 (3) of the Criminal Appeal Act 1968, it is open to this court in those circumstances, if in the view of this court it is a proper course to take, to increase the sentence that was imposed for the substantive offence—that of 12 months' imprisonment—and make it a sentence of 18 months' imprisonment, which makes it a lawful sentence for the purposes of s 3 of the 1961 Act, and for the court also to direct that the suspended sentence of six months' imprisonment which was ordered to run consecutively should, instead, be ordered to run concurrently with that altered sentence.

(1) 135 JP 526; [1971] 2 All ER 1470.

(2) (1971), unreported.

The result is that the total sentence imposed on the appellant is no different from that which resulted from the judge's sentence coupled with his order regarding the suspended sentence. It is 18 months in all. It is clear that this court has that power under s 11 (3) of the Criminal Appeal Act 1968 and it is also apparent from s 40 (9) of the Criminal Justice Act 1967 that that is a permissible course for the court to take in relation to a suspended sentence. The court is fully satisfied that that is the proper course here. It will quash the sentence of 12 months' imprisonment for the substantive offence of robbery and will substitute therefor a sentence of 18 months' imprisonment. It will direct that the suspended sentence shall run concurrently with, and not consecutively to, that sentence.

*Order accordingly.*

Solicitors: Registrar of Criminal Appeals; A. J. Olson, Durham.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BRIDGE AND SHAW, JJ)

8th, 15th October 1971

#### MCDONALD v HOWARD COOK ADVERTISING LTD

*Town and Country Planning—Advertisements—Control—Display on walls of public houses—Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height—Advertisements showing cigarette packet, man holding glass of beer, and beer glass—Objects shown all above permitted height—Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).*

By s 63 (2) of the Town and Country Planning Act, 1962: 'Without prejudice to any provisions included in regulations made under s 34 of this Act . . . if any person displays an advertisement in contravention of the provisions of the regulations, he shall be guilty of an offence . . .'

The respondents displayed on the walls of three public houses advertisements, two of which advertised a particular brand of cigarette and contained a picture of an open packet of cigarettes of that brand and the third of which advertised a particular kind of beer and showed a picture of a man holding up a glass and another picture of a glass of beer with the words 'Thirst Prize'. The packet of cigarettes, the figure of the man, and the glass of beer all exceeded 0.75 metres in height. Information were preferred against the respondents charging them with contravening the Town and Country Planning (Control of Advertisements) Regulations, 1969, contrary to s 63 (2) of the Town and Country Planning Act, 1962, in that the advertisements, although displayed with deemed consent under Class IV of reg 14 (1) [ie advertisements on business premises relating to the display of brands of goods on sale within the premises], they did not comply with the condition imposed by reg 14 (2) (a) that the advertisements should not 'contain letters, figures, symbols, emblems or devices of a height exceeding 0.75 metres'. Justices dismissed the informations on the ground that the objects referred to constituted 'pictures' and as such were not prohibited by the regulation. On appeal by the prosecutor,

**HELD:** the regulation, as a penal enactment, must be strictly construed, and, as the objects shown were not 'letters or figures' (by which the regulation meant numerical figures) nor 'symbols, emblems or devices' in any ordinary sense, they were not prohibited by reg 14 (2), and the justices had rightly dismissed the informations.

CASE STATED by justices for the county borough of Bury.

On 8th October 1970 informations were preferred against the respondents, Howard Cook Advertising Ltd, by the appellant, James Alfred McDonald on behalf of the council of the county borough of Bury, charging that on 11th August 1970 at the county borough of Bury the respondents did display certain advertisements in contravention of the Town and Country Planning (Control of Advertisements) Regulations 1969, in that the advertisements, although displayed with deemed consent under class IV of reg 14 (1) of the regulations, did not comply with the condition imposed by reg 14 (2) (a) contrary to s 63 (2) of the Town and Country Planning Act 1962.

The justices were of the opinion that the three summonses were not proved in so far as the advertisements referred to constituted 'pictures' and so did not contravene the regulations, and they therefore dismissed the three summonses, awarding costs of £50 against the council of the county borough of Bury to be paid to the respondents. The prosecutor appealed.

*J Hugill* for the appellant.

*F Reynold* for the respondents.

*Gordon Slynn* as amicus curiae.

*Cur adv vult*

15th October. **BRIDGE J** read the following judgment of the court: This is an appeal by the local planning authority, as prosecutor, from the dismissal by the Bury justices of three informations charging the respondents with offences in contravention of the Town and Country Planning (Control of Advertisements) Regulations 1969. The point of law it raises, though short, is both difficult and important.

Regulation 14 (1) of the 1969 regulations permits the display, without the express consent of the local planning authority, of, inter alia, class IV, 'Advertisements on business premises', which relate only to

'the business or other activity carried on, the goods sold or services provided, and the name and qualifications of the person carrying on such business or activity or supplying such goods or services, on those premises.'

But, by reg 14 (2) it is a condition of such display that

'(a) no such advertisements . . . shall contain letters, figures, symbols, emblems or devices of a height exceeding 0.75 metre.'

The respondents had displayed on the walls of three public houses advertisements of a kind more commonly seen on hoardings. Two, which are identical, advertise Players No 10 cigarettes and contain a picture of an open packet of cigarettes of that brand. The third advertisement is for Thwaites beer. This has two pictures. In one is the figure of a man holding up a glass of beer with a tribute to Thwaites beer tattooed on his chest and an expression of delighted anticipation on his face. In the other is a glass of beer decorated with a rosette bearing the legend 'Thirst prize'. In those three pictures the cigarette packet, the man's figure and the beer glass respectively all exceed 0.75 metre in height. It is common ground that advertisements of this kind, i.e. advertising particular brands of goods on sale within the premises whereupon they are displayed, are permitted by reg 14 (1). The sole issue is whether the three objects, depicted as just described, fall within any of the categories to which the height restriction in reg 14 (2) (a) applies. The justices decided that they did not. The point of construction involved is free of authority, which is perhaps surprising considering that a regulation in these terms has been in force since 1948. But it is



of interest to note that in Scotland a sheriff's court has decided it in *Arthur Maiden Ltd v Lanark County Council* (1), in relation to comparable pictorial advertisements, in the same way as the Bury justices.

We are grateful for the assistance we have had from counsel for the parties and from counsel who appeared for the Secretary of State as *amicus curiae* at the request of the court and supported the argument for the appellant. But the point hardly admits of elaborate argument and must largely be one of impression.

The objects in question are obviously not letters or figures (which here clearly means numerical figures). Are they symbols, emblems or devices? We have been referred to the dictionary definitions of those terms which do not greatly help save as showing a substantial overlap between their meanings (one finds each defined in terms of one or more of the others) and indicating a common denominator in that a symbol, emblem or device suggests in each case something which points to a meaning beyond itself.

It is said for the appellant that many objects depicted in advertisements are plainly intended to stand as symbols, emblems or devices representing the product advertised. A white horse signifying a well-known brand of whisky is a good example. So far the argument is irrefutable. Then it is argued: if such pictorial symbols are restricted it must accord with the policy of the regulations to construe their language as applying equally to any pictorial representations used in advertising the product to the public. If the pictorial symbol (e.g. the white horse) is prohibited over a certain height, it is absurd that, for instance, an actual whisky bottle may be pictured on any scale. Counsel for the respondents on the other hand points out how easy it would have been to impose an overall restriction on the scale of pictorial advertising within the permitted classes or to include 'pictures' or 'representations' among the restricted categories. He submits that, whatever anomalies may result from an application of the language of the regulations in its ordinary meaning, the court should not exert itself to stretch that meaning and that a picture or representation of the product advertised is not in any ordinary sense a symbol, emblem or device.

These arguments are nicely balanced. We think the draftsman of this provision never had in contemplation its application to the kind of pictorial advertising now in question. Bearing in mind that this is a penal enactment we have concluded that we should resist the temptation to make good any shortcomings of his language in order to effect the supposed policy of the legislation. We adopt the narrow construction urged on behalf of the respondents. If this will lead to practical anomalies the remedy must lie in an amendment of the regulations. In the result this appeal will be dismissed.

*Appeal dismissed.*

Solicitors: Lewin, Gregory, Mead & Sons, for J A McDonald, Bury; Ward, Bowie & Co, for Booth & Co, Leeds; Solicitor, Department of the Environment.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) (1958) *Journal of Planning and Property Law* 417.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BRIDGE AND SHAW, JJ)

15th October 1971

SKEATE v MOORE

*Food and Drugs—Samples for analysis—Unwrapped meat pies—Purchase of six pies by sampling officer—Division into three lots each consisting of two pies—Submission of one lot to public analyst—Aggregate of meat in those two pies smaller percentage of their total content than that required under regulations—Liability of seller—Food and Drugs Act, 1955, s 93 (1), Sch VII, Part I, paras 1, 2.*

The appellant, who carried on business as a baker, sold unwrapped Cornish pasties, which were baked on his own premises. A sampling officer employed by the local authority, in purported exercise of his powers under the Food and Drugs Act, 1955, entered the appellant's shop and purchased six of the pasties as a sample under the Act for the purpose of analysis. Purporting to treat the sample in the manner required by the Act, the officer divided the six pies into three lots of two. He sent one lot of two pies to the public analyst, left one lot with the appellant, and retained one lot for production in court, if required. The only lot analysed was that sent to the public analyst whose analysis showed that the aggregate of meat in the two pies represented a percentage of their total content smaller than the percentage required to be in a meat pie under the regulations. On the basis of that analysis the appellant was convicted of selling a meat pie (one of the two analysed) which had a meat content less than that required under the regulations, contrary to regs 5 (5), 5 (13) and 12 (1) of the Meat Pie and Sausage Roll Regulations, 1962. On appeal by the appellant,

Held: the language and scheme of the Act of 1955 showed that the statutory sample had to be either co-extensive with the subject-matter of the charge or a representative sample of some larger entity to which the charge related; where a number of pies had been used as the statutory sample there could not be a prosecution authorised under the Act relating to one particular pie which had been analysed; the sampling procedure followed had, accordingly, been unlawful.

CASE STATED by Bradford, Yorkshire, justices.

On 25th November 1970 an information was preferred by the respondent, Gordon Charles Moore, against the appellant, Howard Skeate, that he, on 1st October 1970 at 766 Great Horton Road, Bradford, sold a meat pie containing meat and vegetables, namely a Cornish pasty, which had a meat content of 7.9 per cent, whereas it should have had a meat content of not less than 12.5 per cent, contrary to regs 5 (5), 5 (13) and 12 (1) of the Meat Pie and Sausage Roll Regulations 1967.

The justices found that the information was proved and convicted the appellant. On appeal by the appellant the questions for the opinion of the court were whether the meat pie, the subject of the information, was sufficiently identified; whether the sampling procedure followed was lawful; and whether the justices came to a correct determination in point of law.

P M J Slot for the appellant.

S Levine for the respondent.

**BRIDGE J:** This is an appeal by Case Stated against the conviction of the appellant on 15th February 1971 by justices for the city of Bradford of an offence of selling a meat pie with less than the required statutory percentage of meat contained in it, contrary to certain provisions of the Meat Pie and Sausage Roll Regulations 1967 made under the Food and Drugs Act 1955.

The facts are in a very short compass. The appellant carries on business as a baker in Bradford and sells, inter alia, Cornish pasties baked on his own premises, which

I should mention are sold unwrapped. On 1st October 1970 a sampling officer employed by the local authority for the purpose of the exercise of their functions under the Food and Drugs Act 1955, in purported exercise of powers conferred by the Act, entered the appellant's shop and there purchased six of the appellant's Cornish pasties as a sample under the Act for the purposes of analysis. Then purporting to treat the sample in the manner required by the provisions of the Act, to which I will shortly have to refer, the sampling officer divided the six pies into three lots of two. One lot of two pies he sent to the public analyst for analysis. One lot of two pies he left with the appellant and one he retained for production in court if proceedings should result, as they did.

The only lot in fact analysed was that which was sent to the public analyst. His analysis of the two pies he received showed that the aggregate of meat in the two pies represented a smaller percentage of the total content of the two pies than the percentage required to be contained in a meat pie under the regulations, and it was on the basis of that analysis, which logically showed that one at least of the two pies analysed had been deficient in meat content, that the appellant was charged and convicted of the offence of selling a meat pie in contravention of the regulations.

Before the justices the procedure which had been followed was challenged as being defective for a number of technical reasons. All those challenges were rejected by the justices; some of them are not renewed before us. The basic submission for the prosecution, which succeeded before the justices, can very shortly be summarised thus: it was said that the procedure which had been adopted by the sampling officer in taking six meat pies and treating them as a sample for the purpose of the Act, dividing them into three lots in the way he had done, was really the only practical way of sampling meat pies in accordance with the procedure laid down by the Act. If the procedure was technically defective, then it disclosed a state of affairs in which it would not be practicable to enforce the Meat Pie and Sausage Roll Regulations 1967 at all. Accepting that view, the justices reached the conclusion that the procedure was not defective, and I am bound to say, speaking for myself, that I feel some sympathy for them in approaching the matter in that rather robust way.

Before I go to the submissions made by counsel for the appellant, it will be convenient to refer as shortly as possible to the relevant provisions of the 1955 Act. One starts with s 91. This and the following sections empower the sampling officer to purchase samples of food and drugs with a view to their analysis by a public analyst and, if appropriate, in the light of what that analysis reveals, with a view to the subsequent prosecution of the seller for an offence either under the Act or under regulations made in exercise of powers conferred by the Act.

It is common ground, and it appears to be well settled law, that if a prosecution follows the exercise by the sampling officer of the power of sampling conferred on him by these sections, due compliance with the statutory sampling procedure is a condition precedent to a valid conviction for an offence under the Act or regulations as the case may be.

Section 93 (1) provides:

'A sampling officer who purchases or takes a sample of any food, drug or substance for the purpose of analysis by a public analyst shall deal with the sample in accordance with the provisions of Part I of the Seventh Schedule to this Act.'

Schedule 7, Part I, provides:

'1. The sampling officer shall forthwith divide the sample into three parts, each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall—(a) with respect to one part of the sample comply with

paragraphs 2 to 8 of this schedule, and (b) deal with the remaining parts in accordance with paragraph 9 of this schedule.

2.—(1) If the sample was purchased by the sampling officer, he shall give the part of the sample to the vendor . . .

9. Of the remaining parts of the sample, the sampling officer shall, unless he decides not to have an analysis made, submit one for analysis [to a public analyst] and retain the other for future comparison.

If one goes back to ss 108 and 112, one discovers what is the future comparison contemplated by para 9. The third part of the sample (that is to say counting the first as the one which goes to the public analyst, and the second as the one which goes to the defendant), if a prosecution results from the sampling process, is by s 108 (4) required to be produced in court at the trial and by the provisions of s 112 the court may in any case, if it thinks fit, and must, if asked to do so by either of the parties, order that that third part of the sample shall be subjected to an independent analysis in the manner there prescribed.

Pausing there, it has been said in earlier authorities on this legislation that the purpose of the procedure whereby the sample is divided into three parts is to enable the defendant if he wishes, and the court if an independent analysis is later ordered under s 112, to make or have made what has been appropriately called a 'checking analysis', an analysis, that is to say, to check the accuracy of the first analysis made by the public analyst, which will be the basis of the prosecution. Clearly that procedure presupposes that if not precisely homogeneous, the three parts of the one sample will at length be in a substantial sense fairly representative of the whole.

It is clear that there may be some substances or articles which will not admit of sampling and analysis under this procedure. One such case is contemplated by s 97 of the 1955 Act which is in these terms:

'Where any person procures a sample consisting of a food, drug or substance contained in unopened containers, and the division into parts of the food, drug or substance contained in those containers—(a) is not reasonably practicable, or (b) might affect the composition, or impede the proper analysis, of the contents, the provisions of Part I of the seventh schedule to this Act . . . with respect to the division of samples into parts shall be deemed to be complied with if the person procuring the sample divides the containers into the requisite number of lots and deals with each lot as if it were a part in the manner provided by those provisions; and references in this Act to a part of a sample shall be construed accordingly.'

It may be of importance to observe that so far as regulations made under the Act are concerned, there is a power conferred on the regulation-making authority to modify the Act as necessary in certain respects. Thus by s 123:

'Regulations made under Part I of this Act . . . may—(a) modify for the purposes of the regulations any provisions of this Act relating to the taking, analysis and examination of samples . . .'

The Meat Pie and Sausage Roll Regulations, 1967, were made under Part I of the Act. I turn to the regulations in question. It is unnecessary to refer to the rather elaborate definitions in reg 2 of the expressions 'meat pie' and 'meat content' because it is common ground that the appellant's Cornish pasties were meat pies, and, whatever other shortcomings there may have been in the analysis procedure followed, it is not suggested that the public analyst adopted anything other than the proper view as to what constituted 'meat content' in reaching his conclusions. Regulation 5 provides:

'(5) . . . any meat pie containing meat and vegetable . . . sold . . . whether in a container or not, shall have a meat content of not less than 12½ per cent . . . (13) No person shall sell . . . any meat pie . . . in contravention of this regulation.'

Regulation 12 creates the criminal offence and provides for penalties. In the regulations there has been no exercise of the power conferred by s 123 to modify in any way the statutory procedure for the taking and analysis of samples. The offence charged against the appellant was, as I have already indicated, selling one of the two meat pies analysed by the public analyst, which his analysis showed to contain less than 12½ per cent of meat.

Counsel for the appellant, with his usual lucidity and economy, attacks the propriety of the procedure followed on two grounds. His first ground is a narrow one; he submits that both the language and the scheme of the Act drive one to the conclusion that the sample which has to be dealt with in accordance with the Act must be either co-extensive with the subject-matter of the charge, or must be a representative sample of some larger entity, to which the charge relates. Putting the same point in converse language, he says: if the seller of food is prosecuted for an offence alleged in respect of part only of the statutory sample taken, then the prosecution cannot succeed. I am not sure whether the point in the form in which it is taken before us was precisely taken below. But it matters not; it is a point of pure law which is clearly open to counsel for the appellant in this court. After considering the factors which weighed with the justices, and the argument of counsel for the respondent, of which I will say more in a moment, I have reached the conclusion that counsel for the appellant's submission on this narrow ground cannot be resisted.

First, so far as the language of the Act is concerned, I derive assistance particularly from a consideration of s 108 to which so far I have only made a passing reference. That is a section which contains a number of important provisions governing the conduct of proceedings when there is a prosecution under the Act or regulations, including the provision referred to earlier that the third part of the statutory sample is to be brought to court. In that section one finds not once but several times the phrase 'proceedings in respect of an article or substance sampled' which clearly must mean an article or substance sampled in accordance with the statutory procedure.

It seems to me that that language really presupposes the correctness of counsel for the appellant's proposition. If I may put the point in the form of a rhetorical question, how can the proceedings be said to be 'in respect of a substance sampled' if the proceedings relate to part only of the sample taken? Putting the point still more narrowly in relation to the facts of this case; these proceedings were 'in respect' of an offence alleged in the sale of one of the two meat pies which had been analysed by the public analyst; how then could the sample taken, six meat pies, possibly be a sample of the one meat pie?

Similarly it seems to me that the conclusion is reinforced by consideration of the scheme of the Act. I have already pointed out that the division of a statutory sample into three parts is to enable the defendant, and the court, if they eventually order independent analysis under s 112, to make what has been called a 'checking analysis'. Looking a little deeper into the purpose of this procedure, it is, to my mind, to give to the defendant and to the court in due course as good an opportunity as the public analyst had, when he made his analysis, of ascertaining and establishing whether the offence charged has been committed. If the offence charged relates and relates exclusively to the composition of that part of the sample which the public analyst alone had the opportunity to examine, it is manifest, as I think, that the object of this statutory procedure, if not wholly frustrated, is seriously impeded.



Of course, it is true that the justices in this case for instance, had it been shown by independent analysis that the two pies kept by the appellant, or the two pies produced in court, contained ample meat, might on that ground have doubted the validity of the public analyst's conclusion that the two pies he analysed contained insufficient meat. But the justices would have been by no means bound to reach that conclusion. They might have said: 'All that shows is that the quantities of meat in the pies varied from pie to pie, and on the basis of the public analyst's analysis alone, which we do not think has been impugned, we are going to convict.' If that was open to them, then they could convict by a procedure which, as it seems to me, by-passes an important safeguard intended to be embodied in the statutory machinery. That, to my mind, is another way of reaching the conclusion that counsel for the appellant's submission is well-founded.

That is sufficient to lead to the result that the appeal must succeed. But I should mention that, as indicated, there was a second wider submission urged on us by counsel for the appellant, which, very shortly, was to the effect that six separate meat pies could not in any event constitute 'a sample' for the purposes of this legislation. That is a submission which raises important and far-reaching considerations, and for myself I find it unnecessary to decide it. Counsel accepted that a consequence of his wider submission, if it be right, would be, at all events on the assumption that, as the justices thought, you can only sample meat pies in the manner adopted by the sampling officer in this case, that the regulations, so far as they purport to control the percentage of meat in meat pies, would be ineffective and incapable of being enforced.

It is certainly possible, although I am far from saying that it necessarily follows, that the same result, namely that the regulations are rendered ineffective, will follow from the decision that a number of meat pies cannot be used as a sample when the prosecution relates to one particular meat pie, i.e. when the offence charged is an offence in respect of one particular meat pie analysed by the public analyst. That was the assumption on which counsel for the respondent based his argument. What he contends is that the court, recognising that the construction urged by counsel for the appellant would defeat the purposes of the regulations, should so construe the Act that the regulations may be effective. That would be a very cogent argument indeed if we were concerned here with provisions all contained within the Act itself; but, in my judgment, it rests on a false premise when the provisions are not all contained in the Act but partly in the Act and partly in the regulations.

What we have to do is construe the statutory procedure in the light of the statutory language independently of its effect under the regulations. If that construction will frustrate effective sampling under the regulations, that is no reason to modify the construction of the Act, particularly where, as here, if the Act needs modification, there is a power in the Act to modify it for the purpose of the regulations. So, if the result of our decision is that the regulations have been frustrated, the remedy must lie in amendment of the regulations.

In the result, in my judgment, this appeal must be allowed.

**SHAW J:** I agree.

**LORD WIDGERY CJ:** I also agree.

*Conviction quashed.*

Solicitors: Michael Kramer & Co; Town Clerk, Bradford.

Reported by T R Fitzwalter Butler, Esq, Barrister.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BRIDGE AND SHAW, JJ)

8th October 1971

R v CHIEF IMMIGRATION OFFICER OF MANCHESTER AIRPORT  
Ex parte INSAH BEGUM

*Commonwealth Immigrant—Refusal of admission—Notice of refusal—Delivery—Notice handed by immigration officer to immigrant's solicitor at airport—Immigrant illiterate and unable to speak English—Commonwealth Immigrants Act, 1962, Sch I, para 2 (1).*

By Sched I, para 2 (1), to the Commonwealth Immigrants Act, 1962: 'The power of an immigration officer under s 2 of this Act to refuse admission into the United Kingdom or to admit into the United Kingdom subject to conditions shall be exercised by notice in writing; and subject to sub-para (2) of this paragraph, any such notice shall be given by being delivered by the immigration officer to the person to whom it relates.'

The applicant, a Pakistani citizen, who was illiterate and had no knowledge of English, arrived at Manchester airport on 14th September 1971. She held herself out as the wife of a person already resident in England, and, when seen by an immigration officer at 14.15 hours, produced what purported to be an entry certificate to the United Kingdom granted to her by the authorities in Lahore. This document appeared to the immigration officer to be a forgery, and he immediately served her with a notice under Sched I, para 1 (2), requiring her to submit to further examination. The interview was suspended at 14.30 hours. Subsequently, the immigration officer, through an interpreter, examined her from 18.00 hours to 19.15 hours and again from 20.30 hours to 21.00 hours. The investigation was then suspended till the following day when Telex information from Lahore was received which confirmed the suspicions of the officer that the document was a forgery. The appropriate notice of refusal was then preferred and was served at the airport on the applicant's solicitor, who raised no objection, the applicant at the time being in a different part of the airport. The applicant applied for an order of certiorari to quash the decision of the immigration officer.

**HELD:** although the object of para 2 (1) of Sched I was to ensure that the notice should be delivered by hand to the immigrant and not sent through the post or given in any other form of communication, in a case where the immigrant was illiterate and incapable of dealing with her affairs there was nothing wrong in the notice being handed to someone authorised by her to receive it; it was an inevitable inference in such a case as the present that the legal adviser who was representing the immigrant and handling the whole affair on her behalf should be regarded as a person having authority to receive the notice.

**HELD, further:** there being no function in the notice referred to in para 1 (2) of Sched I except to provide for the contingency where the examination was not to be completed within the time specified in that paragraph, no situation ever arose in which the notice under para (1) would have any relevance and no occasion for the initial notice having to be renewed; nor was there any ground for the contention that the examination under para 1 was concluded at 21.00 hours on 14th September, and as the examination was still in force right up to and including 13.30 hours on 15th September when the notice of refusal was given, it was given within the time prescribed under the terms of para 2 (3); the notice was, therefore, valid in every respect, and certiorari must be refused.

**MOTION** for certiorari by Insa Begum to bring up and quash a decision made on 15th September 1971 by an immigration officer at Manchester airport whereby he refused her admission to the United Kingdom.

G S Khan for the applicant.

Gordon Slynne for the chief immigration officer.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicant, Insa Begum, for an order of certiorari to bring up and quash a decision

made by Her Majesty's immigration officer at Manchester airport on 15th September 1971 whereby admission to this country was refused to the applicant. The notice of motion asks for other relief, which request is not pursued before us, and it also raises a number of grounds on which counsel for the applicant has found it impossible to proceed. The matter therefore lies before us in a relatively small compass.

The applicant arrived at Manchester airport from Pakistan on 14th September 1971. She held herself out as a married woman, the wife of a person already resident in this country, one Arif Hussain, using a passport which had in effect what purported to be an entry certificate into this country granted to her by the authorities in Lahore. She was seen by an immigration officer at 14.15 hours on 14th September, and, to the eye of the immigration officer, the entry certificate appeared to be a forgery. He appreciated that this would involve considerable enquiries, and might involve the expenditure of some time, and he immediately served her with a notice under para 1 (2) of Sch 1 to the Commonwealth Immigrants Act 1962, which in its original form provided:

'A person shall not be required to submit to examination under this paragraph after the expiration of the period of twenty-four hours from the time when he lands in the United Kingdom unless, upon being examined within that period, he is required in writing by an immigration officer to submit to further examination.'

The period of 24 hours has since been amended to 28 days by s 4 of the Commonwealth Immigrants Act, 1968, and the purpose of the provision both in its original and amended form quite evidently is that, unless proceedings can be completed within that limit of time, the onus is thrown on the immigration officer of serving a notice requiring the would-be immigrant to submit to further examination.

In perhaps an excess of caution, such a notice was served as soon as the difficulties in this case became apparent. The interview beginning at 14.15 hours was suspended at 14.30 hours, but later in the same day further enquiries took place between the immigration officer and the applicant through an interpreter. The period of that examination was from 18.00 hours until 19.15 hours. I might have said that the applicant is illiterate and had no knowledge of the English language, and at an early stage her solicitor and later her counsel were brought to the airport to assist her and the enquiry.

The second interview, if that is the right word, having finished at 19.15 hours, there was a further interview between 20.30 and 21.00 hours, and the circumstances in which that interview terminated are described by Mr David Ian Fuller, one of the immigration officers concerned, in his affidavit. Speaking of this last interview he states:

'At the conclusion of this interview which was finished at about 21.00 hours I told Mr. Anwar Salamat Ali and the applicant through Mr. Kumar that I considered that the entry certificate was a forgery. I also told them that I was not satisfied as to the authenticity of the marriage. I further told them that I was expecting a reply to a Telex that had been sent to the entry certificate officer at Lahore about the entry certificate and that no decision would be taken to admit or to refuse to admit the applicant until this had been received.'

Accordingly, at 21.00 hours on 14th September the investigation was suspended until the following day when the Telex from Lahore was received, and since the terms of the Telex confirmed the suspicions of the immigration officer that the entry certificate was a forgery, they decided to refuse entry to the applicant at 13.30 hours on 15th September. Thereupon the appropriate notice under para 2 of Sch 1 of the 1962 Act was prepared, and it was handed by the officers to Mr Bookin, who was

the applicant's solicitor, and who was present at the time. Just to complete the picture at this point the applicant herself was not present although somewhere within the airport confines. Present at the moment when the certificate of refusal was issued were the immigration officers, the solicitor to the applicant, and her counsel.

Schedule 1, para 2 (1), is in these terms:

'The power of an immigration officer under section two of this Act to refuse admission into the United Kingdom or to admit into the United Kingdom subject to conditions shall be exercised by notice in writing; and subject to sub-paragraph (2) of this paragraph, any such notice shall be given by being delivered by the immigration officer to the person to whom it relates.'

In fact, as I have already recounted, the notice was handed, not to the applicant, but to her solicitor, who raised no objection at the time and indeed on some aspects of the evidence may have appeared to welcome it being given to him rather than anybody else.

Counsel for the applicant, having abandoned a number of matters which were to be ventilated according to the terms of the notice of motion, has really taken three points. He says, first of all, that the certificate of refusal was of no effect because it was handed to the solicitor and not delivered to the applicant, that is to say, to the person to whom it related. To my mind, it is quite clear that the draftsman of these regulations wished to emphasise that the notice was to be delivered and not sent through the post or by any other form of communication, and no doubt it is right to apply the paragraph strictly to the extent that in normal circumstances, where the applicant is in a position to receive the notice and capable of understanding what it means, a wise immigration officer will follow the literal language of Sch 1, and deliver it by hand to the applicant. But it seems to me impossible to hold that in the not uncommon case where the applicant is illiterate and quite incapable of dealing with her affairs there is anything wrong in handing the certificate over to someone authorised by her to receive it. It seems to me an inevitable inference in such a case as the present that the legal adviser, who was representing the applicant and who was handling the whole affair on her behalf, should be regarded as a person having authority to receive the notice. Accordingly, in my judgment, there is nothing in the first point.

The second point is that, the investigation having taken place in a series of interviews, in the manner which I have described, it is said that the initial notice under Sch 1, para 1 (2), of a requirement for the applicant to submit for further examination should have been renewed in the form of a new notice of that kind at the close of each section of the interview. Accordingly it is argued that when the initial interview finished at 14.30 hours, a notice should have been served, as indeed it was, and that a later notice should have been served at the end of the second and third interviews. For my part, I find no foundation whatever in this argument. There seems to me to be no function in the notice referred to in para 1 (2) of Sch 1 except to provide for the contingency where the examination is not to be completed within the time specified in that paragraph, that is to say, the initial 24 hours, now 28 days. If in fact the investigation is concluded and a decision to admit or refuse is made within that period, it seems to me that such a notice has no function, and it is a matter of total irrelevance whether it was ever given at all, or once, or more than once. In any event I do not subscribe to the suggestion that new notices are required as the enquiry itself goes on, but the short answer in the present case is that no situation ever arose in which the notices under para 1 (2) would have any relevance at all.

The third and the last point made by counsel for the applicant is under para 2 (3) of Sch 1 which, still dealing with a notice of refusal, provides:

'Subject to the following provisions of this schedule, a notice under this paragraph [i.e. a notice of refusal] shall not be given to any person unless he has been examined in pursuance of paragraph 1 of this schedule, and shall not be given to any person later than twelve hours after the conclusion of his examination (including any further examination) in pursuance of that paragraph.'

The argument here is that the examination under para 1 which undoubtedly took place in respect of the applicant was concluded at 21.00 hours on 14th September at the end of the third interview to which I have referred. Counsel for the applicant points out that between that hour and 13.30 hours on the following day, when refusal was in fact notified, there was an interval of more than 12 hours, indeed an interval of 16½ hours, and so he says that the notice of refusal was invalid in that it was given out of time under the terms of para 2 (3).

This argument depends on the validity of the submission on behalf of the applicant that the examination was concluded at 21.00 hours on the evening of 14th September. Counsel for the respondent's argument is that when regard is had to Mr Fuller's explanation of the deferment until the following day and of the desire to receive information by Telex from Lahore the irresistible conclusion is that the examination had not been concluded on the previous evening, and for my part I find that conclusion entirely acceptable. I do not think the examination was concluded on the previous evening at 21.00 hours, any more than it had been at the end of either of the earlier interviews. I think that the examination was still in force right up to and including the time when notice of refusal was given at 13.30 hours on 15th September.

In my judgment, the three points which have been clearly and economically made by counsel for the applicant are each and severally without foundation, and I find it necessary to refuse this application.

**BRIDGE J:** I entirely agree.

**SHAW J:** I also agree.

*Motion dismissed.*

Solicitors: *Simpson, Silvertown & Co. for Amelan & Roth, Manchester; Treasury Solicitor.*

Reported by T R Fitzwalter Butler, Esq. Barrister.



**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, EDMUND DAVIES AND MEGAW, LJJ)

16th December 1970

MOORE v CLERK OF ASSIZE, BRISTOL

*Contempt of Court—Intimidation of witness—Threat to witness after giving evidence.*

The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, during it, or after it. Where, therefore, the appellant had threatened a witness who had given evidence against his brother,

**Held:** the appellant had been rightly found guilty of contempt of court and sentenced to imprisonment.

APPEAL by Colin Anthony Moore from an order of PARK J made at Bristol Assizes committing him to prison for three months for contempt of court.

M R Coombe for the appellant.

Gordon Slynn for the respondent.

**LORD DENNING MR:** On Thursday 19th November 1970 PARK J at the Bristol Assizes was trying a number of men for an affray. A schoolgirl aged 14, Christine Margaret Chojnacki, gave evidence in the course of the morning in respect of one of the accused named Graham Moore. At the end of her evidence the judge released her. On the same day she went with another girl to a café nearby for a meal. She saw some men sitting at a table. One of the men was Colin Moore. He called Christine over to him and reproached her for giving evidence against his brother Graham. He said: 'That was tight of you—splitting on Graham'. Christine said: 'I never said it was definitely him. I said I think it was him'. Colin Moore said that his brother had never dragged anyone out. Another girl said to her: 'You'll be dragged along in a minute'. Colin Moore heard that remark and said to Christine: 'You had better get out of here fast'. At the same time he clenched his fist with his elbow on the table. He was shouting. He was a big man—big to her, anyway. She was frightened. She went out of the café and told the police.

The judge had Colin Moore brought before him. He asked counsel to represent him. He heard evidence on the next day in the absence of the jury. The judge accepted Christine's evidence. He held that Colin Moore had been guilty of a contempt of court. He sentenced him to three months' imprisonment. Colin Moore appeals to this court.

The first question is whether this was a contempt. The law has been settled by *A-G v Butterworth* (1). The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, during it, or after it. Here it was after the girl had given evidence. It is a contempt of court to assault a witness after he has given evidence. It is also a contempt of court to threaten him or put him in fear if it is done so as to punish him for what he has said. There is no doubt whatever that this conduct of Colin Moore was a contempt.

The next question is what is the appropriate sentence? This is more difficult. We have had before us Colin Moore's record. He is a man of 21. His record is not too good. In 1963, when he was much younger, for stealing, a probation order was made against him. Two years ago for disorderly behaviour and using insulting words he was fined £30 and bound over. In October 1970 at the Portsmouth Magistrates' Court he was found guilty of stealing and fined £10 and 5 guineas costs. Now,

(1) [1962] 3 All ER 326; [1963] 1 QB 696.

within six weeks of that last conviction, he is threatening this schoolgirl of 14, frightening her in the middle of a case then being heard. I think the judge was amply justified in sentencing him then and there to three months' imprisonment. I would dismiss the appeal.

**EDMUND DAVIES LJ:** I agree. I regard this as a quite substantial contempt of court, and I merely add the shortest postscript to the observations of LORD DENNING. In *A-G v Butterworth* (1) DONOVAN LJ said:

'in this kind of case, it must be proved by the Crown that knowledge of the revenge taken on one who has given evidence is likely to come to the knowledge of potential witnesses in future cases.'

In the course of learned counsel's submission I ventured respectfully to doubt whether there was any incumbency on the Crown to prove any such thing. It thereafter emerged that in *Chapman v Honig* (2) LORD DENNING said:

'In my judgment the victimisation of a witness is a contempt of court and unlawful, irrespective of whether other people get to know of it or not. It is a gross affront to the dignity and authority of the court and a grievous wrong to the individual affected.'

I respectfully adopt those words, for I do not think there is any obligation on the Crown to do more than prove that which has been abundantly established in the present case. As to the sentence, I concur with LORD DENNING in all he has said.

**MEGAW LJ:** I agree.

*Appeal dismissed.*

Solicitors: Victor J Lissacke; Treasury Solicitor.

Reported by G F L Bridgman, Esq, Barrister.

(1) [1962] 3 All ER 326; [1963] 1 QB 696.

(2) [1963] 2 All ER 513; [1963] 2 QB 502.

**COURT OF APPEAL (CIVIL DIVISION)**

(LORD DENNING, MR, CAIRNS AND ROSKILL, LJJ)

12th October 1971

**PROVINCIAL PROPERTIES (LONDON) LTD v CATERHAM AND  
WARLINGHAM URBAN DISTRICT COUNCIL**

*Town and Country Planning—Compulsory purchase—Compensation—Assessment—Land in area zoned for residential building—No prospect of permission being given for that use—Land Compensation Act, 1961, s 16 (2).*

By s 16 (2) of the Land Compensation Act, 1961: 'If the relevant land . . . consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land . . . for any development which—(a) is development for the purposes of that use of the relevant land . . . and (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land . . .'

The assumption directed by the subsection cannot be made unless it can be shown that the development fulfils both para (a) and para (b). Accordingly, where land is in an area zoned for residential building, but in respect of which there is no prospect that planning permission will be given for that purpose the owner is entitled only to compensation based on the value of the land without planning permission, i.e. usually as agricultural, not building, land.

CASE STATED by Lands Tribunal.

Caterham and Warlingham Urban District Council appealed against a decision of the tribunal determining at £10,500 the amount of compensation due to the claimants, Provincial Properties (London) Ltd, in respect of the acquisition by the council of their land at Whyteleafe, within the jurisdiction of the council, in pursuance of a purchase notice under s 129 of the Town and Country Planning Act 1962 given by the council and later confirmed by the Minister of Housing and Local Government.

G N Eyre QC and M H Spence for the council.

M L M Chavasse QC and A B Dawson for the claimants.

**LORD DENNING MR:** At Whyteleafe in Surrey there is a high ridge of land which commands a lovely countryside. On it there used to be a large house called Bleak House, with grounds of some six acres. Surrey County Council made a development plan for the county. It was confirmed by the Minister in 1958. In that development plan Bleak House and its six acres of ground were zoned for residential building. The remaining ground on the ridge was zoned to be kept open and not built on. It was part of the green belt.

The owners of Bleak House and its grounds were the claimants, Provincial Properties (London) Ltd. They applied for planning permission to build houses there. They got permission for a portion of the six acres, but not for the whole. They got planning permission for Bleak House to be converted into two dwellings and for eight detached houses to be built in a small part of the grounds. This permission was specially limited so as to keep houses on the west side of the ridge below the skyline. That permission was given for that part and the houses were built. The owners made four or five other applications to build in the remainder of the grounds, but every one was refused. The reason for the refusal was to preserve the view of the ridge from the valley; so that the skyline should be studded with trees and not houses. This planning policy was so plain that it became clear that planning permission would never be granted for the remainder of the grounds.

Now we come to the case in question. At the very top of the ridge here was a stretch of land of only two-thirds of an acre. It had been part of the grounds of Bleak House and zoned accordingly for residential purposes. The owners applied for planning permission to put up three houses on that small two-thirds of an acre. On 11th May 1966 the council rejected that application. Thereupon the owners served a notice requiring the local council to purchase the land compulsorily. The owners said it had been rendered sterile by refusal. It was a piece of rough grassland and had become incapable of any beneficial use in its existing state (s 129 of the Town and Country Planning Act 1962). The local council said that it could be used for agricultural purposes. On appeal the Minister thought the owners were right. On 6th December 1966 he confirmed the purchase notice. Accordingly, the local council were deemed to have served a notice to treat on the owners in respect of the land so as compulsorily to acquire it as at that date (s 133 of the 1962 Act).

So the question is what is the compensation to be paid for this little piece of land? It is two-thirds of an acre at the top of the hill. It is zoned for residential purposes, but it is agreed on all hands that in no circumstances will planning permission ever be granted for that. It is also agreed that, if planning permission could be expected for it, the value would be £10,500. I assume that to be based on three plots for three houses at £3,500 a plot. But, if planning permission could not be expected for it, the value would only be £500. I assume that to be agricultural value, plus 'hope' value. So the owners claim £10,500. The council say £500. Incidentally, since all these happenings, this little piece of land has been removed from the residential zone. It is now designated as part of the metropolitan green belt. But that does not affect our present case because at the material time it was still zoned as residential.

This question depends on the true interpretation of the Land Compensation Act 1961. Section 16 (2) provides:

'If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which—(a) is development for the purposes of that use of the relevant land or that part thereof, and (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.'

Applying that section here, the opening words are clearly satisfied. The current development plan was the Surrey Development Plan. The relevant land was this two-thirds of an acre. It was part of an area which was shown in the current development plan as allocated primarily for residential use. That was a use specified in the plan in relation to the area. Then the section goes on: 'it shall be assumed that planning permission would be granted ... for any development which—(a) is development for the purposes of that use ...', that is, in this case will be granted for any development which is residential. There the important conjunction is 'and'—'and (b) is development for which planning permission might reasonably have been expected to be granted ...'

It is quite plain that para (a) is satisfied as to residential development, but that para (b) is not satisfied. On all the evidence planning permission could not reasonably be expected to be granted for this little two-thirds of an acre. It would be refused. So one of the assumptions does not exist. You cannot assume that planning permission would have been granted. No houses would be permitted on this piece of land.

What is the compensation payable, therefore, for land which is in an area zoned for residential use, but for which planning permission will not be given? This is

often the position. Cases often arise where land is in an area zoned for residential use but permission is refused on some ground or other. It may be refused because of difficulties of access, or objections from the neighbours, or because houses on that particular piece would spoil the view, and so forth. The mere fact that land is within residential zoning does not in the least mean that planning permission could reasonably be expected in respect of it. If planning permission could not reasonably be expected, then compensation is to be assessed accordingly. The owner gets its value without planning permission, i.e., usually as agricultural land, not as building land.

Some reference was made to s 16 (6). That only means that if it is a case where you are to assume that planning permission will be granted, then you are further to assume that it will be granted subject to such conditions as might be expected to be imposed. That subsection does not apply at all to a case where, as in the present case, the owners could not expect planning permission at all. Test it this way. Suppose the owners of this land were to offer it for sale on the market? No purchaser would give much for it. He would know that planning permission had been refused, and would be refused. The owner would not get any more than £500 for it. Now suppose that is the subject of compulsory purchase. Is the owner to get £10,500 on the footing that planning permission would be given for these houses? Clearly not. He is only to get the £500 which it is worth without planning permission. I would, therefore, allow the appeal and say the proper compensation is £500, and not £10,500.

**CAIRNS LJ:** I agree that this appeal should be allowed for the reasons given by LORD DENNING. I agree with the construction which he has placed on s 16 (2) of the Land Compensation Act 1961. I am bound to say that but for the view tentatively expressed by RUSSELL LJ in *Devotwill Investments Ltd v Margate Corpn* (1), and for the conclusion arrived at by the President of the Lands Tribunal in this case (to which I pay great respect because his knowledge of this Act is infinitely greater than mine), I should have thought the meaning of this section was quite plainly that which LORD DENNING has indicated. The subsection provides that it is to be assumed that planning permission would be granted in respect of the land for any development which fulfils two conditions. The two conditions are stated—(a) and (b), and unless it can be shown that the development fulfils those two conditions, it seems to me on the plain meaning of the subsection that the assumption cannot be made. The contrary view was indicated in the report to which I have been referred by RUSSELL LJ in these terms. He said:

'(It is not material in the present case, but I am inclined to disagree with the view expressed by the Lands Tribunal on the construction of the section that it is possible to find that no such development might reasonably have been expected to have been permitted: I would prefer the view that the function of s 16 (2) (b) is to restrict the *carte blanche* of the rest of the subsection but never to extinguish its operation).'

That was the view with which Sir Michael Rowe QC, President of the Lands Tribunal, agreed, and it has been put before this court by counsel for the claimants. But it does not seem to me that the right approach to this subsection is to look at the effect of para (a) standing by itself and then to ask whether its effect can be restricted or extinguished under para (b). The two paragraphs have to be applied together, and unless they are both fulfilled, then the assumption which is called for by the body of

(1) [1969] 2 All ER 97; *rvsd* HL 134 JP 19; [1970] 3 All ER 864.



the subsection cannot be made. For those reasons I agree that the construction placed on this subsection by the Lands Tribunal was wrong.

An alternative argument was advanced by counsel for the claimants on which Sir Michael Rowe QC did not give any decision. It was not necessary for him to do so having regard to the conclusion that he formed on the other part of the case. This is an argument based on s 133 of the Town and Country Planning Act 1962, and on certain sections of Part V of that Act to which reference is made in s 133. I can only say that for my part I cannot see how the section has anything whatever to do with the assessment of this compensation, and therefore I am not able to see how that argument of counsel could assist the case of the claimants here. For these reasons I agree that the appeal should be allowed.

**ROSKILL LJ:** I also agree that the appeal should be allowed. I only add a few words out of respect to the President of the Lands Tribunal, Sir Michael Rowe, from whom we are differing and, who, as LORD DENNING has said, has great experience in this field. The learned President said: 'In the present case there was never a hope of permission'. The argument before him proceeded on the admission on the part of the claimants that they could not get and could not expect thereafter to get planning permission for any number of houses on this small area of land. The learned president said (rightly in my view) that the argument before him centred on the true construction of s 16 (2) (b) of the Land Compensation Act 1961. He stated the rival arguments thus—I quote from his decision:

'Does [para (b)] mean that, although you must assume under para (a) that planning permission would be granted for the purposes of the use shown for the land in the development plan, namely, primarily for residential use, you must none the less look to see whether at the date of the notice to treat there was any reasonable expectation that planning permission would have been granted for any residential development and that, if there was not, you must disregard the paragraph (a) assumption? Or as the claimants contended, does it mean only that, having made the assumption under (a), you must then consider the sort of residential development for which planning permission might reasonably be expected, i.e., what density, what means of access and so on?'

The learned President accepted the argument of counsel for the claimants in favour of the latter view. This argument has been repeated in this court and comes to this, that the view for which the local authority contended involved construing para (b) as cutting down and indeed emasculating para (a). For my part, I do not think that is the right approach, nor do I think that the true construction has that effect. Before the compensation can be assessed under s 16 (1) (b) there are two conditions which must be fulfilled. First, the development has to be development for the purpose of the relevant use—that is residential use of the relevant land. No one has disputed that. Secondly, it has to be development for which planning permission might reasonably have been expected to be granted in respect of the relevant land. On the finding and indeed the concession that there was no hope of permission being granted, it seems to me, with great respect to the argument of counsel for the claimants, that on the true construction of s 16 (2) (b) the answer is clear. As to what RUSSELL LJ said in *Devotwell Investments Ltd v Margate Corp'n* (1), it is perhaps necessary to say that we were told that this point did not directly arise either in this court or subsequently in the House of Lords, and the learned lord justice did not have the benefit of hearing any argument on it such as we have had.

So far as the alternative argument of counsel for the claimants under s 133 of the Town and Country Planning Act 1962 is concerned, I am unable to see how that affects the assessment of compensation under s 16 (2). If, therefore, the claimants' claim fails, as it does in my judgment, on the true construction of that section, I do not think they can pray in aid s 133 as producing any different result. For those reasons I think the appeal must be allowed.

*Appeal allowed.*

Solicitors: Sharpe, Pritchard & Co; I M Wimborne & Co.

Reported by G F L Bridgman, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, JAMES AND BRIDGE, JJ)

3, 4, 5 November 1971

R v ANDERSON AND OTHERS

*Criminal Law—Obscene publication—"Obscene"—Sending postal packet containing indecent or obscene article—Conspiracy to corrupt public morals—Distinction between book and magazine containing obscene matter—Expert evidence—Admissibility on issue whether article tends to deprave or corrupt and issue whether publication of article, though obscene, is for public good—Defence that article would have aversive tendency rather than tendency to deprave or corrupt—Obscene Publications Act, 1959, s 4—Post Office Act, 1953, s 11 (b).*

On a charge under s 11 (b) of the Post Office Act, 1953, of sending a postal packet containing indecent or obscene articles and also on a charge of conspiracy to corrupt public morals when the particulars of offence allege conspiracy to produce a publication containing obscene matter, 'obscene' has its ordinary or 'dictionary' meaning and includes things which are shocking, lewd, indecent, etc, but on a charge of publishing an obscene article or having an obscene article in possession for gain, contrary to s 2 of the Obscene Publications Act, 1959, 'obscene' has the more limited meaning of having a tendency to deprave or corrupt persons who are likely to read, see or hear the matter in issue, and this distinction must be made clear to the jury. Where the defence rely on the theory of 'aversion', i.e., that the matter complained of is so unpleasant that it would at first shock and subsequently tend to repel rather than deprave or corrupt, this defence must be put adequately before the jury.

A different approach is proper when the question of obscenity contained in a magazine arises from that appropriate when a book is under consideration. In the case of a magazine the individual items and not the magazine as a whole should be examined. If the test shows one individual item to be obscene, that is sufficient to render the whole magazine obscene, but the writer of a book is entitled to have his work judged as a whole.

On a charge under the Act of 1959, expert evidence is not admissible on the issue whether the article is obscene. It is admissible only on the issue whether the publication of an article found to be obscene is justified as being for the public good within the meaning of s 4 by reason of its literary, artistic, scientific, or other merit.

APPEALS by James Anderson, Richard Clive Neville and Felix Dennis, as editors, and Oz Publications Ink Ltd, as publishers, against their convictions at the Central Criminal Court of publishing an obscene article, contrary to s 2 of the Obscene Publications Act 1959; sending indecent or obscene articles by post contrary to s 11 of the Post Office Act 1953; having obscene articles for publication for gain, contrary to s 2 of the Act of 1959; and having obscene articles for publication for gain. The appellants

Anderson, Neville and Dennis were sentenced to concurrent terms of imprisonment as follows: Anderson, 12 months on count 2, six months on count 3, 12 months on count 4 and 12 months on count 5; Neville, 15 months on count 2, six months on count 3, 15 months on count 4 and 15 months on count 5; Dennis to nine months on count 2, six months on count 3, nine months each on counts 4 and 5. The appellant company was ordered to pay fines of £300 each on counts 2, 4 and 5 and £100 on count 3, and also to pay a quarter of the costs of the prosecution to an amount not exceeding £1,250.

*J C Mortimer QC and J J Walker-Smith for the appellants.  
B L Leary and R D Amlot for the Crown.*

**LORD WIDGERY CJ** delivered this judgment of the court: These three individual appellants (as they now are) and the appellant company, Oz Publications Ink Ltd, were convicted at the Central Criminal Court at the end of July 1971 after a lengthy trial occupying no less than 27 working days. The indictment contained five counts. In the first the four appellants were charged with conspiracy to corrupt public morals, the particulars being that—

‘on divers days between the 1st day of January and the 8th day of June 1970 [I only quote the relevant words] they conspired together with Vivien Laurence Berger and with certain other young persons to produce a magazine containing divers obscene, lewd, indecent and sexually perverted articles, cartoons, drawings and illustrations with intent thereby to debauch and corrupt the morals of children and young persons within the Realm.’

On that count all four appellants were acquitted. It is quite obvious from the verdicts of the jury on the other counts that they were acquitted because the jury were not satisfied that there was the charged intent to corrupt public morals. Of the remaining counts, count 2 was laid under s 2 of the Obscene Publications Act 1959, and charged the four appellants that—

‘on a day between the 1st day of May and the 8th day of June 1970 . . . they published an obscene article namely a magazine entitled “OZ No. 28 School Kids Issue”.’

And indeed it is the publication known as Oz No 28 School Kids Issue which is the central theme of the proceedings with which we are now concerned. On that count they were all convicted. The appellant Neville was sentenced to 15 months’ imprisonment, the appellant Anderson to 12, the appellant Dennis to nine and the appellant company was fined £300. Then on count 3 it was charged under the Post Office Act 1953, that all four of them on a day there specified ‘sent a postal packet which enclosed a number of indecent or obscene articles namely magazines entitled “OZ No. 28 School Kids Issue”.’ That count has been referred to as ‘the Post Office Act count’. Count 4, again against all four appellants, alleged that they had certain obscene articles in their possession for publication for gain. The articles were copies of the same magazine to which I have referred. On that count all were convicted. The same prison sentences were imposed, to be concurrent, and again the appellant company was fined £300. The fifth count was similar to the fourth. It again was laid under s 2 of the Obscene Publications Act 1959, and it again alleged that they had certain obscene articles in their possession for publication for gain, the articles again being Oz No 28. They appeal today, by leave of the court, against conviction and sentence.

This is a case which has aroused enormous interest amongst the public and no doubt the decision of the court today will also excite a certain amount of interest and comment. It is therefore perhaps worthwhile briefly to remind oneself of the functions

of judge, jury and of this court, in cases of this kind. At the Central Criminal Court the only issue, up to the moment of conviction, was whether that jury as then constituted would find this publication obscene within the meaning of the various statutes. Whatever the decision of the jury in the court below, it could have no binding effect on other juries on other occasions in relation to other publications, and the conception, somewhat widely held, that this case was a great milestone in that respect, is a false understanding. It was not a case which would in itself create an authority for the future at all. The function of this court is also worth explaining. It is not here to consider whether the jury was right or wrong, nor to consider whether the publication was obscene or not obscene—that is a decision for the jury and the jury only. The function of this court is to review the proceedings below with the assistance of counsel to see if the proceedings were properly conducted, and if not to see whether any irregularities which arose in the course of the proceedings were sufficient to render the finding of the jury unsafe or unsatisfactory.

I stress that because it is important for people to realise that we in this court are not here to clear Oz or to condemn Oz. Our own opinion in regard to the character of the subject-matter is totally unimportant. We are here simply to review what happened below and see whether there were such irregularities as to justify the convictions being quashed. If we come to the conclusion that there were such irregularities, then we quash the convictions and since there is no machinery in English law for re-trial in such circumstances, the matter rests in that somewhat inconclusive state.

To turn to Oz itself, it is, as its title proclaims, the 28th edition in the series. It is a magazine of some 48 pages. It is printed in bright and attractive colours, and it contains what one might fairly describe as a very considerable assortment of items. No one can pass a judgment on Oz without reading it; nobody can successfully do what I am now going to attempt to do, namely to give some idea to those who have not read it, of what it contains, but it is important, as I say, in view of the public interest in this case, that people should have some idea of what the magazine really contains.

There are in it a number of perfectly serious articles. Its origin is not without interest. The editors apparently on this occasion decided to recruit the assistance of a number of children of school age to assist them in compiling the magazine. It may be that originally the idea was that the children should do it all, but it is evident from the evidence that they did not do it all and that some contributions at any rate to the magazine came from the editors themselves, the three appellants. The idea, so we are told, and the reason for doing it this way, was to enable children of school age to express their view and to see the sort of magazine which they would make, and so it came out and is called the School Kids issue. There was a suggestion below that it was intended for consumption only by 'school kids' but that, as far as we can see, was not made out, and the intention no doubt was that it would enjoy its normal circulation of some 30,000 or 40,000 copies.

As I have said, it includes a great many serious and wholly innocuous articles. It deals with school affairs, the system of education in this country, the system of corporal punishment in schools and a whole host of topics of that sort. It has a number of articles concerned with the taking of drugs, and it is perfectly fair to say, as has been said, that in form at any rate many of these articles discouraged the taking of drugs and indicate the danger of taking drugs. On the other hand, and according to the point of view which one adopts, some of the articles are said to have the reverse effect and to encourage the taking of drugs. That kind of distinction was the distinction which the jury in the court below had to direct their minds to, and it is not for us to comment on it further.

In addition to these articles, there are a great many illustrations, some of them charming and humorous, which would not cause the slightest flutter in any well conducted Victorian household. Others, however, are quite different. There is a good deal of material which one gathers is culled from what are called American comics and there are many illustrations which have a very pronounced and overt sexual theme. I do not want to be unfair to the publication by stressing unduly those items in it which attracted the principal attention in this case, but again one cannot give a fair appreciation of what the magazine looks like without looking at some of the less attractive features. On p 28 there is an advertisement for what seems to be a magazine, a magazine called Suck. It is an advertisement occupying some 30 or 40 lines of print. It is a salaciously written account of the joys from the female aspect of an act of oral sexual intercourse. It deals with the matter in great detail. It emphasises the pleasures which the writer says are to be found in this activity, and there is in it no suggestion anywhere which would imply that this was a wrong thing to do or in any way induce people not to do it. The importance of that last observation is that there could be nothing here as far as we could see on which an argument that this was aversive, as tending to induce people not to conduct the activity described, could be founded. There are a great many pictures of people in, or apparently in, the act of sexual intercourse. Some of them are extremely artistic; some of them are crude to a degree. There is a comic strip in the middle of the magazine, again no doubt from American sources, which shows a number of children dressed in school clothes indulging in a number of sexual activities including at the end a very crude drawing of a girl in the act of oral sexual intercourse. Shocking, undoubtedly; whether it was obscene was of course, as I have endeavoured to explain, a matter for the jury.

Then we have the back cover itself, which shows some five nude women. It is extremely attractively drawn, and at first inspection, as one of the witnesses said, it appears to be a simple piece of artistic work. Closer inspection however shows that these women are lesbians or at least are indulging in lesbian activities. One of them has what appears to be a rat's tail protruding from her vagina. In another case a woman is wearing strapped to her thighs an artificial penis or dildo, as apparently it is called, and other pairs are indulging in what are clearly lesbian activities. Attention has not unnaturally been drawn to that as an example of material in this magazine which might deprave or corrupt.

Then—and I am not going to try and review the magazine as a whole—in addition to that, there is a page of what have been called small advertisements, apparently genuine advertisements and not advertisements concocted for the purpose of the magazine, in which various people advertise for co-operation in sexual activities of a somewhat devious kind. For example, one advertisement is headed:

'Voyeurs . . . Homosexuals, Lesbians, Heterosexuals, All Erotic Minorities . . . Join Contact Club International [and then an address is given]. Membership £2 only. 100% Confidential. Free Fucking, Sucking, Hardcore Pornzines of your choice! Excellent for Masturbation and Fuckstimulation!!'

That is one example of advertisements which are advertised here. Another says: 'Teenage male models wanted'; another says: 'Guy requires turned on chick for temporary marriage', and so it goes on. There is a page of advertisements there which on one view certainly could be regarded as tending to corrupt or deprave as tending to induce and propagate these kinds of activity.

At the trial, which as I have said lasted some 27 days, these five counts were before the jury, and it is important to note at the outset that, although the word 'obscene'



appears in each of the counts, its meaning in its context is not necessarily the same in each instance, and it is this difference in meaning which has given rise to the difficulties which we have had to investigate in this court. So far as the Post Office Act count is concerned, there is no doubt in our judgment but that 'obscene' in its context as an alternative to indecent has its ordinary or as it is sometimes called dictionary meaning. It includes things which are shocking, lewd, indecent and so on. On the other hand, in the Obscene Publications Act 1959, there is a specific test of obscenity and in charges under that Act it is this test and this test alone which is to be applied, and it is in this form. Section 1 of the Act provides:

'(1) For the purposes of this Act an article shall be deemed to be obscene if its effects or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

'(2) In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.'

It is to be observed that in the first subsection of that section, the test of obscenity for present purposes is a tendency to deprave and corrupt and nothing else will do, so far as charges under the 1959 Act are concerned.

At the trial, the Crown accepted the proposition that in deciding whether the offences under the 1959 Act had been made out, it was right for the jury to consider the magazine as a whole and not to look at individual items in isolation. That was a proposition accepted by the Crown, we are told by counsel for the Crown, largely in fairness to the defence, and, being accepted by both parties, it was a proposition which was accepted by the judge as well. It certainly did the defence no harm; it was much to their interests; but, in the judgment of this court, it was entirely wrong. It is in our view quite clear from s 1 that where one has an article such as this comprising a number of distinct items, the proper view of obscenity under s 1 is to apply the test to the individual items in question. It is equally clear that if, when so applied, the test shows one item to be obscene that is enough to make the whole article obscene. Now that may seem unfair at first reading, but it is the law in our judgment without any question. A novelist who writes a complete novel and who cannot cut out particular passages without destroying the theme of the novel, is entitled to have his work judged as a whole, but a magazine publisher who has a far wider discretion as to what he will, and will not, insert by way of items is to be judged under the 1959 Act on what we call the 'item by item' basis. This was not done in this case. Our main concern in mentioning the point now is to ensure that it will be done in future. To consider the article as a whole did no harm to the defence in the present case, but the proper course to be taken in future is the item by item approach for magazines and other articles comprising a number of distinct items.

The second matter which arose in the court below, and which requires some general comments by this court, relates to the expert evidence which was called. The defence called expert evidence for something more than 20 days. A great mass of expert evidence was called. Part of that evidence was directed to what is called the 'public good' defence contained in s 4 of the 1959 Act. I need not read the section in full but under that section a defence can be put forward in respect of an obscene article that its publication is desirable in the public good, and the section specifically provides that the opinion of experts as to the literary, artistic, scientific or other merit of such an article may be admitted. What is contemplated there is that if an article is found to be obscene, evidence of experts as to its merits under those heads may be called and it is then for the jury to balance the merit and demerit of the article and conclude

whether they find it acceptable or not. So far as evidence was called under that section, no question arises on it now, but a majority of the expert evidence called by the defence in this case bore no relation to the defence of public good under s 4, but was rather directed to showing that the article was not obscene. In other words, it was directed to showing that in the opinion of the witness it would not tend to deprave or corrupt. Now whether the article is obscene or not is a question exclusively in the hands of the jury, and it was decided in this court in *R v Calder and Boyars Ltd* (1) that expert evidence should not be admitted on the issue of obscene or no. It is perfectly true that there was an earlier Divisional Court case in which a somewhat different view had been taken. It was the case of *Director of Public Prosecutions v A and BC Chewing Gum Ltd* (2). That case in our judgment should be regarded as highly exceptional and confined to its own circumstances, namely a case where the alleged obscene matter was directed at very young children, and was itself of a somewhat unusual kind. In the ordinary run of the mill cases in the future the issue 'obscene or no' must be tried by the jury without the assistance of expert evidence on that issue, and we draw attention to the failure to observe that rule in this case in order that that failure may not occur again. We are not oblivious of the fact that some people, perhaps many people, will think a jury, unassisted by experts, a very unsatisfactory tribunal to decide such a matter. Those who feel like that must campaign elsewhere for a change of the law. We can only deal with the law as it stands, and that is how it stands on this point.

I should add, as some justification for the course which was taken below, that it may be that the calling of expert evidence was related to the first count of conspiracy on which the jury acquitted. We are not convinced that that was so, but we need not pursue it further. In ordinary cases under s 2 of the 1959 Act expert evidence on the issue obscene or not is not to be admitted. Now here it was admitted and again it did the defence no harm. They called the evidence and, insofar as there was any irregularity there, it was favourable to the defence and not to the prosecution.

I turn now to the criticisms which have been made by counsel for the appellants of the directions given by the learned judge in this case. The first two, which to a very large extent are complementary, are really the ones on which this appeal against conviction is based. It is said that in directing the jury as to the meaning of 'obscenity' under the 1959 Act, the learned judge did not make it clear that for the purpose of that Act 'obscene' means, and means only, a tendency to deprave or corrupt. He dealt with the meaning of obscenity in more than one place, and it is to be remembered that in the context of this case he had to deal with the meaning of 'obscenity' for the purposes of the different charges. Dealing with the charges under the 1959 Act he said:

'So you see in s 1 it starts off with the definition or the test for obscenity, which is the law of this country at the present time. "... an article"—well, this Oz 28 is an article—"shall be deemed to be obscene if its effect... is, if taken as a whole, such as to tend to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." [If I may interpolate, so far so good. He then goes on:] Now, that is the test of obscenity. I must give you a little more help about the meaning of that—the legal meaning of it. We were told, I think, by Mr. Duane one of the last witnesses in this trial, that the historical meaning of the word "obscene"—and it is of interest and importance in this case—comes originally from the Greek and it refers to things which are not fit, or not right, to be shown on the stage at a public performance. Something which is obscene—"ob" means

(1) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

(2) 131 JP 373; [1967] 2 All ER 504; [1968] 1 QB 159.

"off" or "outside of"—is something which is not fit to be shown to the public. You may think it has retained in our language and in this Act of Parliament basically that meaning ever since."

Counsel for the appellants says, and says with some force, that we here have the judge already beginning to widen the true statutory definition of the word 'obscene'. It does not finish there because later on the learned judge returned to the question of the meaning of the word 'obscene'. He said:

'It is for you as a jury, so the law says, to decide whether taken as a whole, this is likely to deprave or corrupt a significant proportion of people who are likely to read it. As I shall mention later on, this may not, in fact, be so difficult or formidable a task for you as might first appear. The word "obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd". In considering it in its legal sense in each of these five charges—because it is mentioned in each one—that is the approach to it which I wish you to adopt, please, as I have been explaining to you during the last few minutes.'

We have had a good deal of argument in this court about exactly what those words mean and exactly how the jury would have reacted to them, but we feel bound to accede to counsel for the appellants' argument that at least there is grave danger that the jury from that passage in the direction to them, took the view or might have taken the view, that 'obscene' for all purposes including the purposes of the 1959 Act included 'repulsive', 'filthy', 'loathsome' or 'lewd'.

The matter does not stop there because the defence in this case on the charges under the 1959 Act was in a sense two-pronged. They said this material in *Oz* No 28 was not likely to deprave or corrupt; that it may shock is accepted, but it is not likely to cause people to act in a depraved or corrupted fashion. One of the arguments advanced in support of that line of defence was that many of the illustrations in *Oz* were so grossly lewd and unpleasant that they would shock in the first instance and then would tend to repel. In other words, it was said that they had an aversive effect and that far from tempting those who had not experienced the acts to take part in them they would put off those who might be tempted so to conduct themselves. The argument which counsel for the appellants put forward on this point is that the learned trial judge never really got over to the jury this argument of aversion, in other words, never put over to the jury that the proposition central to the defence case was that certain illustrations could be so disgusting and filthy that they would not corrupt and deprave but rather would tend to cause people to revolt from activity of that kind. Strangely enough the same situation arose in the earlier decision in this court to which I referred a few moments ago. *R v Calder and Boyars Ltd* (1) was in fact a then well publicised criminal trial dealing with the book 'Last Exit to Brooklyn'. Counsel for the appellants appeared for the defence, and in this court counsel argued, and this court held rightly argued, that the failure of the learned judge to put what one might call the aversion argument was fatal to the retention of the conviction.

Those two matters put together, in our judgment form a very substantial and serious misdirection, and they are not made any better by the fact that on the one occasion when the judge dealt with the aversion argument in any serious way at all he dealt with it in such a way as to destroy, rather than to explain, its value. It arose in this way. There was a doctor called Dr Heywood, who was the first and perhaps one of the most significant experts called for the defence. He was a highly qualified psychologist. In the course of his work he attended a number of hospitals and was in constant contact with people suffering from various degrees of mental disability.

(1) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

He gave evidence about his experience of this aversion theory. He said in terms on more than one occasion that it was a form of therapy actively practised in mental hospitals but he did go on to say without any doubt at all that in his judgment it was effective not only for the mind of the sick but also for the healthy mind as well. Unfortunately when the judge came to deal with Dr Heywood's evidence he told the jury on more than one occasion that Dr Heywood was only speaking of aversion as applied to the sick mind, whereas in fact, as I have pointed out, the evidence of the doctor went far beyond that and was in fact, if accepted by the jury, evidence of the effect of aversion techniques on the sick mind and the healthy alike.

In addition to those criticisms of the learned judge's attitude to the law, counsel for the appellants has also developed before us a large number of criticisms of the judge's misdirections, as he would put it, on the facts and the evidence. It is not possible to deal in detail with all his objections. The best that the court can do is to give a general impression of them at the end of the day when the argument has been fully deployed. In many instances, the treatment of the evidence of experts was very abbreviated. On many occasions the space attributed to a particular expert in the summing-up is perhaps surprisingly small but it must be remembered that this was an extremely difficult case for the judge to sum up. To deal with the evidence of experts extending over 20 or 25 days from his notebook is a task which no one would envy and it was inevitable in many respects that the reference should be brief. However, there are in a number of cases sentences, asides almost, in the course of the summing-up which tend to denigrate the witness in question. It may be in some instances these asides were justified—it is hard for us to check them all in detail—but they are frequent and give the impression that the judge was biased against experts as a group and was inclined to make little of their evidence whenever he got the chance to do so. In some instances counsel for the appellants' criticisms seem to us at the end of the day not to be justified. He made much of the fact that the judge had spoken of 'these so-called experts' on more than one occasion, but we think having read the summing-up as a whole that the references to 'these so-called experts' were not intended to be a derogatory reference to the highly qualified men who were included amongst the experts but rather was intended to refer to some others who came later in the trial and who might legitimately have justified the title 'so-called experts'.

On the whole, we find comparatively little weight in the criticisms of factual misdirections. There were said originally to be 52, or was it 65, of them. Many of them are errors of such a trivial character that they really deserve no attention at all. Those which we are concerned about are the misdirections amounting to an apparently unfair treatment of an expert witness, but even so when one adds them all together it does not in our judgment amount to a great deal and certainly we should hesitate a long time before setting these convictions aside if that were the only ground urged in favour of it.

In fact at the end of the day we have come to the conclusion that the misdirection on the law, by which I of course mean misdirection in regard to the definition of 'obscenity' and the aversion theory, is a serious misdirection, and one which on its face rendered the verdict of the jury unsafe. We have considered with the assistance of counsel whether this is a case for applying the proviso to s 2 of the Criminal Appeal Act 1968 and saying that the convictions should be upheld on the grounds that no actual miscarriage of justice occurred. The argument in favour of our so acting is that if one looks at this magazine item by item as we have already indicated it should have been looked at, then it is said that certain items, perhaps especially the advertisement for Suck, are such that they are per se obscene and that no one could possibly (looking at them in isolation) take any other view. It may well be that that is true. It may well be that if the matter had been put to the jury in that way on a

proper direction they would have taken the view that the advertisement for Suck was obscene and, if they had, the result would have been that the whole magazine would have been treated as obscene. But having regard to the fact that the trial below was conducted on a wholly different basis, we do not think, although we have considered the matter with care, that it would be right here to apply the proviso on the basis that the items treated individually would necessarily have resulted in a conviction in respect of the magazine as a whole. In the result, therefore, so far as the 1959 Act counts, i.e. counts 2, 4 and 5, are concerned, the appeal is allowed and the convictions are quashed. Count 1 has gone anyway by reason of the verdict of the jury.

We are left only with the Post Office Act count, count 3. I have said really nothing about that so far. The essence of the offence there is sending through the post obscene or indecent matter. 'Obscene' here may have its ordinary meaning and therefore we are not troubled on this count with any difficulties about the jury having been wrongly directed as to the meaning of the word. It is not without importance to remember that when the jury returned their verdict on count 3 they were specifically asked whether they found the matter to be indecent or obscene or both, and they said both. So it is evident that they treated this as a case in which *Oz* on that definition was an obscene publication. There is on the face of it an appeal against this conviction as well, but counsel has had very little to urge on behalf of the appellants on this count, and indeed we can see no reason whatever which would justify the view that there is here any kind of material misdirection which would justify the quashing of the conviction. Accordingly, the conviction on count 3 must stand and the appeal is dismissed so far as it relates to count 3.

That means that all we are concerned with in the end is the proper sentence in the revised situation which now prevails. The penalty imposed by the learned trial judge for count 3 was six months in the case of each of the individual appellants, and a fine of £100 for the appellant company. Counsel for the appellants has drawn our attention to the fact, which is undoubtedly true, that prison sentences for offences of obscenity have been very rare in the past. What the reason for this is is something on which we do not wish to speculate, but it is true that to send a man to prison for offences in this classification has been a relatively unusual thing in the past. However, those of us who sit regularly in this court are only too familiar with the fact that when a particular offence becomes prevalent, and a wave of it appears, the only course which can be taken is to increase the sentences in order to adjust for the increase in the incidence of the offence. That is one of our responsibilities which we must exercise to the best of our ability. We would therefore like to make it quite clear in general terms that any idea that an offence under the Obscene Publications Act 1959 does not merit a prison sentence should be eradicated. There will be many cases in future in which a prison sentence is appropriate if the court imposing the sentence thinks fit, and any general impression to the contrary should not be retained. In this case, having regard to the jury's verdict and having regard to all the other considerations to which I have referred, we are of the opinion that the sentence on count 3 must stand, but of course it will in fact be suspended because any sentence of this length is under the present law automatically a suspended sentence.

Accordingly, the result of the appeal on conviction will be that the conviction on count 3 is sustained. The sentences are retained but suspended for two years. The deportation recommendation, which I have omitted to mention, in respect of the appellant Neville will be cancelled, it being inappropriate to the offence of which he is eventually found guilty.

*Orders Accordingly.*

*Solicitors: Offenbach & Co; Director of Public Prosecutions.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*



COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES, LJ, WRANGHAM AND WALLER, JJ)

28th October, 9th November 1971

R v ROYLE

*Criminal Law—Obtaining pecuniary advantage by deception—Ingredients of offence—Dishonesty—Effect of absence of reasonable ground for belief—Incurring by defendant of personal liability—Obtaining of evasion, not creation, of debt by deception—Proof that pecuniary advantage was obtained by means of alleged deception essential—Theft Act, 1968, s 16 (2) (a).*

By s 16 (2) (a) of the Theft Act, 1968: 'The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—(a) any debt or charge for which he makes himself liable or may become liable . . . is reduced or in whole or in part evaded or deferred; . . .'

On a charge of obtaining a pecuniary advantage by deception, contrary to s 16 of the Act, the jury should be directed (i) that dishonesty is a fundamental ingredient of the charge and the test is whether the defendant had an honest belief in the truth of his representations, and, whereas the absence of reasonable ground for the belief may point strongly to the conclusion that he had no genuine belief in the truth of his representation, it is for them to say whether or not it has been established that he had no such genuine belief; (ii) that the incurring by the defendant of personal liability (actual or potential) must be established before a conviction can take place; (iii) that it is the evasion (and not the creation) of a debt or credit which must be obtained by deception; (iv) and that it must be established that the defendant obtained the pecuniary advantage by means of the alleged deception before a conviction can take place.

APPEAL against conviction and sentence.

On 18th March 1971 at Manchester Crown Court before the commissioner (His Honour Judge Edward Jones) the appellant, Brian Royle, was convicted on four counts of obtaining property by deception and on three counts of obtaining a pecuniary advantage by deception, and was sentenced to two years' imprisonment concurrent on each count.

G W Guthrie Jones QC and J V Williamson for the appellant.

E Sanderson Temple QC and J H Lord for the Crown.

*Cur adv vult*

9th November. EDMUND DAVIES LJ read this judgment of the court: On 18th March 1971 at the Manchester Crown Court before the commissioner, His Honour Judge Edward Jones, the appellant was convicted on four counts (nos 1, 2, 4 and 5) of obtaining property by deception and on three counts (nos 6, 7 and 8) of obtaining a pecuniary advantage by deception, these two groups of counts being based on ss 15 and 16 respectively of the Theft Act 1968. He was sentenced to concurrent terms of two years' imprisonment on all seven counts. An order was also made, pursuant to s 188 (1) of the Companies Act 1948, prohibiting him for the period of five years from being a director or taking part in the management of a company without leave. He appeals to this court, by leave of CHAPMAN J, against his conviction on counts 6, 7 and 8 only, and against the concurrent sentences passed on each of the seven counts.

The appellant is a man of 43 with no previous convictions. In 1969 he became a director of Rateswood Finance Ltd which organised from Nottingham a network of agents in various parts of the country to advertise the availability of loans and overdrafts, particularly those secured on second mortgages. During the autumn of 1969 there was such a reduction in loan applications that the business of Rateswood Finance

Ltd began to founder. Then on 11th December 1969 another company was floated under the name of Whitcroft Finance Ltd (hereinafter referred to as 'W Ltd'), its stated objects including the business of 'mortgage brokers, financial agents and advisers' and 'to negotiate loans'. It had but two directors (Mr Atkins and Mr Templar), the appellant being employed as its financial adviser, and it proceeded to organise a network of agents for precisely the same purpose as Rateswood Finance Ltd had done. Its registered address was Green Farm, Little Horwood, near Bletchley, Bucks, where a woman who had assumed the name of 'Mrs Royle' lived, but it had no working office either there or elsewhere and employed no clerical or accounts staff. It was not until 22nd December 1969 (which was later than the dates assigned to the offences charged in counts 1, 2, 6 and 7) that the directors passed the necessary resolution to open a bank account. According to Mr Templar, between then and his resignation as director in February 1970, he was persuaded to sign batches of cheques in blank and gave them to the appellant.

W Ltd advertised in financial newspapers for local agents to act on their behalf. Candidates were interviewed by the appellant who used the Rateswood forms and brochures to explain the nature and object of the proposed agency. He then asked them for a substantial payment in consideration of being granted the sole agency to act for W Ltd in a designated area, undertaking that, in the event of the agency being terminated, the company would endeavour to resell the agency and hand over the proceeds to its former possessor. A most impressive, formally engrossed contract form was produced, and there were those who were deceived into thinking that they were dealing with the representative of a solidly based and well established finance company, to become whose agent it would be worth paying for. When they did, their money soon disappeared, for those in charge of the company's affairs showed extreme efficiency in sharing the spoils.

It was the appellant's participation in these criminal activities which led to his being charged with the four counts of obtaining property by deception. We take count 1 as an illustration. Early in December 1969 (before, in fact, the company was incorporated), Mr Richards, a hotelier in North Wales, saw one of W Ltd's advertisements and answered it. The appellant and Mr Atkins promptly visited him on 13th December, the former falsely describing himself as a director of W Ltd, represented that it was a soundly based finance company carrying on a genuine business in commercial, industrial and domestic finance, and so on. Mr Richards was asked to pay a premium of 500 guineas for the agency, but he could manage only £100 at that time and at the appellant's request he paid him this in cash. Two things then struck Mr Richards as odd: (a) that the appellant did not bother to count the bundle of notes handed to him, and (b) that he was about to leave without giving any receipt. His suspicions being aroused, when the appellant returned on 27th December to collect the balance, Mr Richards questioned him further and decided to retract. The appellant was unable to comply with Mr Richards's request for the return of the £100 and even induced the latter to lend him a further £30 on the security of his watch and pens before he departed. Attempts to recover his £130 failed for some time, but on 1st May 1970 he received a cheque for the full amount, drawn on the account of yet another company (Trusthold Investments Ltd) and signed by the appellant. That cheque was cleared, but other victims were not so fortunate, for on 18th December 1969 a Mr Clark parted with £750 to the appellant and recovered nothing (count 2). On 13th January 1970 a Mr Cook of Warwick was persuaded to give him a cheque for £375 (being one-half of the premium requested) and after some months extracted repayment from the appellant, so again he was fortunate (count 4), but a Mrs Parker of Sutton Coldfield recovered nothing out of the £400 she was by similar deception induced to part with on 14th January 1970 (count 5).

Although there is no appeal in respect of the appellant's conviction on these four counts, the circumstances giving rise to them provide a significant background against which to consider the remaining three counts, as well as having intrinsic importance in relation to the two years' sentences imposed in respect of each of them. Counts 6, 7 and 8 were all laid under s. 16 (1) of the Theft Act 1968, the material parts of which provide as follows:

'(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.

'(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—(a) any debt or charge for which he makes himself liable or is or may become liable . . . is reduced or in whole or in part evaded or deferred; . . .'

Subsection 3 of s 16 adopts the definition of 'deception' contained in s 15 (4), which defines it as

'any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.'

Despite the aim of the still-youthful Theft Act to simplify the law, we feel that the time has already come to declare that so obscure is s 16 that it has created a judicial nightmare. It has even puzzled some academic lawyers: see, for example, Professor Elliott on Obtaining Credit by Fraud (1) and Professor J C Smith on Obtaining Credit by Fraud and the Theft Act (2). It is said to have led to certain erroneous dicta of this court in *R v Waterfall* (3); and during this year it has led to two decisions, *R v Page* (4) and *R v Locker* (5), the former of which has, in the view of Professor J C Smith (6) been impliedly overruled by the latter, even though the court said in terms that they were following it (see per WIDGERY LJ in *R v Locker*). However that may be, s 16 unquestionably raises problems of analysis and exposition which may well daunt and defy those coping with the heavy criminal calendars which are commonplace in these days, and we venture to express the hope that it will be speedily replaced by a simpler provision.

Let us turn to the facts of the counts of which it formed the basis. All three arose from visits paid by the appellant to various hotels while going about the country for the purpose of obtaining premiums from would-be agents of W Ltd at times when, as counsel for the appellant conceded, it must be accepted that the appellant knew it was a bogus company. Count 6 charged that on 16th December 1969 he

'dishonestly obtained for [himself] a pecuniary advantage, namely the evasion of a debt of £15. 14s. 1d. for accommodation, refreshment and services for which the [appellant] was then liable to Merion Hotel, Leeds, by deception, namely, by false representations that Whitcroft Finance Limited was a company carrying on a genuine business and that the said company intended to pay for the said accommodation, refreshment and services upon presentation of the account.'

(1) See [1969] Crim LR 339.

(2) See [1971] Crim LR 448.

(3) 134 JP 1; [1969] 3 All ER 1048, [1970] 1 QB 148.

(4) 135 JP 376, [1971] 2 All ER 870.

(5) 135 JP 437; [1971] 2 All ER 875.

(6) See [1971] Crim LR 424.

With the necessary differences in relation to dates, hotels, and sums involved, counts 7 and 8 were similarly framed.

On 14th December 1969 (that is, on the day following the dishonest obtaining by the appellant from Mr Richards of £100 which was the subject of count 1), someone telephoned the Leeds hotel and used words to the effect that the appellant of W Ltd would be arriving there the following day at 9.00 pm and required accommodation. The appellant did indeed arrive the following evening, signed the hotel register in his true name, then added, 'account to Whitcroft Finance Ltd, Green Farm, Little Horwood, Bucks'. It was in these circumstances that when he left the hotel the following day the debt of £15 14s 1d which had been incurred remained unpaid. The account was sent to W Ltd and at no time to the appellant. It remained unpaid for some months, and then, the police having interviewed the appellant on 12th May 1970, the hotel manager received on 21st May a cheque for the full amount with a letter on the notepaper of Trustholds Indemnity Ltd. Stated to have been 'dictated by Mr Royle and signed in his absence', it read, 'Herewith cheque to the value of £15. 14. 1. incurred by Whitcroft Finance Ltd. earlier this year'.

We turn to count 7. On 16th December the appellant and Mr Atkins booked in at the Midland Hotel, Manchester, the appellant registering under his own name and giving as that of his firm 'Whitcroft Finance Ltd'. On Friday, 19th December, there arrived a letter on the company's notepaper, dated 18th December and purporting to have been signed by Mr Atkins (who had been at the hotel since 16th December), which read:

'Account Royle and Atkins. We hereby confirm the booking for the above-mentioned accommodation and request that the account be forwarded to this office for payment.'

Despite receipt of this letter, the management put pressure on the appellant for payment when the account increased substantially, and he in fact produced a solicitor's IOU for £20 in favour of the hotel manager on 19th December and was consequently given further credit. On Sunday, 21st December, he said he wanted to leave, was presented with a bill for £199 1s 9d, handed over a cheque for £100 drawn in favour of W Ltd (and presumably indorsed over in some way) and was allowed to leave with balance unpaid. On presentation that cheque was dishonoured, and on 24th December the bill for the full amount was sent to W Ltd. It was not until 22nd May 1970 that it was paid, this time again by cheque drawn by Trustholds Indemnity Ltd.

Now as to count 8. On 5th February 1970 the appellant and a woman booked in at the Palace Hotel, Buxton, for a single night. The following morning there arrived a letter from W Ltd, dated 5th February, 'to confirm the booking for Mr. Royle this evening', and adding: 'The account should be sent to the above address for payment.' Although an account for £16 8s 7d had already been made out in the name of the appellant himself, in view of the request contained in the letter (which the appellant repeated orally), he was allowed to leave without settlement and the account was sent off to W Ltd at Aylesbury the same day. No reply being received, reminders were sent, and at length, on 26th May 1970, there arrived a cheque for £15 (£1 8s 7d short).

The defence to these three s 16 counts had at least the merit of simplicity. It was that the appellant considered that as he was working for W Ltd, he was entitled to indicate that the company would foot the bill. As to this, the commissioner said:

'In a properly run concern that would be so. If you are an employee and you do not know what the company's finances are then you are not fraudulent. If you are going round in a legitimate business on behalf of your employers you

are perfectly entitled to say that you can charge up your expenses, and you can say, 'Send the bill to my employers'. You are entitled to assume that unless you know something to the contrary.'

Such, in essence, were the issues involved in counts 6, 7 and 8. While the case for the Crown, if accepted, showed a shabby series of criminal tricks, their gravity was a good deal less than the cheatings which were the foundation of the earlier counts. That was certainly the view adopted by the commissioner, who said 'I am not going to waste a lot of time on the hotels'. But the unfortunate result of this understandable approach was that the complexities of s 16 were insufficiently explored in the lower court. It is true that, at an early stage of the summing-up, s 16 (1) was read to the jury, and they were directed that:

'There must be a deception. There must be dishonesty. There must be an obtaining in each of these cases, largely for himself, but it might be for another, and there must be a pecuniary advantage.'

They were then instructed regarding the word 'deception' in relation to both groups of counts and were told:

'If you come to the view that there was deliberateness about it, of course, . . . your task would be concluded, but . . . you will bear in mind the word "reckless" is used. That is a very high degree of disregard of the obvious, a very, very, high degree . . . It is a high degree of recklessness as to really amount to a deliberate deception.'

The statutory definition of 'pecuniary advantage' in s 16 (2) was at no time quoted. We are far from saying that the jury would have been illuminated had this been done, but the fact remains that it was not. Instead, what the commissioner said was this:

'In relation to the pecuniary advantage, what is said is that he obtained goods for himself and for others from these three hotels by saying that Whitcroft Finance would, in fact, have paid the bill. What it really amounts to is he knew perfectly well they could not, or was so utterly reckless in the face of the facts that anybody looking at it must have realised he knew if he had really faced the facts that they could not have paid.'

That part of the summing-up which deals with these three counts has been criticised, and in our judgment not without justification. The charges being that debts had been dishonestly 'evaded' by deception, contrary to s 16 (2) (a), it was incumbent on the commissioner to direct the jury on the fundamental ingredient of dishonesty. In accordance with *R v Waterfall* (1) they should have been told that the test is whether the accused had an honest belief, and that, whereas the absence of reasonable ground might point strongly to the conclusion that he entertained no genuine belief in the truth of his representation, it was for them to say whether or not it had been established that the appellant had no such genuine belief.

The jury should further have been directed on the statutory requirement that the debt was one 'for which [the accused] makes himself liable or is or may become liable . . .' But the only direction given was that, when dealing with count 6, they were told:

'What is alleged is that he obtained the evasion of a [debt] of £15 14s. 1d. for refreshment and services for which he was then liable. Any person who goes and makes a booking is himself liable until somebody accepts somebody else; by deception, namely by false representation that Whitcroft Finance Limited was

(1) 134 JP 1; [1969] 3 All ER 1048, [1970] 1 QB 148.



a company carrying on a genuine business, and the said company intended to pay for the said accommodation. Having heard [the appellant's] pathetic tale of impecuniosity he was not going to pay or be able to pay, was he? It is a matter for you . . . Do you think when he went to the Reception at the hotel and said Whitcroft Finance would pay the bill that was a deception, and [the appellant] knew perfectly well neither he nor Whitcroft Finance would pay that bill? The fact at some future date it might be paid and was, in fact, paid is quite irrelevant. It is what he thought at that moment.'

All this is highly relevant to the elements of dishonesty and deception, but what the commissioner unfortunately omitted to direct the jury was that s 16 (2) (a) had no application unless and until they were convinced that a debt had been incurred which the appellant had made himself liable to pay or for which he was or might become liable. Furthermore, as Mr Edward Griew has stated (1):

'It would not be adequate to say that (the accused) had made himself liable to a debt which, incidentally, he had evaded. For evasion of a debt is a pecuniary advantage within the section, while the creation of a debt (or credit) is not; so it is the evasion which must be obtained by deception.'

A close examination of the evidence was therefore called for, to enable the jury to decide whether the accused had ever made himself liable or whether the hotel managements were from first to last looking only to W Ltd for payment, in which latter case the relevance (if any) of any deception practised by the appellant would depend on a number of complex factors. The commissioner might even have been called on to explore the tangled undergrowth of quasi-contract. Be that as it may, there was, to say the least, some evidence which, properly examined, might have led the jury to conclude that the incurring by the appellant of personal liability (actual or potential) had not been established. But they were never invited to consider it from that point of view.

Further criticisms of this part of the summing-up have justifiably been made. Thus, it is rightly said that the element of *evasion* of the debts due to the hotels was never properly explored, and the jury were in terms directed, as we have already indicated, that the fact that the debts might in the future be discharged (as they in fact were) had no relevance. But it was arguable that it might have some bearing (however tenuous) on the essential elements of deception and dishonesty, and that this was a case of debts being 'deferred' rather than 'evaded'.

Again, it was incumbent on the Crown to establish that it was by means of the alleged deception that the appellant obtained 'pecuniary advantage' from the hotels concerned. This requirement was nowhere dealt with by the commissioner, yet here, just as much as under the old s 13 of the Debtors Act 1869, it was basic to the charge. Instead, the commissioner took for granted the nexus between the making of representations to the hotel managements and the fact that thereafter they allowed the appellant to leave with their accounts still unpaid. That this will not do is amply demonstrated by the concession made by counsel for the Crown before us that he cannot support the conviction on count 7, because the evidence showed that credit was granted because the Midland Hotel manager trusted the appellant as an old customer and in no way because of what he said or because of the contents of the letter which arrived during his stay there. Other criticisms of the summing-up could be advanced, but we have said sufficient to indicate why in our view the conviction of these three hotel counts cannot stand. It follows that the appeal must be allowed and the convictions on counts 6, 7 and 8 quashed.

(1) (1970), 33 MLR 218.

We finally turn to the appeal against the concurrent sentences of two years passed on counts 1, 2, 4 and 5. In our judgment, the commissioner was right in approaching the hotel counts as trivial by comparison. He was dealing with an able and intelligent man of 43 with an honourable career behind him and no previous convictions, and who had heavy domestic commitments. It was urged that he secured repayment of something like £1,000 out of the £2,500 dishonestly obtained by W Ltd, that he was not the only beneficiary, and that the amount of repayment he effected has exceeded any pecuniary benefit he himself derived. Nevertheless, the commissioner took a grave view of the appellant's misconduct and we think he was entitled to do so. Notwithstanding our quashing of the convictions on the later counts, those that remain fully justified the sentences imposed in respect of them. The appeal against such sentences is accordingly dismissed.

*Orders accordingly.*

Solicitors: A E M West & Co, Manchester; D S Gandy, Manchester.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### HOUSE OF LORDS

(LORD DONOVAN, VISCOUNT DILHORNE, LORD SIMON OF GLAISDALE, LORD CROSS OF CHELSEA AND LORD KILBRANDON)

2nd, 3rd, 4th November, 16th December 1971

#### LONDON BOROUGH OF EALING v RACE RELATIONS BOARD

*Race Relations—Housing—Council houses—Tenants restricted to British subjects—Validity—Action for declaration by local authority—Competency—Race Relations Act, 1968, s 2 (1), s 19 (2) (10).*

By s 19 (1) of the Race Relations Act, 1968, civil proceedings may be brought by the Race Relations Board in respect of any act alleged to be unlawful under Part I of the Act by reason of it causing discrimination against any person on specified grounds, and by s 19 (2) and (10) such proceedings may be brought only in a county court appointed to have jurisdiction to entertain such proceedings by an order made by the Lord Chancellor.

**HELD:** the right of a subject to recourse to Her Majesty's courts for the determination of his rights was not to be excluded except by clear words; the restriction of the hearing of proceedings to a hearing in an appointed county court applied to proceedings by the board and was not to be extended to proceedings against the board by other persons; and consequently the High Court had jurisdiction to grant to a local authority declarations that they had not, as alleged by the board, committed an offence against the Act.

By s 1 (1) of the Race Relations Act, 1968: 'a person discriminates against another if on the ground of colour, race, or ethnic or national origins he treats that other ... less favourably than he treats or would treat other persons ...' By s 5 (1) it is unlawful for any person to discriminate against any person seeking to acquire housing accommodation.

A local housing authority refused, on the ground that he was a Polish national to put one Z on the list of applicants waiting for housing accommodation, a rule made by the council being that to be placed on the list 'an applicant must be a British subject within the meaning of the British Nationality Act, 1948'.

**HELD** (LORD KILBRANDON dissenting): 'national origins' in s 1 (1) was not the same thing and did not include nationality; Z was not discriminated against by reason of his Polish origin, but because of his nationality at the time when he made his application; and, therefore the local authority in refusing the application was not in breach of s 1 (1).

APPEAL by the corporation of the London Borough of Ealing and a cross-appeal by the Race Relations Board against a decision of SWANWICK J, reported, 135 JP 131, whereby he held that he had jurisdiction to grant declarations sought by the council against the board and one Stanislaw Zesko to establish the validity of the refusal by the council to place Mr Zesko on their list of applicants for council houses as not constituting unlawful discrimination within the meaning of the Race Relations Act 1968, but refused to grant the declarations on the ground that the council's conduct did constitute unlawful discrimination under the Act.

*J G Le Quesne QC and K C L Smithies for the council.*

*R A MacCrimble QC and Anthony Lester for the board.*

Their Lordships took time for consideration.

16th December. The following opinions were delivered.

**VISCOUNT DILHORNE:** The late LORD DONOVAN's opinion is now in print, and he was in favour of allowing the appeal.

**LORD DONOVAN:** The appellant council ('the council') is the housing authority for the borough of Ealing. As such it keeps a register of all applications for housing accommodation within the borough and a waiting list containing names transferred from that register. A points scheme adopted by the council, which takes into account among other things the time the applicant has been waiting, governs the allocation of council accommodation to those on the waiting list. Another rule, r 3 (1), of the council governing admission to the waiting list reads thus: 'An applicant must be a British subject within the meaning of the British Nationality Act, 1948.' That Act defines a British subject as including both British subjects and Commonwealth citizens.

In 1966 and again in 1968 a Mr Zesko, a Polish national of excellent antecedents and character, sent in an application to the council for housing accommodation describing himself therein as a Polish national. On each occasion because of the rule just quoted the council declined to put him on the waiting list.

Section 1 (1) of the Race Relations Act 1968 ('the 1968 Act') enacts that a person discriminates against another for the purposes of the Act if

'on the ground of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4 or 5 below applies, less favourably than he treats or would treat other persons . . .'

Section 5 of the Act deals specifically with discrimination against a person in the matter of the disposal of housing accommodation and makes such discrimination unlawful.

A complaint on behalf of Mr Zesko was lodged with the Race Relations Board now operating under the 1968 Act ('the board') that in the foregoing circumstances the council were in breach of s 5. In accordance with the Act the board investigated the complaint and formed the opinion that it was well-founded. So it proceeded, as required by the Act, to try and secure a settlement and an assurance against repetition of such alleged discrimination. Taking the view, however, that it had committed no unlawful act, the council, on 21st November 1969, issued in the High Court an originating summons claiming a number of declarations against the board, of which it is sufficient to quote no 5:

'that the council are and were at all material times entitled to decline to place Zesko upon their housing waiting list on the grounds that he was not at

the material time a British subject but was on the contrary a person of foreign or alien nationality.'

It is the board's case that the High Court had no jurisdiction to grant any such declaration or indeed any of the other reliefs asked for in the originating summons; and they so contended when the summons was heard by SWANWICK J in October 1970. The contention is based primarily on certain of the provisions which govern the right of the board to bring civil proceedings in England and Wales and are contained in s 19 of the 1968 Act.

The striking feature of these provisions is that the board is confined to bringing proceedings in certain nominated county courts and in those alone. The judge is to be assisted by two assessors having special knowledge and experience of problems connected with race and community relations. The board may sue for an injunction or for damages or for both, and for a declaration that an act is unlawful under the provisions of the Act. A right of appeal is given to the Court of Appeal on questions of fact or law.

All this, says the board, amounts to a comprehensive and exclusive code of proceedings for problems of race and community relations. Under it the board itself cannot go to the High Court and seek a declaration. Why, therefore, should its opponent be allowed to do so? It is to be observed in this connection, however, that the board's opponent can initiate no action of any kind in the nominated county court. He must sit down and wait until he is taken there by the board.

Other arguments were used by the board in support of its contention which are set out in the judgment of the learned judge. In my opinion, their persuasive force was small and they were adequately disposed of by him in his reserved judgment. He went on to say, quite rightly, that clear words are necessary to oust the jurisdiction of the High Court and there are none in the Act of 1968. Nor can any necessary implication to that effect be drawn from its language. His observations were prompted by VISCOUNT SIMONDS's remarks in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* (1) that:

'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNAIR, J., called it in *Francis v Yiewsley & West Drayton UDC* (2) a "fundamental rule" from which I would not for my part sanction any departure.'

I certainly can see no justification for ousting the jurisdiction of the High Court in the manner desired by the board, and I proceed, therefore, to consider the substance of the originating summons.

The question which it raises is one of construction, namely, whether the refusal of the council to place Mr Zesko's name on their housing waiting list was discrimination against him on the ground of 'national origins' within the meaning of s 1 (1) of the 1968 Act. The council did not use the expression 'national origins' in this context. It simply applied its rule that every applicant wishing to be placed on its waiting list for housing accommodation must be a British subject within the meaning of the British Nationality Act 1948, and at the time Mr Zesko was a Pole. Had 'discrimination' been defined in s 1 (1) as including discrimination on the ground of nationality, the council's rule would clearly have fallen foul of it. So the question comes to this: Do the words 'national origins' amount for present purposes to the same thing as 'nationality'?

(1) 123 JP 429; [1959] 3 All ER 1; [1960] AC 260.

(2) [1957] 1 All ER 825, [1957] 2 QB 136, *aff'd* CA 122 JP 31; [1957] 3 All ER 529, [1958] 1 QB 478.

The Act itself contains no definition of 'national origins'. It must, I think, mean something different from mere nationality, otherwise there would be no reason for not using that one word, as indeed the Act does in later provisions to which I shall have to refer. But, looking at the matter from the point of view of a would-be discriminator on the grounds of 'national origins', what sort of matters would he take into account which were not simply present nationality?

One example which readily suggests itself is that of a naturalised person. The would-be discriminator may say: 'Yes, I know he has become a naturalised British subject, but he was born a German and I bear a grudge against all such persons'. Any consequent discrimination could then be said to be on the ground of national origins, i.e., the nationality received at birth. If this is what 'national origins' means, this difficulty arises for the board, namely, that the council plainly did not reject Mr Zesko's application because he had been born a Pole but because at the moment of his application he was not a British subject. Had he been, there is no doubt (in the light of subsequent events) that he would have been put on the waiting list, despite his Polish origin. I am conscious that it may be said that this is still discrimination on the ground of national origins, and that the fact that these have remained unchanged makes no difference, but of this I am not convinced. Four grounds of discrimination only are specified in s 1 (1). Discrimination on any other ground, e.g., religion or politics, is not unlawful under the Act. When one finds that the council was indifferent to Mr Zesko's national origins but concerned only with his present nationality, and present nationality is not expressly made a ground of possible discrimination, I hesitate to assert that nevertheless it is.

It is argued alternatively by the board that the phrase 'national origins' is wide enough by itself to embrace nationality and in many cases this may be so. But the Act of 1968 is dealing with discrimination on grounds existing at the time it occurs, and I find 'national origins' a very inapt phrase to embrace present nationality.

There are certain provisions in the Act which expressly mention 'nationality'. Thus, s 8 (11) preserves the legality of selecting for employment a person of a 'particular nationality' or descent if the work requires attributes especially possessed by such person. Section 27 (9) preserves the legality of present or future rules restricting employment in the service of the Crown or of certain prescribed public bodies to persons of particular birth, citizenship, nationality, descent or residence. Both sides rely on these provisions. The board argues that 'national origins' is thus shown to include nationality, otherwise, the provisions would, to this extent at least, be otiose. The council replies that if the true construction of 'national origins' does not include present nationality, saving provisions like ss 8 (11) and 27 (9) cannot be extended so as to achieve that result, it being common for such clauses to err on the side of caution. I think there is force in the council's reply and I do not think the provisions in question shed a crucial light on the interpretation of 'national origins' in s 1 (1).

If the council is to be stigmatised as being guilty of an unlawful act under the 1968 Act I think that conclusion ought to be reached with reasonable confidence. Giving the rival arguments the best consideration I can I must say that I do not feel that measure of confidence. Instead, I still feel much doubt about it, and in that state of mind I would allow this appeal and make the declaration suggested by my noble and learned friend, VISCOUNT DILHORNE. It follows from what I have previously said that I would dismiss the cross-appeal.

I should perhaps add that since these proceedings were begun Mr Zesko has become a naturalised British subject and been placed on the housing waiting list. This does not render the proceedings academic since he would have lost the benefit of a certain amount of waiting time, assuming that the contentions advanced on his behalf had been correct.



**VISCOUNT DILHORNE:** On 15th June 1965 the council adopted certain 'Conditions and Rules of Acceptance of Housing Applications'. One of the conditions was that to be accepted on the council's waiting list and to be assessed under the points scheme, the applicant 'must be a British subject within the meaning of the British Nationality Act, 1948'. Presumably it was in the council's opinion not right to allot council houses to aliens when so many British people were wanting houses.

On 30th August 1966 a Mr Zesko applied to the council for a house. In his application form he stated that he and his wife were Polish and had been born in Poland. In fact his nationality was Russian for we were told that at the time of his birth Poland formed part of Russia and that in fact he was born in Siberia. His application was rejected on the ground that he was not a British subject. Mr Zesko had a fine war record, and, when he applied for naturalisation, he was granted it. He then renewed his application for a house and was put on the waiting list. The only effect this appeal may have so far as he is concerned is that, if it is dismissed, the council will have to treat him as if he had been put on the waiting list when he first applied, in which event he will gain an advantage in the housing queue.

The Race Relations Act 1968 came into operation on 25th November 1968 (s 29 (3)). Section 1 (1) is in the following terms:

'For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4 or 5 below applies, less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of these grounds.'

Discrimination is made unlawful in respect of the provision of goods, facilities or services by s 2, in relation to employment by s 3, in relation to membership of trade unions, employers' and trade organisations by s 4, and in relation to housing accommodation by s 5.

On 2nd June 1969 the board's chief conciliation officer wrote to the council telling them that the board had considered the complaint made by the Anglo-Polish Conservative Society on behalf of Mr Zesko that the council had unlawfully discriminated against him by refusing to consider his application for housing as he was not a British subject. He said that the board had formed the opinion that the council had acted unlawfully and contrary to s 5 (c) of the Act and he sought in accordance with s 15 (3) (b) of the Act to seek a settlement of the differences between Mr Zesko and the council and an 'assurance against any repetition of the unlawful act or the doing of further acts of a similar kind'.

No such assurance was forthcoming as the council maintained that they had not acted unlawfully as alleged, and on 14th November 1969 the chief conciliation officer wrote saying that the board had decided to maintain their opinion that unlawful discrimination had occurred. He again asked formally whether the council was prepared to reach such a settlement and give such an assurance but he imagined that the answer would be in the negative and said:

'The board would then have to determine whether or not to bring proceedings. However, they would defer their determination until after the High Court proceedings had been disposed of.'

High Court proceedings were instituted—in the light of the foregoing, it would seem with the agreement of the board—on 21st November 1969, by originating summons claiming five declarations. The action was heard by SWANWICK J. At the hearing counsel for the board contended that the court had no jurisdiction to grant

the relief claimed and, alternatively, if it had jurisdiction, in the exercise of its discretion it should refuse to make any of the declarations claimed. SWANWICK J rejected these contentions, but held that there had been unlawful discrimination against Mr Zesko and dismissed the summons. From his decision the council have, with leave, appealed direct to this House, and the board have again contended that there is no jurisdiction to grant the relief claimed, and, alternatively, that, if there is jurisdiction, in the exercise of discretion relief should not be granted. It will be convenient to consider these two contentions first.

Section 19 (1) of the Race Relations Act 1968 provides:

'Civil proceedings may be brought in England and Wales by the Race Relations Board, in pursuance of a determination of theirs under section 15 of, or schedule 2 or 3 to, this Act and not otherwise, in respect of any act alleged to be unlawful by virtue of any provision of Part I of this Act . . .'

and that in such proceedings an injunction or damages or an injunction and damages or 'a declaration that that act is unlawful by virtue of that provision or any other provision of the said Part I' may be claimed. Section 19 (2) provides that proceedings under the section may be brought in a county court appointed to have jurisdiction to entertain such proceedings by the Lord Chancellor 'and shall not be brought in any other court'. Section 19 (10) *inter alia* provides:

'except as provided by [s. 19 (1)] no proceedings, whether civil or criminal, shall lie against any person in respect of any act which is unlawful by virtue only of a provision of Part I of this Act.'

The proceedings instituted by the council were not brought against any person in respect of any act which is unlawful by virtue of Part I, and s 19 (10) therefore does not apply to them. Section 19 (2) is expressed to apply to 'proceedings under this section'. Proceedings under the section are proceedings by the board and it is those proceedings which cannot be brought in any other court than one appointed by the Lord Chancellor. Section 19 (2) does not, therefore, prevent the institution of proceedings such as those in this case. Proceedings brought by the board under the section must be in pursuance of a determination of the board under s 15 or Sch 2 or 3 'and not otherwise' and 'in respect of any act alleged to be unlawful' by virtue of the Act. Section 19 and ss 20-24 all deal with the enforcement of the Act by the board. I can find nothing in the Act which ousts the jurisdiction of the courts to grant a declaration. The council are not bringing any proceedings to which s 19 applies.

I therefore reject this contention of the board. Whether any of the declarations sought should be made is a matter of discretion. A borough council, accused by the board of having acted unlawfully in the administration of its housing scheme, may well seek to have the allegation disposed of one way or the other at the earliest possible moment. If they do not do so, and have to wait to see whether the board decides to institute proceedings, they may be left in doubt about how to deal with applicants for houses. If the board is right, it is only if the board starts proceedings that the council can clear itself of the imputation cast on its conduct. Where, as in this case, there is no dispute as to the facts and where the legality of the council's action depends and solely depends on the construction of the Act, the issue of an originating summons is a convenient procedure for determining the question of construction. If the council is entitled to any of the declarations it claims, I see no reason to refuse in the exercise of discretion to make a declaration. I therefore reject the board's second contention.

Whether the council acted lawfully or unlawfully depends on the meaning to be given to the words 'national origins' in s 1 (1). Those words appear in s 1 (1) (repealed

by the 1968 Act), s 5 (1) and s 6 (1) of the Race Relations Act 1965. Our attention was not drawn to their use in any other Act and in neither Race Relations Act is the meaning to be given to these words defined. They must have been intended in the 1968 Act to have the same meaning as they had in the 1965 Act and I propose first to consider whether the 1965 Act throws any light on the meaning to be given to them.

The long title to that Act is in the following terms:

'An Act to prohibit discrimination on racial grounds in places of public resort; to prevent the enforcement or imposition on racial grounds of restrictions on the transfer of tenancies; to penalise incitement to racial hatred; and to amend section 5 of the Public Order Act 1936.'

Section 1 (1) provides that it is unlawful for, inter alia, proprietors of places of public resort 'to practise discrimination on the ground of colour, race, or ethnic or national origins'. Section 5 (1) makes it unlawful to withhold a licence or consent to the disposal of a tenancy on the same grounds and s 6 (1) makes it an offence to do certain acts with intent to stir up hatred 'against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins'. The words quoted in these three sections show the meaning to be attached to the word 'racial' in the long title.

The question to be decided in this appeal is whether discrimination in favour of British subjects within the meaning of the British Nationality Act 1948 and against aliens is discrimination on the ground of 'national origins'.

'Nationality', in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to international law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards citizenship. Thus, further, although all Polish individuals are of Polish nationality qua race, for many generations there were no Poles qua 'citizenship': see Oppenheim's International Law, 8th edn, vol 1, p 645. Just as 'nationality' can be used in these two senses, so can the word 'national'. Bearing in mind the racial objects of the 1965 and 1968 Acts, and that the words 'national origins' with the other words with which it appears explain what is meant by the word 'racial' in the long title, I think that the word 'national' in 'national origins' means national in the sense of race and not citizenship.

The long title of the 1968 Act is in the following terms:

'An Act to make fresh provision with respect to discrimination on racial grounds, and to make provision with respect to relations between people of different racial origins.'

And again the use of the words 'colour, race or ethnic or national origins' in s 1 (1) show the content of the word 'racial'.

The word 'nationality' does not appear in the 1965 Act. In the 1968 Act it appears in two places. Section 8 (11) of that Act states:

'Section 3 above shall not render unlawful the selection of a person of a particular nationality or particular descent for employment requiring attributes especially possessed by persons of that nationality or descent.'

Section 27 (9) is in the following terms:

'Nothing in this Act shall—(a) invalidate any rules . . . restricting employment in the service of the Crown or by any public body prescribed for the purposes of this subsection by regulations made by the Treasury to persons of particular birth, citizenship, nationality, descent or residence . . .'

In both ss 8 and 27 'nationality' is used in the sense of citizenship of a state. It was argued for the board that these references to nationality would not be necessary unless nationality in the sense of citizenship of a state was comprehended in the words 'national origins', for, it was said, if that were not the case there would be no need to refer to it in these saving clauses. I am not convinced by this reasoning that one should on this account construe the words 'national origins' in both Acts, for the meaning must be the same in both, as including nationality. I think that it is likely that these references to nationality were made *ex abundanti cautela*, it being realised that the interpretation to be given to 'national origins' might lead to difficulties.

As a step towards determining whether there has been unlawful discrimination one has to consider the characteristics of the individual alleged to have been discriminated against and then to decide whether he was discriminated against on account of his colour, race, or ethnic or national origins. Consideration of those matters involves consideration of his antecedents. Mr Zesko's race was Polish. His national origins were Polish. Was he discriminated against on that account? If that was the ground of the discrimination it was not removed by his naturalisation, and the fact that despite his race and his Polish origin he was after naturalisation accepted on the waiting list shows, in my view, that he was not discriminated against on account of his national origins. The ground for the discrimination was that he was not a British subject. It was his nationality at the time when he applied, not his national origins, that led to the refusal to put his name on the waiting list.

'The first and chief mode of acquiring nationality is by birth: indeed, the acquisition of nationality by another mode is exceptional, since the vast majority of mankind acquires nationality by birth and does not change it afterwards:'

Oppenheim's International Law, 8th edn, vol 1, p 651. This is no doubt, true and affords a foundation for the argument that discrimination against aliens is in the vast majority of cases discrimination consequent on their national origins. It was not in this case discrimination on the ground of national origins but on the ground of the nationality possessed at the time of the making of the application to go on the waiting list. An applicant's nationality may have been acquired at birth. It may be that his nationality is due to his national origins, but the council, as I understand the position, concern themselves with what an applicant is and not with what his origins were.

While I recognise that the question for decision is a difficult one owing to the omission in the Acts of any indication of the meaning to be given to the words 'national origins', and one on which different views may be held, it must, I think, be recognised that 'nationality' and 'national origins' have not the same meaning, and that, if it had been Parliament's intention, either in 1965 or in 1968, to make discrimination between British subjects and aliens unlawful, that could easily have been achieved by the addition of the words 'or nationality' after 'national origins'. The fact that Parliament did not do so and the fact that there is no clear indication in either Act that it intended to do so and the other reasons I have stated lead me to the conclusion that the council did not act unlawfully in breach of s 5 of the 1968 Act in refusing to enter Mr Zesko's name on the waiting list.

Of the five declarations sought by the council, four do not appear to me apposite and the fourth declaration sought requires, in my view, slight amendment so that it should be declared that by declining on or about 4th February 1969 to place Mr Zesko on their housing waiting list on account of his not then being a British subject within the meaning of the British Nationality Act 1948 the council did not commit a breach of s 5 of the Race Relations Act 1968.

For the reasons I have given I think that this appeal should be allowed, that a declaration in the above terms should be made, that the other declarations sought should not be granted, and that the cross-appeal should be dismissed.

**LORD SIMON OF GLAISDALE:** Three issues arise on these cross-appeals—first, has the court jurisdiction to entertain the application for a declaration by the original council? secondly, if so, should the court in the exercise of its discretion make a declaration? thirdly, if so, what should the declaration be, i.e., what is the proper construction of s 1 (1) of the Race Relations Act 1968? On the first and second issues I have had the advantage of reading the speeches prepared by my noble and learned friends, LORD DONOVAN and VISCOUNT DILHORNE, and I agree with what they say. I also agree with their observations on the third issue; but, since I understand that your Lordships are not unanimous on what is not an easy point of construction, I venture to make some observations of my own.

It is the duty of a court so to interpret an Act of Parliament as to give effect to its intention. The court sometimes asks itself what the draftsman must have intended. This is reasonable enough; the draftsman knows what is the intention of the legislative initiator (nowadays almost always an organ of the executive); he knows what canons of construction the courts will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention. Parliament, of course, in enacting legislation assumes responsibility for the language of the draftsman. But the reality is that only a minority of legislators will attend the debates on the legislation. Failing special interest in the subject-matter of the legislation, what will demand their attention will be something on the face of proposed legislation which alerts them to a questionable matter. Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning or that a statute establishing a criminal offence will be expected to use plain and unequivocal language to delimit the ambit of the offence (i.e. that such a statute will be construed restrictively) are not only useful as part of that common code of juristic communication by which the draftsman signals legislative intention but are also constitutionally salutary in helping to ensure that legislators are not left in doubt what they are taking responsibility for.

In some jurisdictions the courts, in order to ascertain the intention of the instrument calling for interpretation, can look at the legislative history or the 'preparatory works'. Though this may sometimes be useful, it is open to abuse and waste; an individual legislator may indicate his assent on an assumption that the legislation means so-and-so; and the courts may have no way of knowing how far his assumption is shared by his colleagues, even those present. Moreover, by extending the material of judicial scrutiny, the cost of litigation is inevitably increased. Finally, our own constitution does not know a pure legislature; the sovereign is the Queen in Parliament and the legislative history of a statute stretches back from the parliamentary proceedings—by successive drafts of a bill, heads of instruction to the draftsman, departmental papers, and minutes of executive committees—into the arcana imperii. (All this is not, of course, to say that an explanatory memorandum accompanying a complicated measure, such as accompanies almost every statutory instrument, might not often be useful both in apprising legislators of the details for which they are assuming responsibility and in assisting the courts in their task of interpretation.)

In the absence of such material the courts have five principal avenues of approach to the ascertainment of the legislative intention: (i) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (ii) a conspectus of the entire relevant body of the law for the same purpose; (iii) particular regard to



the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objectives will be stated; (iv) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation; (v) examination of the other provisions of the statute in question (or of other statutes in *pari materia*) for the light which they throw on the particular words which are the subject of interpretation. Difficult questions can arise when these various avenues lead in different directions. Fortunately in the present case, in my view, they lead to an identical conclusion.

First, then, the social background. There have been periods in our history which have been disgraced by acute xenophobia. Lombards, Scots, Irish (though sectarian influences were also present here), Eastern Europeans (though anti-semitism here played its part), Germans, have all at various times been objects of execration. But the 1960s were not such a period. Social strains then were caused by considerable immigration of peoples who, although often of British nationality or of citizenship of the United Kingdom and colonies, were of alien culture and of deeper than native pigmentation, and by a recrudescence of anti-semitism. 'Wog', 'Nig-nog', 'Yid', 'Dago' were current terms of abuse. 'Chink', 'Hun', 'Russky', 'Portuguese', even 'Jerry', have a distinctly old-fashioned resonance, while 'Frog', 'Mounseer', 'Polack', 'the Potsdam Dutch and the goddam Dutch', are of purely historical significance. Uncle Tom rather than Uncle Matthew is the relevant literary stereotype.

Secondly, for the general legal conspectus. The Race Relations Acts 1965 and 1968 do not provide a complete code against discrimination of socially divisive propaganda. The Acts do not deal at all with discrimination on the grounds of religion or political tenet. It is no offence under the Acts to stir up class hatred. It is, therefore, unquestionably with a limited sort of socially disruptive conduct that the Acts are concerned; and it is, on any reading, within a limited sphere that Parliament put its ameliorative measures into action.

Thirdly, for the long title of the 1968 Act. This states:

'An Act to make fresh provision with respect to discrimination on racial grounds, and to make provision with respect to relations between people of different racial origins.'

It is significant that there is no word here about 'nationality', whether used in its popular or in its legal sense. Moreover, 'racial' is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word 'race' is biologically at all relevant to the species amusingly called *homo sapiens*.

Fourthly, for the words of s 1 (1) itself. The crucial words are:

'For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other . . . less favourably than he treats or would treat other persons . . .'

This is rubbery and elusive language—understandably when the draftsman is dealing with so unprecise a concept as 'race' in its popular sense and endeavouring to leave no loophole for evasion. But if discrimination on the ground of 'nationality' were within the intendment of the subsection, the draftsman had available a term of legal precision; it could have been used expressly in the list of grounds, leaving no room for doubt; and there would be no conceivable reason for hiding the concept obscurely within the words 'national origins'.

Fifthly, for the concomitant statutory provisions. The 1968 Act repealed ss 1 to 4 of the Race Relations Act 1965 (and a few other immaterial provisions of that Act); but it left the rest of the 1965 Act standing, to be cited together with it. Among the sections of the 1965 Act left standing is s 6 (1) which provides that it is a criminal offence to do

certain acts 'with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins'. This is the very same terminology as is used in s 1 (1) of the 1968 Act, which must bear the same meaning. In other words, it is also used to define a criminal offence.

This, I think, disposes of an argument for the original board to the following effect: 'National origins' must include nationality by birth, which is indeed the most usual way of acquiring nationality. A person of foreign nationality by birth can only acquire British nationality subject to residential qualifications and at the discretion of the Secretary of State. A person of foreign nationality is therefore treated less favourably than other persons (i.e. natives) if he is required to surmount the obstacles to acquiring British nationality as a condition of receiving equal treatment with natives. Thus, a foreign national who is not accorded equal treatment with the native is discriminated against on the ground of his national origins. The short answer to this line of argument is that criminal offences are not to be created in this oblique, circuitous and obscure way. The use of the words 'national origins' in the penal section of the 1965 Act tends to suggest a restricted rather than an expansive meaning.

As for the other provisions of the 1968 Act itself, the very word 'nationality' appears in ss 8 (1) and 27 (9) (a) of the Act. Both of these provisions are by way of exception from the generality of the Act. It was argued on behalf of the original board that this shows the generality ('national origins') must be wide enough to include what is excepted from it ('nationality'). But this would mean extending the ambit of the criminal offences created by s 6 of the 1965 Act not only by an implication but by an implication dependent on an argument of considerable subtlety; it is not, in my view, the right way to approach the construction of a statute involving penal provisions; on the contrary, the courts will look for unambiguous expression; and, in the event of ambiguity, will prefer the narrower construction. Moreover, I think that considerable caution is needed in construing a general statutory provision by reference to its statutory exceptions. 'Saving clauses' are often included by way of reassurance, for avoidance of doubt or from abundance of caution. Section 27 (9) (a) itself provides a striking example: it provides that nothing in the Act should invalidate certain rules restricting certain classes of employment to 'persons of particular birth, citizenship, nationality, descent or residence'; and 'residence' at least is not conceivably within the ambit of s 1 (1). Once the argument on construction of the general provision from a 'saving clause' fails, the use of the word 'nationality' elsewhere in the Act gives added significance to its omission from s 1 (1).

In my judgment, therefore, all the five relevant approaches to the construction of s 1 (1) of the 1968 Act tend (some more, some less, strongly, but in cumulation decisively) to the conclusion that the subsection was not dealing with discrimination on the ground of present nationality. This, however, is a negative conclusion, and the argument is not complete without a satisfactory explanation of what Parliament could have had in mind other than nationality when enacting the words 'national origins'. In addition to the probable use of the words to forestall argument based on some alleged ambiguity in the word 'race', there are, in my view, at least two such specific situations.

I have already indicated that these words are part of a passage of vague terminology in which the words seem to be used in a popular sense. 'Origin', in its ordinary sense, signifies a source, someone or something from which someone or something else has descended. 'Nation' and 'national', in their popular in contrast to their legal sense, are also vague terms. They do not necessarily imply statehood. For example, there were many submerged nations in the former Hapsburg empire. Scotland is not a nation in the eye of international law, but Scotsmen constitute a nation by reason of those most powerful elements in the creation of national spirit—tradition, folk

memory, a sentiment of community. The Scots are a nation because of Bannockburn and Flodden, Culloden and the pipes at Lucknow, because of Jenny Geddes and Flora Macdonald, because of frugal living and respect for learning, because of Robert Burns and Walter Scott. So, too, the English are a nation—because Norman, Angevin and Tudor monarchs forged them together, because their land is mostly sea-girt, because of the common law, and of gifts for poetry and parliamentary government, because (despite the wars of the Roses and Old Trafford and Headingley) Yorkshireman and Lancastrian feel more in common than in difference and are even prepared at a pinch to extend their sense of community to southron folk. By the Act of Union English and Scots lost their separate nationalities, but they retained their separate nationhoods; and their descendants have thereby retained their separate national origins. So, again, the Welsh are a nation—in the popular, though not in the legal, sense—by reason of Offa's Dyke, by recollection of battles long ago and pride in the present valour of their regiments, because of musical gifts and religious dissent, because of fortitude in the face of economic adversity, because of the satisfaction of all Wales that Lloyd George became an architect of the welfare state and prime minister of victory. To discriminate against Englishmen, Scots or Welsh, as such, would, in my opinion, be to discriminate against them on the ground of their 'national origins'. To have discriminated against Mr Zesko on the ground of his Polish descent would have been to have discriminated against him on the ground of his national origins.

There is another situation which the phrase is apt to cover—namely, where a person of foreign nationality by birth has acquired British nationality or where a person of British nationality by birth is descended from someone of foreign nationality. There are those who are apt to say: 'The leopard cannot change his spots; once an Erehwonian always an Erehwonian'. To discriminate against a British subject on the grounds of his foreign nationality by birth or alien lineage would be to discriminate against him on the ground of his national origins. To have discriminated against Mr Zesko on the ground of Russian nationality by birth (if such was his case, which is not clear) would have been to have discriminated against him on the ground of his national origins.

I would therefore allow the appeal to the extent of making the declaration proposed by my noble and learned friend, VISCOUNT DILHORNE, and dismiss the cross-appeal.

**LORD CROSS OF CHELSEA:** The facts of this case are set out in the speech of my noble and learned friend, LORD DONOVAN, which I have had the advantage of reading and I need not repeat them. I agree with him that the cross-appeal on the jurisdiction point fails and I cannot usefully add anything to what he has said on the topic. I also agree with him that the appeal should be allowed, but as your Lordships are not of one mind on the question of construction I will give my reasons for thinking that the council are right in my own words.

The phrase 'national origins' appeared in the statute book for the first time in ss 1, 5 and 6 of the Race Relations Act 1965. These sections, so far as relevant to this appeal, run as follows:

'1 (1) It shall be unlawful for any person, being the proprietor or manager of or employed for the purposes of any place of public resort to which this section applies, to practise discrimination on the ground of colour, race, or ethnic or national origins against persons seeking access to or facilities or services at that place ...

'5 (1) In any case where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises comprised in a tenancy, that licence or consent shall be treated as unreasonably withheld if and so far as it is withheld on the ground of colour, race or ethnic or national origins ...

'6 (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins—(a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins . . .'

There is no definition of 'national origins' in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between an individual and one or more groups of people who can be described as a 'nation'—whether or not they also constitute a sovereign state. The connection will normally arise because the parents or one of the parents of the individual in question are or is identified by descent with the nation in question; but it may also sometimes arise because the parents have made their home among the people in question. Suppose, for example, that a man of purely French descent marries a woman of purely German descent and that the couple have made their home in England for many years before the birth of the child in question. It could, I think, fairly be said that the child had three 'national origins'—French through his father, German through his mother, and English, not because he happened to have been born here but because his parents had made their home here. Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide. That is shown by this very case. Mr Zesko was born in 1913 when Poland—although a 'nation'—was not a sovereign State but part of the Russian Empire. So at birth his 'national origins' were Polish, but his nationality was Russian. When Poland became an independent state after the first war he became a Polish citizen, but now, although his 'national origins' have remained throughout Polish, he has become a citizen of the United Kingdom by naturalisation. It is not difficult to see why the legislature in enacting the Race Relations Act 1965 used this new phrase 'national origins' and not the word 'nationality' which had a well-established meaning in law. It was because 'nationality' in the strict sense was quite irrelevant to the problem with which they were faced. Most of the people against whom discrimination was being practised or hatred stirred up were in fact British subjects. The reason why the words 'ethnic or national origins' were added to the words 'racial grounds' which alone appear in the long title was, I imagine, to prevent argument over the exact meaning of the word 'race'. For example, a publican who had no objection to West Indians might refuse to serve Pakistanis. He could hardly be said to be discriminating against them on grounds of colour and it might well be argued that Pakistanis do not constitute a single 'race'. On the other hand, it could hardly be argued that they did not all have the same 'national origin'. Then did the Act make it an offence for a publican or hotelkeeper to refuse to serve a customer or receive a guest on the ground of his 'nationality' in the legal sense? Of course, in practice no publican or hotelkeeper would dream of practising discrimination simply on that ground. An hotelkeeper, for example, might have come to dislike Germans or Japanese—perhaps because of his experiences as a prisoner of war—and he might refuse to accept as a guest in his hotel someone whom he recognised by his appearance, or speech, or demeanour as belonging to the obnoxious race. But it is in the highest degree unlikely that his feelings would alter in any way if the potential guest told him that he had recently been naturalised as a British subject. His reaction would probably be 'once a Hun always a Hun' or 'once a Jap always a Jap'. But in order to test the validity of the board's argument it is, I

think, useful to imagine an eccentric hotelkeeper who refused to give a room to anyone who could not show that he was a British subject—who, that is to say, would refuse to receive someone who although his 'national origin' was purely British had renounced his British citizenship, but was ready to receive anyone who though his 'national origin' was purely foreign was a British subject either because he happened to have been born here while his parents were visiting this country or because he had become naturalised. I cannot see how it could be said that such an hotelkeeper was practising discrimination 'on the ground of national origins'.

If one turns to the Race Relations Act 1968, one finds that the meaning given to 'discrimination' in s 1 is the same as that given in the 1965 Act and, again, there is no definition of 'national origins'. The Act of 1968 covers a much wider field than the earlier Act, and it appears to have occurred to the draftsman of it that it might be construed as applying to discrimination on ground of nationality in the legal sense save in so far as the contrary was expressed. So one finds various saving clauses on which counsel for the board naturally placed considerable reliance. But I find it impossible to hold that these saving clauses—inserted as I think *ex abundanti cautela*—have the effect of inserting by implication the words 'or nationality' after the words 'national origins' in s 1(1) of the 1968 Act—especially as the two Acts must be read together (see s 29 (2)) and the 1965 Act, for the reasons which I have tried to give, did not, as I see it, forbid discrimination on the ground of nationality.

The rule in question in this case was not a device to evade the race relations legislation. It was made before the 1965 Act was passed and it is not suggested that the council do not apply it honestly in accordance with its terms. As soon as Mr Zesko became naturalised he was placed on the waiting list. It may well be that in fact of those persons of foreign national origins who have resided for more than five years in the area as many have become naturalised as remain aliens. It is true that one of the effects of the rule is that a foreign national who has lived in Ealing for five years but is either unwilling to apply to be naturalised or has been refused naturalisation is in a less favourable position than persons with the same residence qualification who have always been British subjects or have become naturalised. But as I see it, the council are not discriminating against such foreign nationals 'on grounds of their national origins'. I agree with the form of declaration proposed by my noble and learned friend, VISCOUNT DILHORNE.

**LORD KILBRANDON:** The council 'discriminated against Mr Zesko, as that word is used in s 1 (1) of the Race Relations Act 1968, inasmuch as they treated him, in a situation to which s 5 of the Act applies, less favourably than they treated other persons. They refused to transfer his name from the housing register, which they keep in pursuance of s 22 of the London Government Act 1963, to the waiting list of those requiring housing in the borough, and this they did because of a rule which they have made that such transfers will only be made where the applicant is a British subject, which Mr Zesko was not. Such a transfer is an essential preliminary to the allocation of a council house. This was a discrimination, under s 5 of the Act, by a person having power to dispose of housing accommodation; whether it was also a discrimination, under s 2, by a person concerned with the provision to the public of services of a local authority it is not necessary to discuss.

The short question in the case, which I have found to be very difficult to answer, is whether that discrimination was unlawful as having been made on the ground of Mr Zesko's 'national origins'. The council say that they discriminated on the ground of his nationality, and they say that that is not ground struck at by the Act.

That one should be left groping for, or even speculating about, the meaning of a key phrase used in a recent Act of Parliament designed to remedy social grievances by



assuring large groups of citizens of the protection of the law, and at the same time imposing criminal sanctions, is an unhappy feature of our present rules for the interpretation of statutes. The discrimination complained of has been in operation in Ealing at least since 1965; we were told that, while it is not particularly common, it is by no means unknown elsewhere. The existence of it must have been familiar to the framers of the 1968 legislation. Yet that legislation is silent on the question. It must be perfectly well known, in some quarter or other, whether Parliament intended that discrimination on the ground of nationality should be distinguished from discrimination on the ground of national origins. Yet such sources are denied to those charged with the duty of saying what the Act means. Apart from the actual words of the statute, we are indeed permitted to consider 'what was the mischief and defect for which the common law (or existing law) did not provide'. But this is at best an unsatisfactorily subjective test, since each judge must depend on his own notion of the mischief, derived from his own private interpretation of the social and political scene, whether recent or remote. The instant case provides such an unusually apt example of a commonly voiced complaint that a repetition may be forgiven.

The council's argument gains powerful general support from the wording, framework and limitations of the Act itself. The long title speaks only of discrimination on racial grounds, and of relations between people of different racial origins. These phrases are not particularly apt to include concepts of nationality as that word is used in international law. Turning to s 1, we see that no provision is made for the prevention of discrimination in the extremely sensitive fields of religion and politics; a refusal (at least by a private landlord) to house Roman Catholics or Communists as classes would not offend against the Act, although a local authority landlord might perhaps be under other restraints. The forbidden grounds are 'colour, race, or ethnic or national origins'. These characteristics seem to have something in common: they have not been acquired, and they are not held, by people of their own choice. They are in the nature of inherited features which cannot be changed, as religion, politics, and nationality can be changed, more or less at will, although subject, in the case of the last, to fairly strict rules laid down by the receiving State. These considerations seem to indicate a deliberate exclusion of nationality from the unlawful grounds, apart from the strong argument that so familiar a popular as also juridical concept could hardly have been omitted from the area of protection by accident.

On the other hand, the practical consequences of excluding discrimination on the ground of nationality from the scope of national origins are striking. The phrase 'on the grounds of colour, race, or ethnic or national origins' first appeared in s 1 (now repealed) of the Race Relations Act 1965, which dealt in s 2 with discrimination against persons seeking access to places of public resort such as hotels, public houses, cinemas and public transport. If 'national origins' is not wide enough to include 'nationality' then exclusion of persons by a notice which read, for example, 'No Poles admitted', would have been of debatable legality, according as the discrimination were interpreted as being against Polish nationals or against persons of Polish origin. 'No foreigners' would have been safer, since the word 'foreigner' properly describes a foreign national rather than a British subject of foreign origin, while, as counsel for the council conceded, a notice 'British subjects only' outside a public house would have been unexceptionable, since it would have admitted persons of foreign national origins who had become British subjects by naturalisation, and it would be of no consequence that it discriminated against others on the ground of nationality.

While s 2 of the 1965 Act has been repealed, s 6, which deals with public order, has not; the results of the interpretation proposed by the council would, as the learned judge points out, be no less capricious in the realm of the criminal law. Whereas

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<b>ROAD TRAFFIC - Motorway - Hard shoulder - Part of verge - Marginal strip - Part of carriageway - Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f).</b>		
<b>Wallwork v Rowland</b> .. .. .	QBD	137
<b>TOWN AND COUNTRY PLANNING - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).</b>		
<b>McDonald v Howard Cook Advertising Ltd</b> .. .. .	QBD	79
<b>TOWN AND COUNTRY PLANNING - Compulsory purchase - Compensation - Assessment - Land in area zoned for residential building - No prospect of permission being given for that use - Land Compensation Act, 1961, s 16 (2).</b>		
<b>Provincial Properties (London) Ltd v Caterham and Waringham Urban District Council</b> .. .. .	CA	93
<b>TRADE DESCRIPTIONS - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3).</b>		
<b>Naish v Gore</b> .. .. .	QBD	1

by s 3(1) discrimination on the grounds stated against persons seeking employment is made unlawful, sub-s (2) saves the provisions of any enactment relating to the employment or qualification for employment of persons. Since such enactments refer to nationality, not national origins, it was argued that here the legislature was making a special provision for nationality, and that this demonstrated that no general provision had been made in s 1. In my opinion, however, it is equally probable that Parliament, realising that nationality was comprised in the phrase 'natural origins', was making certain that existing statutory disqualifications on the ground of nationality should not be affected by the prohibition contained in this Act.

Similar conclusions may be drawn from the terms of s 6(2), which deals with advertisements indicating that Commonwealth citizens are required for employment overseas, and s 8(11) which excepts from the provisions of s 3 the selection of a person of a particular nationality. The question is, whether the word 'nationality' is used because it was, exceptionally, necessary to reach a class not otherwise included in s 1(1), or was it used in order to except persons from a class in which they would otherwise have been included? On the whole I prefer the latter alternative.

Section 27 deals with, *inter alia*, Crown employment and in sub-s (9) is found the phrase 'persons of particular birth, citizenship, nationality, descent or residence'. It appears that in this passage it has been found necessary to include characteristics, i.e. descent and residence, which are admittedly outside the s 1 classes. Does this not show that nationality is outside them also? While feeling the force of this argument, I think it probable that the reason for the use of these words is that the subsection is saving 'rules (whether made before or after the passing of this Act)', relating to employments carefully delimited, and it seems reasonable that the subsection is designed to cater for an existing pattern of rule-making, and that no firm conclusion can be arrived at from it.

The arguments in favour of either interpretation are finely balanced. I would not accept the view that there is some presumption here in favour of freedom from liability; the race relations code does, of course, contain some criminal sanctions, and it restricts liberty, but, on the other hand, it is conceived as a measure of social reform and relief of distress. Not much help is to be got from presumptions either for freedom or in favour of benevolent interpretation. I have come to the conclusion that on a consideration of the Acts as a whole the interpretation contended for by the board leads to a result less capricious and more consistent with reality than that proposed by the council, although, as I have said, the language used, and the limitations on the assistance permissible, do not encourage confidence in the expressing of an opinion.

On the procedural point, I agree with your Lordships and have nothing to add. Accordingly, I would dismiss this appeal.

*Appeal allowed; cross-appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co; Lawford & Co.*

Reported by G F L Bridgman, Esq, Barrister.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(LORD WIDGERY, CJ, DONALDSON AND EVELEIGH, JJ)

27th, 28th, 29th, September, 11th October 1971

**R v ANDREWS WEATHERFOIL LTD AND OTHERS**

*Criminal Law—Corruption—Officer of public body—Reward—Payment for past favours—No contemplation of further favours—Public Bodies Corrupt Practices Act, 1889, s 1.*

By the Public Bodies Corrupt Practices Act, 1889, s 1: 'Every person who shall . . . corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body . . . doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour'.

HELD: under this section it would be unnatural not to give an *ex post facto* meaning to the word 'reward' and it should not be limited to the receipt of money in contemplation of future favours, but should be held to cover the receipt of money for a past favour without any antecedent agreement.

*Criminal Law—Company—Criminal responsibility—Act of servant—Status and authority of servant—Identification of servant with company—'Responsible agent'—'High executive'.*

It is not every 'responsible agent' or 'high executive' of a company who can by his actions make the company criminally responsible. It is necessary to establish whether, on the facts found, the natural person in question had the status and authority which, in law, which make his acts the acts of the company itself. It is necessary for the judge to invite the jury to consider whether or not there are established those facts which he has decided as a matter of law are necessary to identify the person concerned with the company. Where this has not been done, the conviction will be quashed.

*Criminal Law—Verdict—Inconsistent verdicts—Separate trials—Charges of giving and receiving bribes—One defendant convicted and one acquitted.*

As long as persons concerned in a single offence can be tried separately, the verdicts returned by the separate juries will on occasion appear to be inconsistent with one another, which may be accounted for by differences in the evidence presented to the respective juries or the different views which the juries separately take of the witnesses and the fact that the verdict 'not guilty' includes 'not proven!' Where, therefore, X had been acquitted on a charge of corruptly offering emoluments to the appellant and the appellant had been convicted of corruptly accepting those emoluments.

HELD: that inconsistency alone did not render a verdict of guilty in the case of the appellant unsafe, and, as it was not suggested that evidence favourable to the appellant had been given in the trial of X, but not in the trial of the appellant, the conviction of the appellant should stand.

*Criminal Law—Evidence—Admissibility—System—Corrupt practices—Several defendants—Counts against each defendant relating to same transaction—Admissibility of evidence against one defendant against co-defendant.*

Evidence of the actions of one defendant may be admissible on the trial of another defendant as evidence of system in relation to the issue whether the other defendant was acting with a corrupt motive, and the fact that the conduct was that of the first-named defendant does not detract from the relevance of the evidence.

APPEALS by Andrews Weatherfoil Ltd, Sidney Frederick Charles Sporle, and Peter George Day, against their convictions at the Central Criminal Court of bribery and corruption under s 1 of the Public Bodies Corrupt Practices Act 1889. Andrews Weatherfoil Ltd were found guilty of offering the appellant Sporle emoluments in connection with their employment on council housing projects and were fined



£10,000; Sporle was found guilty on seven counts of corruption and sentenced to six years' imprisonment; Day was found guilty of corruptly offering £500 to Sporle for Sporle's wife as an inducement for promoting the interests of a company of building contractors, and he was sentenced to 18 months' imprisonment.

*Victor Durand QC and J G Nutting for the appellants Andrews Weatherfoil Ltd.*

*J B R Hazan QC and A C L Lewisohn for the appellant Sporle.*

*J F F Platts-Mills QC and P J Crawford for the appellant Day.*

*J H Buzzard and M H D Neligan for the Crown.*

*Cur adv vult*

11th October. **EVELEIGH J** read the following judgment of the court: On 23rd March 1971 at the Central Criminal Court in a trial which lasted over six weeks the appellants, Andrews Weatherfoil Ltd, Sidney Frederick Charles Sporle and Peter George Day, were charged with bribery and corruption under s 1 of the Public Bodies Corrupt Practices Act 1889, in relation to council building contracts of the Battersea Metropolitan Borough Council and the London Borough of Wandsworth Council when the appellant Sporle was a member and chairman of the housing committee or a member of the council.

Count 1 charged that the appellant Sporle on 4th January 1965 corruptly agreed to receive a salary from Ellis (Kensington) Ltd as an inducement to or reward for favouring them. Count 2 alleged a similar agreement in respect of salary from Property Estates Development Ltd again for favouring Ellis (Kensington) Ltd. Count 3 alleged a similar agreement on 27th January 1967 to receive a motor car from Property Estates Development Ltd for favouring Ellis (Kensington) Ltd. Count 4 alleged that the appellant Sporle corruptly solicited from one Culpin employment for Ellis (Kensington) Ltd on account of the appellant Sporle favouring or forbearing to disfavour Mr Culpin. Count 5 charged the appellant Sporle with agreeing on 2nd September 1966 to receive £500 for his wife from the appellant Day 'as an inducement to or reward for ... promoting the interests of John Laing Construction Limited'. Count 6 charged the appellant Day with corruptly offering the £500. Count 7 alleged that between 31st October 1966 and 29th April 1967 the appellant Sporle corruptly agreed to receive emoluments from employment by the appellants Andrews Weatherfoil Ltd for favouring them. On count 8 the appellants Andrews Weatherfoil Ltd were charged with corruptly offering the appellant Sporle the emoluments. Count 9 alleged that the appellant Sporle on 28th April 1967 corruptly solicited from one Harding employment for the appellants Andrews Weatherfoil Ltd on a housing scheme of the borough council on account of the appellant Sporle favouring or forbearing to disfavour Mr Harding's firm. In this count the appellants Andrews Weatherfoil Ltd and their employee Green were charged with aiding and abetting the appellant Sporle. Count 10 alleged that the appellant Sporle between 1st November 1965 and 6th July 1967 agreed to receive emoluments from one T D Smith for favouring Fleet Press Services Ltd.

The appellants Andrews Weatherfoil Ltd were found guilty on count 8, but they and Mr Green were acquitted on count 9. The appellant Sporle was found guilty on all counts except count 3. The appellant Day was found guilty on count 6. Mr T D Smith was granted a separate trial in respect of offering the emoluments referred to in count 10. One J C Bianco was granted a separate trial in respect of a charge alleging that he corruptly solicited advantages for the appellant Sporle from Mr Culpin in return for the appellant Sporle favouring Mr Culpin. Both Mr Smith and Mr Bianco were subsequently acquitted by the jury.

The appellants Andrews Weatherfoil Ltd were given leave to appeal against conviction on two grounds, in their notice of appeal, and seek leave to appeal after refusals on other grounds. The appellant Sporle seeks leave to appeal against conviction in respect of counts 1, 5, 7, 9 and 10 and the appellant Day seeks leave to appeal against his conviction, in each case after refusal by the single judge.

The Crown's case was that the appellant Sporle used his position on the council to obtain sums of money in return for support in obtaining building contracts from the council. The evidence showed, it was said, a systematic course of conduct to show favour where he had financial expectations and that when he acted in purported discharge of his duties to the council he failed to disclose his interest. In this way it was sought to show that he acted intending to benefit his employers or their nominees without regard to the interest of the council. Once his support for candidates for contracts from the council was shown to be given with improper intentions or motives (it being too much of a coincidence that so often those he supported turned out to be his employers), there was material relevant to the question of the existence of an antecedent agreement to do so in return for benefits to himself which the evidence showed he received. In this connection the fervour of his support for the cause of his employers was also relied on. Thus it was said he was so determined to assist Ellis (Kensington) Ltd that he even threatened Mr Culpin—an independent architect appointed to carry out some of the council's plans—with the possible loss of council work unless Ellis (Kensington) Ltd were given sub-contracts. So too, in relation to the appellants Andrews Weatherfoil Ltd, he made a similar threat to Mr Harding. Both of these gentlemen refused to be coerced.

*The appellants Andrews Weatherfoil Ltd*

The grounds on which the appellants Andrews Weatherfoil Ltd were given leave to appeal were failure properly to direct on law as to the criminal responsibility of a limited liability company for the act of a servant and failure to deal with the correct factors that in law determine the question whether a criminal intention in an employee is also that of the company. On examination these two grounds overlap, for in the present case the offence was not an absolute statutory offence, but involved criminal conduct and a guilty mind on the part, it was said, of the company's senior employees. The question, therefore, of the status and authority of the person or persons responsible was of great importance.

The Crown concedes, and in the view of this court rightly concedes, that the learned judge's direction was not adequate. There were three people who were alleged by the Crown to have the status and authority to involve the company itself in criminal liability for corruption in connection with the offer of employment to the appellant Sporle as a reward for anticipated favours from him. Those three were Mr Neuman, the managing director, Mr Allen, a 'technical director' and Mr Williams, the manager of the or a housing division. That these three were concerned in the engagement of the appellant Sporle there is no doubt. The actual offer of employment was made by Mr Neuman in a letter which Mr Allen had some part in drafting. Whether or not it was one, two or all of these three who sought or were party to seeking favours for the appellants Andrews Weatherfoil Ltd from the appellant Sporle as a return for the offer of employment was, as is usually the case, a matter of inference from the evidence. The learned judge directed the jury as follows:

'If an act is done by anyone who is in control of a company and who is in authority to perform an important act of that sort then that act of that person can be the act of the company itself . . . if an act is done by a responsible agent or a company; if in the course of that act that agent commits an offence and he does it in the name of the company then the company is liable . . . if an agent acts corruptly on behalf of the company the corruption of the agent is the corruption of

the company. That is not an absolute rule; it is a principle which depends on the circumstances of the offence... if one of these people, Williams or Allen or Neuman or any combination of them acting as a high executive of Andrews Weatherfoil indulges in the employment of a person to act corruptly to further the interests of the company of which that man is one of the executive directors the company is responsible and the company is guilty of a criminal offence.'

On counsel drawing the judge's attention to the fact that Mr Williams was not a director he continued:

'There is no magic in being a director. If you are the manager of the housing department or in any high executive position in such a way that you can recommend to your managing director that someone should be employed, as it is said Allen recommended Sporle, in those circumstances the person who recommends it, who is in a high position, if you are satisfied that he did that in the name of the company and it was corrupt the company can be liable. That is a matter for you as to whether or not you are satisfied that that employment by Sporle was done with the approval and knowledge of a high executive of Andrews Weatherfoil acting as an agent of the company for the purpose of his employment and that employment to the knowledge of the executive or executives was corrupt.'

It is not every 'responsible agent' or 'high executive' or 'manager of the housing department' or 'agent acting on behalf of a company' who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law make their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities. As LORD REID said in *Tesco Supermarkets Ltd v Natrass* (1):

'It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.'

LORD REID added:

'I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company.'

It follows that it is necessary for the judge to invite the jury to consider whether or not there are established those facts which the judge decides as a matter of law are necessary to identify the person concerned with the company. This was not done in the present case.

The court was invited to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968. It is not possible, however, to decide whether or not the jury regarded Mr Neuman, Mr Allen or Mr Williams, or any or what combination of them as responsible for the criminal act. Mr Williams's position in the company is not at all clear and the description 'housing manager' does not succeed in making it so. To a less extent this is true of Mr Allen. Consequently it is impossible to say that the

jury would have arrived at the same verdict if properly directed and it follows that this appeal must succeed.

In so far as the appellants Andrews Weatherfoil Ltd seek leave to appeal on other grounds it will be sufficient to say that leave is not granted.

*The appellant Sporle*

Count 1. The appellant Sporle contended that the judge failed clearly to direct the jury that corruption had to be proved at the time of the appellant entering the employment of Ellis (Kensington) Ltd and that proof of a later supervening corruption was not enough. The Crown had presented the case on that basis. The date alleged in the particulars, namely, 4th January 1965, was not vital in this kind of charge but coupled with the way in which the case had been presented it meant, as counsel for the Crown properly conceded, that the beginning of the appellant Sporle's employment was the material period. While it is true that the judge said: 'Whether it was the 4th January or thereabouts matters not' he went on to say that the allegation in count 1 was that the appellant Sporle was employed on that date substantially for the purpose of putting forward Ellis's interests and that he was paid over £1,000 a year from 1st January so that

'if you are satisfied so that you are sure that he agreed to receive that money in return for those favours you ought to find him guilty. If you are not satisfied you find him not guilty.'

It was also contended that the judge failed to remind the jury that there was no evidence of corruption until after the appellant Sporle had become employed by the company. The judge did in fact remind the jury that the appellant Sporle had been employed by a Mr Nixon, the sales manager (Mr Ellis did not give evidence), and that, according to Mr Nixon, there had been some preliminary discussion as to approaching the council, but it was made clear to the appellant Sporle that he was debarred from doing so. The judge further told the jury that the nub of the allegation against the appellant Sporle was his threat to Mr Culpin in March 1965, that is after he began to work for Mr Ellis. The appellant Sporle's contentions are unfounded. The judge summed-up the facts fairly to the jury and there was clear evidence from which the jury were entitled to infer a corrupt agreement at the beginning of the appellant Sporle's employment.

Count 5. This count can conveniently be dealt with at the same time as count 6 on which the appellant Day applies for leave.

Count 7. It is claimed that if the appellants Andrews Weatherfoil Ltd succeed on the two grounds stated in their notice of appeal, the appellant Sporle's conviction is unsatisfactory.

In returning a verdict of guilty against the appellants Andrews Weatherfoil Ltd, the jury must have concluded that a corrupt offer of employment with the company had been made to the appellant Sporle and accepted by him. This court had only decided that the jury were not properly directed whether or not the person making the offer was in such a position as to involve the company in criminal liability. This decision in no way affects the question whether or not the appellant Sporle corruptly agreed to accept employment.

Count 9. It is claimed that, if the appellants Andrews Weatherfoil Ltd succeed as above, the conviction of the appellant Sporle on count 9 is unsatisfactory. This argument is very difficult to follow, for count 9 alleges that the appellant Sporle personally made a corrupt request himself to Mr Harding. The point of law in the appeal of the appellants Andrews Weatherfoil Ltd on count 8 has no relevance to the question whether or not the appellant Sporle made such a request.

Count 10. It is said that as Mr Smith was acquitted on 12th July 1971 on the charge of corruptly offering emoluments to the appellant Sporle, the appellant Sporle's conviction for corruptly accepting those emoluments is unsafe.

As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses. That the result produced by such inconsistency is 'unsatisfactory' cannot be disputed, but it is the unsatisfactory character of the guilty verdict to which s 13 of the Criminal Justice Act 1968 is directed, rather than an unsatisfactory result of the two trials as a whole. When inconsistent verdicts are returned by the same jury, the position is usually more simple. If the inconsistency shows that that single jury was confused, or self-contradictory, its conclusions are unsatisfactory or unsafe and neither verdict is reliable. Very often, however, an apparent inconsistency reflects no more than the jury's strict adherence to the judge's direction that they must consider each case separately and that evidence against one may not be admissible against the other; e.g. where there is a signed confession. So, too, where the verdicts are returned by different juries the inconsistency does not, of itself, indicate that the jury which returned the verdict was confused or misled or reached an incorrect conclusion on the evidence before it. The verdict 'not guilty' includes 'not proven'. We do not, therefore, accept the submission of counsel for the appellant Sporle that inconsistent verdicts from different juries ipso facto renders the guilty verdict unsafe. If, as will usually be the case, the evidence at the two trials was significantly different, this not only explains the different verdicts, but also defeats the claim that inconsistency alone renders the guilty verdict unsafe. If the difference in the evidence consists of additional material favourable to the accused being called at the second trial, the first accused should seek to call that evidence in this court and not rely merely on the inconsistent verdicts. The jury in the present case had the opportunity of hearing the appellant Sporle in the witness box, and there has been no suggestion that evidence favourable to the appellant Sporle was given in Mr Smith's trial which was not given in the trial of the appellant Sporle. There are, therefore, no grounds for concluding that the verdict against the appellant Sporle was unsatisfactory.

*The appellants Sporle and Day*

Counts 5 and 6. In April 1965 in the Grosvenor Hotel the appellant Sporle met the appellant Day and one Cameron, employed by John Laing Construction Ltd, from whom the appellant Day stood to receive commission in the event of Laing's being awarded a contract by the council. There was evidence that subsequent to this meeting the appellant Sporle furthered the interest of Laing's until April 1966 when a letter of intent was sent by the council to Laing's with the object of employing them. On 1st September 1966 Mr Brennan, managing director of the company, signed a contract of employment between the company and the appellant Sporle. The appellant Day was out of the country. On 2nd September it was arranged between the appellant Sporle and Mr Brennan that the sum of £500, being the appellant Sporle's fee under the contract, should be paid to the appellant Sporle's wife. Although the letter of intent was not the final contract, and there were further necessary negotiations before the contract was concluded in March 1967, the case was not presented on the basis that the appellant Sporle was being remunerated in September 1966 for any assistance thereafter.

It was contended on behalf of the appellants Sporle and Day that it was necessary in a charge under s 1 of the Public Bodies Corrupt Practices Act 1889 to establish a corrupt agreement for reward in contemplation of future favours, and that a reward ex



post facto unrelated to any such earlier agreement was not enough. It was contended that the judge did not make this clear to the jury. Section 1 (1) of the 1889 Act provides:

'Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.'

There is no doubt that the word 'reward' can be given the natural meaning of a post facto gift without any antecedent agreement.

It was argued, however, that the word 'doing' was the present participle and that to bring within the section a reward made without an agreement which preceded the favour was to construe the verb as though it read 'having done'. A similar argument was directed to the use of the present tense in the phrase 'in which the said public body is concerned'. The court's attention was drawn to the wording of s 1 of the Prevention of Corruption Act 1906, in which the past tense is specifically used in the phrase 'for having after the passing of this Act done or forborne to do any act', etc. However, the specific use of the past participle in that Act was by way of contrast to preceding present participles in order to express Parliament's intention that a reward for a past act without antecedent agreement would only be an offence in respect of an act done after the passing of the Act. It was also pointed out that s 99 (2) (b) of the Representation of the People Act 1949 uses the words 'corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting'. Again this court does not find the reference to the wording of another statute helpful in construing the relevant section in the present case. Section 99 of the Representation of the People Act 1949 sets out in separate clauses the different acts which were made to constitute bribery. A distinction appears in the clause to which counsel referred in that the word 'corruptly' is introduced which does not appear in the other clauses setting out other acts which are made to constitute bribery.

The court does not say that another statute in *pari materia* may not be looked at as an aid to construction in an appropriate case, but when, as in the present case, the court is satisfied as to the meaning on the natural wording of the section it is neither necessary nor desirable to refer to other statutes enacted for different purposes.

This court is of the opinion that it would be unnatural not to give an *ex post facto* meaning to the word 'reward'. It is to be noted that that word is not only used in association with the words 'gift', 'loan', 'fee' and 'advantage' but is repeated in contradistinction to 'inducement' in the phrase 'as an inducement to, or reward for'. The use of the present tense in the phrase commencing with the words 'doing or forbearing to do' is equally applicable to past or future conduct seeing that that phrase is simply descriptive of the nature of the activity for the time being contemplated as the subject-matter of the inducement or reward. This court then is of the opinion that the Act covers receipt of money for a past favour without any antecedent agreement and it was open to the jury to convict both accused on this basis.

However, the judge in fact left the case to the jury on a more favourable basis, for taken as a whole his direction indicated that they should look for an agreement before April 1966. He specifically said:

'of course, if the £500 and any suggestion of any money was not given until after everything was over, and there was no suggestion that he was to have an inducement or reward beforehand that would not be good enough.'

There was in fact ample evidence from which an antecedent agreement could be inferred and consequently this ground for leave to appeal fails.

Counsel for the appellant Day made a number of points on various passages in the summing-up, and contended that the jury had not been reminded of parts of the evidence favourable to his client. The court has carefully considered those submissions, but it has no doubt that the case for the appellant Day was adequately and fairly put.

It was also said that the judge wrongly directed the jury to the effect that the appellant Day would be responsible for the contract signed by Mr Brennan when the appellant Day was out of the country. In the view of this court the judge made it perfectly clear that it was necessary for the jury to be satisfied that the appellant Day, as the judge himself said, 'knew that this was going to be done and was a party to it.'

It was further argued that the judge had wrongly referred to counts 5 and 6 as 'mirror counts' indicating to the jury that they should stand or fall together. It was said that on the facts of the present case this resulted in the jury taking into account the appellant Sporle's activities in relation to the other transactions such as those concerning Ellis and the appellants Andrews Weatherfoil Ltd.

Two counts in an indictment may be so closely connected that an acquittal or conviction on one would appear logically to a layman to lead to an acquittal or conviction on another. The strict regard for the rules of evidence and the burden of proof, however, may lead to different verdicts, as those practising in the courts are well aware. It is consequently undesirable, however closely connected the facts of the two counts may be, for the judge to adopt the expression 'mirror counts'. In cases of corruption it is possible to envisage a bribe being corruptly offered and innocently accepted and possible even the other way round. On the facts of the present case, however, it is impossible to conceive that the £500 was corruptly received by the appellant Sporle unless corruptly given by the appellant Day. The court recognises that the appellant Sporle's conduct on the council in relation to the other accused would be an important factor in the deliberations of the jury, but it is of the opinion that the evidence relating thereto was admissible in the case against the appellant Day.

In the forefront of the case was the allegation that the appellant Sporle was actively engaged in supporting Laing's quarrels with the council. This the appellant Sporle was entitled to do if he was acting with the council's interests in mind, but was not entitled to do if he acted with a corrupt motive. The state of the appellant Sporle's mind was consequently relevant. Evidence of system is admissible for this purpose to show the appellant Sporle's intention and whether his support in the council was proper and innocent on the one hand, or improper and corrupt on the other. In *R v Bond* (1) A T LAWRENCE J said:

'Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least shew that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person.'

One might appropriately add 'or to benefit or reward those from whom he had expectations'. The fact that the conduct was that of the appellant Sporle and not of the appellant Day does not detract from the relevance of the evidence.

(1) [1906] 2 KB 389, [1904-07] All ER Rep 24.

The result is that the appeal of the appellants Andrews Weatherfoil Ltd will be allowed on the two grounds in their notice of appeal and their conviction will be quashed. In relation to the other grounds and to the applications of the appellants Sporle and Day leave to appeal is given and the appeals dismissed.

**LORD WIDGERY CJ:** I now pass to sentence. It is not necessary to deal with the considerations at very great length because they are really all apparent from the judgment which has already been delivered, save only to add that which has been so admirably added by counsel for the appellant Sporle, the very large credit side of the account which the appellant Sporle can claim in view of his long and distinguished record with these local authorities. This is an example of a case, which happily does not arise often, where a man of perfect character who has done a great deal of exceptionally good work for the community commits a serious breach of his trust and eventually stands his trial and is convicted for it. The courts have always, we think rightly, taken the view that such cases must be marked with a substantial sentence of imprisonment. There are many others in the books of recent years of which that can be said.

It is, however, considered that when due regard is had to what I have called the credit side of the account, that a total of six years is excessive and is greater than is merited by the circumstances of this case. We find it unnecessary to say more than that. We accede to that argument; we think it is possible now, having reviewed both sides of the matter, to reduce the sentence on the appellant Sporle to some degree, and in regard to the application for leave to appeal against sentence we shall grant leave to appeal with the consent, which I am sure will be forthcoming, from counsel for the appellant Sporle; we shall treat the application as the hearing of the appeal and in respect of each sentence of 18 months we shall substitute a sentence of 12 months. This will result in a total period of imprisonment of 4 years as against the period of 6 years' imprisonment imposed by the learned trial judge.

So far as the appellant Day is concerned, it is we think obvious that he should be regarded on the same basis as the appellant Sporle in regard to the one incident with which he was concerned, and we shall make a corresponding reduction in his case. Accordingly, we shall grant him leave to appeal against sentence; with counsel for the appellant Day's concurrence we shall treat the application as the hearing of the appeal, and for the sentence of 18 months' imprisonment we shall substitute a sentence of 12 months' imprisonment.

*Orders accordingly.*

*Solicitors: Lawrence, Graham & Co; Kingsley Napley & Co; J R Phillips & Co; Director of Public Prosecutions.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BROWNE AND BRIDGE, JJ)

8th, 9th November 1971

## WALLWORK v ROWLAND

*Road Traffic—Motorway—Hard shoulder—Part of verge—Marginal strip—Part of carriageway—Motorways Traffic Regulations, 1959, regs. 3 (1) (a), (d), (h), (f).*

The hard shoulder of a motorway is part of the verge and not part of the carriageway. The phrase 'marginal strip' in the Motorways Traffic Regulations, 1959, refers, not to the hard shoulder, but to the white line which borders the running surface of the nearside lane.

The appellant was found by the police eating sandwiches in his car which was parked on the hard shoulder of a motorway, a place where under the Motorways Traffic Regulations 1959 a motorist was allowed to stop only in certain specified emergencies. An information was preferred against him charging him with contravention of reg 7 (1), which prohibited a vehicle from stopping or remaining at rest on a carriageway. Before the justices both parties accepted that the expression 'marginal strip' as defined in reg 3 (1) (d) was intended to refer to the hard shoulder. The justices held that the marginal strip was part of the carriageway and convicted the appellant. On appeal,

HELD: that, although the justices had correctly held that the marginal strip was part of the carriageway, the hard shoulder was part of the verge and not of the carriageway; the appellant should have been charged with contravening reg 9 and not reg 7; and, as he had been charged under the wrong regulation, the conviction must be quashed.

CASE STATED by Bolton justices.

On 16th February 1971 an information was preferred by the respondent, John Desmond Rowland, an inspector of police, against the appellant, Hubert Wallwork, that he on 9th January 1971, at Westhoughton in the county of Lancaster did contravene reg 7 of the Motorways Traffic Regulations 1959 in that he did unlawfully cause a motor vehicle to remain at rest on the northbound carriageway of the M61 motorway, contrary to the regulation and s 13 of the Road Traffic Regulations Act 1967. The justices convicted the appellant of the offence charged, for which offence he was adjudged to pay a fine of £5, and he appealed.

N E Beddard for the appellant.

P B B Mayhew for the respondent.

**BRIDGE J:** The appellant appeals against his conviction by Lancashire justices sitting at Bolton of an offence in contravention of the Motorways Traffic Regulations 1959. On 9th January 1971 he was found by the police in a parked motor car on the hard shoulder of the northbound carriageway of the M61 motorway. He was sitting in the motor car eating sandwiches. There is no doubt whatever that there was a contravention of the relevant regulations. One is not allowed to have a picnic on the hard shoulder of a motorway. On any construction of the regulations the hard shoulder is a place where motorists can stop only in certain defined emergencies, and in this case there was no emergency. The question, and the only question, raised by the appeal is which regulation was contravened.

There are two candidates to be considered as the appropriate provision prohibiting the offence which the appellant committed. Regulation 7 (1) provides:

'Subject to the following provisions of this regulation, no vehicle shall stop or remain at rest on a carriageway.'

Regulation 9 enacts that:

'No vehicle shall be driven or moved or stop or remain at rest on any verge except in accordance with paragraphs (2) and (3) of regulation 7.'

These are the provisions which authorise stopping on the verge in an emergency.

What happened here was that the prosecution charged the appellant with a contravention of reg 7. Before the justices and in this court it has been contended for the appellant that he was wrongly charged under reg 7 and should have been charged with contravening reg 9. In other words, the short point for our decision is simply whether, as the prosecution alleged and as the justices decided, the hard shoulder of the motorway is part of the 'carriageway' as defined in the regulations, or whether, as has throughout been contended on the part of the appellant, the hard shoulder is part of the 'verge'.

I go to the definitions in reg 3 (1):

'(a) "carriageway" means that part of a motorway which is constructed with a surface suitable for the regular passage of vehicular motor traffic along the motorway and is distinguishable from the other parts of the motorway by the fact that on each side that part of the motorway either consists of a marginal strip or is contiguous to a raised kerb, but the said expression does not include any part of a central reservation . . . (d) "marginal strip" means a continuous narrow strip of the surface of a carriageway which is at the side of that carriageway and is distinguishable from the rest of that surface by having a colour which is different from the colour of the rest of that surface; . . . (h) "verge" means any part of a motorway which is not a carriageway or a central reservation.'

It is right to point out before going any further that it appears to have been assumed and accepted by all parties before the justices that the expression 'marginal strip' in the regulations was intended to refer to the hard shoulder. On the basis of that assumption it was nevertheless argued for the appellant before the justices that 'marginal strip' was not part of the carriageway. The justices in my judgment rightly rejected that argument. The language which I have just read defining 'carriageway' and 'marginal strip' makes it clear beyond doubt that the 'marginal strip', whatever that may be, is part of the carriageway.

But in this court the argument for the appellant has proceeded on quite a different basis. Counsel for the appellant's submission is that the expression 'marginal strip' as defined in reg 3 is intended to refer not to the hard shoulder, but to what in layman's language one might call the white line which is to be found on any motorway bordering the nearside lane of the running surface of the motorway. It is true that there is no finding in the case as to the presence of such a white line at the relevant part of the M61, but counsel has invited us to look at a picture of a motorway which appears in the Highway Code, and to take judicial notice of what is common knowledge, and that is, I think, our own knowledge as to how motorways are constructed. As I understand it, counsel for the respondent does not resist the submission that we may take judicial notice of a matter of this kind, and may recognise that motorways are constructed with a strip or line, generally rather wider than a lane line or hazard line, marking the near side edge of the running surface of a motorway, and in one sense one might say dividing the running part of the motorway from the hard shoulder. Approaching the matter on the basis that there was such a line here, then counsel for the appellant's submission, as I have said, is that it is to that line and to nothing else that the phrase 'marginal strip' in the regulations refers. Counsel for the respondent on the other hand submits that 'marginal strip' is a wholly inappropriate and incongruous expression to find the draftsman of legislation using



to describe what can conveniently and appropriately be described as a white line or 'longitudinal line', which is the expression used in certain other regulations to which counsel for the respondent has drawn our attention.

If the matter had to be resolved simply on a construction of the language used in the definition regulation, the arguments might be nicely balanced; but happily it does not have to be resolved on that basis alone. To see which construction is to be preferred, it is legitimate, and indeed right, to look at the operative provisions of these regulations, and see which of the two rival constructions contended for accords more readily with the sense and policy of the regulations as a whole.

Regulation 5 provides:

'Subject to the following provisions of these regulations, no vehicle shall be driven on any part of a motorway which is not a carriageway.'

I have already referred to reg 7 (1). Regulation 7 continues:

'(2) Where it is necessary for a vehicle which is being driven on a carriageway to be stopped while it is on a motorway . . . the vehicle shall, as soon and in so far as is reasonably practicable, be driven or moved off the carriageway on to, and may stop and remain at rest on, the verge which lies on the left-hand or near side of that vehicle while it is proceeding along that carriageway in accordance with the provisions of regulation 6.

Paragraphs (a) to (d) of reg 7 (2) define the four types of emergency which make imperative a stop by a motorist on a motorway. Regulation 6 governs the direction of driving.

'(3) A vehicle which is at rest on a verge in any of the circumstances specified in paragraph (2) of this regulation—(a) shall so far as is reasonably practicable be allowed to remain at rest on that verge in such a position only that no part of it or of the load carried thereby shall obstruct or be a cause of danger to vehicles using the carriageway . . .'

Finally, reg 12 provides:

'No person shall at any time while on foot go or remain on any part of a motorway other than a verge except

in certain circumstances which are set out. Counsel for the appellant submits that if 'marginal strip' is construed as referring to the white line on the nearside of the nearside lane of the motorway, then these provisions make sense and accord with every motorist's common understanding as to what parts of the motorway are intended for the passage of traffic and what parts are intended for vehicles which have broken down or stopped in some other emergency. It accords with common sense, he says, and motorists' ordinary understanding that the hard shoulder is available for the broken down vehicle, but is not available or intended for regular use by moving traffic. If, as he points out, the hard shoulder is part of the carriageway, then where there is no verge beyond the hard shoulder, there will be no part of the motorway where a vehicle which has broken down may legitimately remain, even for a short period. He draws our attention to the Highway Code which in terms states:

'If you have a breakdown, get your vehicle off the carriageway on to the hard shoulder so that it does not get in the way of other traffic . . .'

Counsel for the respondent on the other hand boldly submits that the intention of the regulations is in effect that the hard shoulder should not be available for vehicles stopping in an emergency, but should function as what might be called a super slow lane. In my judgment, as soon as one considers these rival arguments, it is plain that there can be only one answer, namely that the hard shoulder of a motorway is part of the verge and not part of the carriageway, and that 'marginal strip' in these regulations is, as counsel for the appellant submits, intended to refer not to the hard shoulder but to the white line which borders the running surface of the near-side lane.

For those reasons I reach the conclusion that, technical as the point may be, this appellant was convicted of the wrong offence. I would allow the appeal and quash the conviction.

**BROWNE J:** I felt great doubt and difficulty about this case, but I do not think I need burden the pages of the law reports with my mental processes, because in the end I have come to the conclusion that I agree with the judgment that has just been given by **BRIDGE J.**, and accordingly I also agree with the result which he proposes.

**LORD WIDGERY CJ:** I also agree with the judgment and with **BRIDGE J.**'s reasons. It may be that part of the trouble in this case is that the regulations were made in 1959 when motorways were still comparatively in their infancy and some the practice and layout has varied slightly since that time. However, the appeal will be allowed.

*Conviction quashed.*

Solicitors: *J B Izod*, for *Adam F Greenhalgh & Co*, Bolton; Solicitor, *Lancashire Police Authority*, Preston.

Reported by *T R Fitzwalter Butler*, Esq, Barrister.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(PHILLIMORE, LJ, PARK AND GRIFFITHS, JJ)

12th November 1971

R v BUSWELL

*Dangerous Drugs—Possession—Lawful obtaining of drugs under doctor's prescription—Mistaken belief of defendant that drugs had been destroyed—Subsequent discovery by defendant of drugs originally supplied—Legality of possession—Drugs (Prevention of Misuse) Act, 1964, s 1 (1).*

The defendant, who was a drug addict, lawfully obtained in November, 1969, 70 amphetamine tablets on a prescription from his doctor. After taking some of them he put, or believed he had put, the remainder in the pocket of his jeans which he placed in a drawer in his bedroom. His mother soon afterwards washed the jeans and the defendant came to the genuine conclusion that the remainder of the tablets had been destroyed. He told his doctor what had happened and obtained a prescription for a further supply. In September, 1970, long after the treatment had been completed, he discovered that the tablets which he believed to have been destroyed were still in the drawer in his bedroom. The police searched the premises and found eighteen of the tablets still in the drawer. The defendant was convicted at quarter sessions of being in unlawful possession of those tablets, contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act, 1964. On appeal,

**HELD:** the conviction must be quashed since (i) the defendant having been originally in lawful possession of the tablets under the doctor's prescription, the possession of the tablets which had not been consumed did not automatically become unlawful once the treatment had concluded; and (ii) the defendant did not cease to be in possession of the tablets which remained in his custody by reason of the fact that he had forgotten their existence or mistakenly believed that they had been consumed; accordingly, the defendant was still in possession of the drugs under the doctor's prescription when he rediscovered them, and that possession was a lawful one.

**APPEAL** by Peter William Buswell against his conviction at Reading Quarter Sessions of unlawfully possessing drugs, contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act 1964.

*I D G Alexander for the appellant.*

*H Wilson for the Crown.*

**PHILLIMORE LJ** delivered this judgment of the court: This is an appeal against conviction by the certificate of the deputy recorder. The appellant appeared at Reading Borough Quarter Sessions on 21st January 1971, and, after he had given his evidence, he was found guilty by the direction of the deputy recorder of unlawful possession of drugs contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act 1964. He was conditionally discharged for two years.

The learned deputy recorder gave a certificate stating that the case

'raises the question of law whether on the facts admitted by the [appellant] his possession of the drugs was lawful or unlawful.'

It is that point we have to determine.

The facts were these. The appellant was a drug addict. It appears that he was for a time under treatment in the Royal Berkshire Clinic, but then, in August 1969, his treatment was transferred from the clinic to his own doctor, a Dr Taylor. From August onwards Dr Taylor was prescribing weekly doses of amphetamine for the appellant on a gradually decreasing scale. The treatment finally concluded in January 1970.

In the course of that treatment, on 11th November 1969, Dr Taylor prescribed 70 amphetamine tablets. We have not seen the actual prescription, but the doctor explained that he anticipated that the appellant, being an addict, would take them all in the course of the week following. It appears that the appellant either put them, or thought that he had put them, in the pocket of his jeans which in turn he put in a drawer in his bedroom. He took a few in the immediately succeeding days. Then on 15th November he discovered that his mother had been through his drawer and washed his jeans. He came to the conclusion—and there does not seem to be any doubt that this was a genuine conclusion—that in washing his jeans she had dissolved the balance of his supply, namely, about 40 tablets. So he went back to Dr Taylor, explained what had happened, or what he believed to have happened, and asked for a prescription to make good his loss. The doctor having checked the facts with the boy's father, who assured him that the story was true, prescribed a new lot of 40 tablets to supplement the loss.

In September 1970, months after the treatment had been completed, the appellant, apparently at his mother's behest, started to clear out his drawer altogether, and in the course of so doing he found his missing tablets. He could not resist the temptation of taking some of them, and then the police had cause to make a search and they found that he had 18 still in his possession that he had not consumed. Hence this prosecution for being in unlawful possession of those tablets.

Of course this was an offence laid under the Drugs (Prevention of Misuse) Act 1964, s 1 (1), which provides, after dealing with possible regulations that,

'it shall not be lawful for a person to have in his possession a substance for the time being specified in the schedule to this Act unless—(a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him, or to a person under his care ...'

Amphetamine is a drug included in the schedule.

What is said by the Crown here and accepted by the deputy recorder, who directed the jury to convict, is that it may be that when he got his original 70 under the prescription, he was lawfully in possession, but they were designed for his treatment, and the tablets which were found in his possession in September 1970 could no longer be said to be lawfully in his possession by virtue of the issue of the prescription because they had been replaced as a result of a new prescription. And it is said that anyhow they were only prescribed for this particular course of treatment and he had no business to be in possession of them once that treatment had been concluded. Finally, and perhaps more important, what is said is that possession involves at least two elements: (i) actual custody of the article, and (ii) a mental element, the fact that one knows that one has got it, what is called 'animus', and so, it is said, inasmuch as the appellant thought that these tablets had been disposed of by being dissolved when the jeans were washed, he then ceased to be in possession of them, albeit they remained in his drawer, and he was not in possession of them until he rediscovered them some nine or ten months later. That, it is submitted, was a rediscovery and a new possession which was not by virtue of any prescription. That is the argument.

This court has been referred to two cases of possession of drugs: one is *Lockyer v Gibb* (1), and the other a case that went to the House of Lords, *Warner v Metropolitan Police Comr* (2). In those cases, a good deal of consideration was given to this question

(1) 130 JP 306; [1966] 2 All ER 653; [1967] 2 QB 243.

(2) 132 JP 378; [1968] 2 All ER 356; [1969] 2 AC 256.

of 'animus'. They were cases which dealt with something very different, i.e., the question whether an article ever came into the individual's possession at all, for example, supposing somebody slipped an article into your pocket and it was there without your knowledge, could it be said to be in your possession? Or if a woman was going along in the street with one of those shopping baskets and somebody put an article into that without her knowledge, could it be said that it was in her possession? Or supposing somebody handed a parcel to you which you believed to contain scent, but which in fact contained drugs, could it be said that those drugs were in your possession?

It seems to this court that that is a very different problem from a case where an article is undoubtedly in your possession and the question is whether, because you forget you have got it or because you think wrongly that it has been disposed of or destroyed, it can be said that it has gone out of your possession, even though it remains physically in a drawer in your house.

As to the argument about the second prescription, as it were, destroying the legality of the first, and the end of the treatment rendering drugs prescribed in the course of it no longer lawfully in your possession, this court thinks nothing of those points. As I have indicated, we have not seen this prescription. There is no reason to suppose that it is stated on the face of it that the drugs prescribed must be consumed not later than a certain date or anything of that sort. Nor indeed that at the conclusion of the treatment the doctor said: 'Well, now, you must hand back any surplus drugs which you may have'. I suppose there are very few households in this country which do not contain a few bottles with some drugs, possibly specified in the schedule, which have not been consumed in the course of treatment but have been kept at the back of the medicine cupboard and completely forgotten. To suggest that a member of the household who received them under a perfectly proper lawful prescription is in unlawful possession once the treatment is concluded seems to this court to be an extraordinary proposition.

Dealing with what seems to be the one real problem here, namely, the question whether drugs lawfully acquired by a prescription in some way pass out of your possession if you forget you have got them or if you think that they have been destroyed, whereas in fact they are still in your drawer, this court thinks that it cannot be said that simply as a result of your mistaken belief or your failure to appreciate that you have got them they have in some way passed out of your possession. It is quite different if I hand something over to someone else to destroy so that it passes from my custody and they officiously put it back in my house without telling me, or if I throw something into the dustbin for disposal by the borough council and some officious person decides that I could not have meant to throw it away and puts it back in my house so that I have it without knowing. In that sort of case you are back on the problem which was dealt with in the cases to which I have referred, i.e., whether something comes into your possession. But if you have got it in your custody and you put it in some safe place, and then forget that you have got it and discover a year or two later, when you happen to look in that particular receptacle, that it is still there, it seems to this court idle to suggest that during those two years it has not been in your possession. It has been there under your hand and control. If it has not been in your possession, in whose possession has it been? Presumably it has not been in a state of limbo. Again with the question of destruction. This court thinks that it is idle to say that if mistakenly you think that someone has dissolved the tablets which you put in the pocket of your jeans, whereas in fact they are still in the drawer, they have in some way passed out of your possession. They have never left your care and control, and accordingly, as I think, remain in your possession.



For these reasons the court thinks that this conviction was entirely wrong. These drugs came into the appellant's possession by virtue of a perfectly lawful prescription. They were in his possession when he rediscovered them, and in his possession still as a result of that prescription. In the judgment of this court in those circumstances this appeal must be allowed and this conviction must be quashed.

*Appeal allowed. Leave to appeal to the House of Lords granted.*

Solicitors: Registrar of Criminal Appeals; J Malcolm Simons, Oxford.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND BRIDGE, JJ)

16th and 17th November 1971

MONTAGUE v BABBS

*Shipping—Pilot—Pilotage district—Offer by licensed pilot—Ship moving from mooring to discharge berth—Pilotage by unlicensed pilot after offer—General offer insufficient—Need of specific offer communicated in relation to particular movement of ship—Pilotage Act, 1913, s 30 (3), s 32—London Pilotage District Bye-Laws, Part IX, byelaw 2.*

The appellant was a waterman licensed by the Port of London Authority, but not a pilot licensed for the London Pilotage District. He piloted a vessel of some 3,647 tons gross and still laden with coal from moorings at Erith buoys to her discharge berth at Ford's jetty, Dagenham, a distance of less than two nautical miles. Both places were within the London Pilotage District. Trinity House Pilot Station, Gravesend, was clearly marked by a sign saying 'Pilots' and by a metal pilot flag, and there were available at the station licensed pilots ready, able, and willing to pilot the ship. The appellant knew of the existence of the pilot station and of the availability of licensed pilots. The station was some nine nautical miles down river from Erith buoys and could not be seen by vessels moving from Erith buoys to Dagenham. Licensed watermen, including the appellant, had for many years piloted ships in similar circumstances. An information being preferred against the appellant charging him with contravention of s. 30 of the Pilotage Act, 1913, he contended that s 30 (3) did not apply to the movement of the ship and did not impose on him the obligation to give way to a licensed pilot by reason of byelaw 2 of Part IX of the London Pilotage District Bye-Laws, made under s 32 of the Act of 1913. The justices convicted the appellant. On appeal,

**HELD:** the conviction must be quashed since (i) no question of a vessel being under the control of a pilot, licensed or unlicensed, could arise when the vessel was deemed not to be 'navigating' in the pilotage district, and the vessel in question was so deemed by virtue of the byelaw made under s 32; (ii) the global offer made by the assembled pilots of the Gravesend pilot station was not a sufficient offer to provide pilotage within the meaning of s 30 (3), since an offer for the purposes of the subsection must be an offer made or communicated in relation to the particular movement of the vessel in question.

*Babbs v Press* (1971), 135 JP 604 applied.

CASE STATED by Beacontree justices.

On 23rd November 1970 an information was preferred by the respondent, Edward Babbs, against the appellant, Raymond Frank Montague, charging that he on 7th June 1970, not being a pilot licensed for the district, piloted the motor vessel Minster from

Erith buoys to Ford's jetty, Dagenham, within the limits of the London Pilotage District after a pilot licensed for the district had offered to pilot the ship contrary to s 30 (3) of the Pilotage Act 1913.

The justices convicted the appellant who appealed to the Divisional Court.

*R F Stone QC and Geoffrey Brice for the appellant.*

*Gerald Darling QC and N Bridges-Adams for the respondent.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices of the petty sessional division of Beacontree sitting at Barking in respect of their adjudication on 24th May 1971. By their adjudication they convicted the appellant of an offence under s 30 (3) of the Pilotage Act 1913, the information against him charging that he on 7th June 1970, not being a pilot licensed for the district, piloted the motor vessel *Minster* from Erith buoys to Ford's jetty, Dagenham, within the limits of the London pilotage district after a pilot licensed for the district had offered to pilot the ship contrary to the section to which I have referred.

The facts found were these. The *Minster* was a motor vessel incoming with a cargo of coal, and at the material time her cargo of coal was still on board. She had in fact been unable to reach her final destination, which was Ford's jetty, Dagenham, owing to the berth being full, and she had secured at Erith buoys short of her destination on that account. The appellant is a waterman licensed by the Port of London Authority. Erith buoys, at which the ship tied up, and her ultimate destination at Dagenham, are both situate between Barking Creek and Gravesend and thus geographically within the London pilotage district. The distance between Erith buoys and the jetty at Dagenham is less than 2 miles, and at all material times there was a Trinity House pilot station at Gravesend. This pilot station was displaying a sign saying 'Pilots' and a metal pilot flag, and the justices found:

'At all material times there were available at the said pilot station licensed pilots who were ready, able and willing to pilot the *Minster* from Erith buoys to Ford's jetty as aforesaid. The said pilot station is some 9 nautical miles down-river of Erith buoys'

In the circumstances, the justices give us a glimpse of the obvious by stating that the station cannot be seen from a vessel moving from Erith buoys to Ford's jetty. Finally they state: 'At all material times the appellant knew of the existence of the said pilot station and of the availability of licensed pilots', but nevertheless piloted the ship to Ford's jetty.

It was contended on behalf of the appellant before the justices that s 30 (3) of the Pilotage Act 1913 was inapplicable to this movement, and did not impose on him the obligation of giving way to a licensed pilot, by virtue of byelaw 2 of Part IX of the London Pilotage District Bye-Laws. That I should read, because it has some considerable relevance. It provides:

'A ship while being moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock in the part of the district between London Bridge and Gravesend shall not be deemed to be navigating in the district, and shall accordingly be exempt from compulsory pilotage provided that between Barking Creek and Gravesend the above exemption shall not apply to ships which are being moved for a distance exceeding two nautical miles.'

The argument for the appellant was that this movement of the Minster came within the exemption provision of that byelaw, and that as a consequence, in the appellant's submission, his obligation to give way to a licensed pilot under s 30 did not arise.

The respondent contended that the byelaw was not applicable, first, on a broad submission that s 30 is independent of the rest of the Act and is not affected by exemptions conferred by the byelaws, and, secondly, on a more limited ground that even if that argument were wrong the movement of the ship from Erith buoys to Dagenham was not a movement within the byelaw, the respondent relying on authority to the effect that a ship which has not yet reached her destination, but has stopped short for some reason, is not within the terms of the byelaw when she makes the final and concluding move to her destination.

The justices accepted the contention of the respondent. In so doing, of course, they accepted that the existence of the pilot station at Gravesend, managed in the manner which they described, was a sufficient offer of a licensed pilot to satisfy the requirement of s 30, and they accordingly convicted the appellant.

The justices' decision was given before these matters were debated in this court in *Babbs v Press* (1). I gave the leading judgment in *Babbs v Press*, and I do not find it necessary or appropriate to repeat now in detail everything which I said on that occasion. I take the liberty of hoping that anyone reading this present judgment will realise that he must read it in the light of *Babbs v Press*.

On that footing three matters have been canvassed before us which require some individual consideration. First of all I should say that in *Babbs v Press* this court rejected the first argument of the respondent to which I referred a few moments ago. In that earlier decision we held that a movement within the terms of the exempting byelaw was a movement to which the restrictions of s 30 did not apply. For my part I would regard myself as bound by the decision in *Babbs v Press*, but in any event, notwithstanding such argument as there has been on the point today, I adhere to that view. I say 'notwithstanding such argument as there has been' because there has been virtually no argument on this point, the court taking the view that it should regard itself as bound by *Babbs v Press*.

I would wish to add a few words only on this point in order to deal somewhat more fully with a point made by counsel for the appellant in that case, to which I fear I did not do justice in the judgment in *Babbs v Press*. It is this. Section 32 of the Pilotage Act 1913, under which the byelaw is made, provides first of all in general terms that a ship being moved within a harbour shall be deemed to be navigating in the pilotage district except so far as byelaws may be made exempting such movements where a ship is changing from one mooring to another or being taken into or out of any dock. The section goes on to provide:

'Provided that a bye-law shall . . . be made for the purpose aforesaid in any pilotage district where any class of persons other than licensed pilots were in practice employed at the date of the passing of this Act for the purpose of changing the moorings of ships or taking ships into or out of dock.'

I read that (and indeed I read it in the course of argument in *Babbs v Press*) as being a provision for the protection of certain classes of men employed on the river who had before 1913 been in the habit of conducting ships in movements of this kind.

The importance of the point is this, that where a movement of a ship comes within the exempting byelaw it is agreed on all hands that what are familiarly called the compulsory pilotage provisions of s 11 of the Act do not apply. Accordingly, where a movement of a ship comes within the exempting byelaw a licensed pilot who presents

himself and offers to take over the ship and who is rejected by the master does not give occasion for prosecution of the master under s 11, because the offence there created, which can be described in general terms as allowing a ship to be moved by an unqualified man after offer by a licensed pilot, cannot arise.

If the argument of the respondent in *Babbs v Press* that these considerations do not apply to s 30 is right, then it seems to me that the protection of s 32 will be wholly nugatory because a waterman conducting the vessel on a movement exempted by the byelaw may be protected from prosecution, as may be the master of the ship, so far as s 11 is concerned, but he will be liable to prosecution under s 30. Counsel for the respondent has been unable to provide any illustration of a movement of a ship in which the protection of s 32 could extend to an unlicensed pilot having regard to his interpretation of s 30. I wish to make it clear that my somewhat brief reference to this point in *Babbs v Press* is really based on that consideration, as it seems to me highly unlikely that Parliament would have given on the one hand in s 32 only to take away with the other hand in s 30.

The second point which arises in the present case is the argument of counsel for the respondent that, even if the byelaw exemption is relevant to this kind of prosecution at all, it is not significant in the present instance as the movement from Erith buoys to Dagenham cannot have been a movement within the terms of the byelaw. This raises an interesting point and one which may give rise to further discussion another day, but, having regard to the view which I take on the third and final point, I find it unnecessary to say anything more about it.

The third point, on which in any event in my judgment this appeal must succeed, is again a point which was raised and dealt with, albeit obiter, in *Babbs v Press*. It arises in this way. The offence charged against the appellant under s 30 (3) is committed only if a licensed pilot has offered his services and the unlicensed pilot nevertheless continues to handle the ship. Accordingly, if the respondent is right on his construction of the Act, it is still necessary in order that he may succeed, for him to show that the justices were right in the view which the justices took that an offer by a licensed pilot had been made in the circumstances found in this case. I content myself by saying that I would repeat everything which I said obiter in *Babbs v Press* on this point. For the reasons which I there gave and which I do not find it necessary to repeat, I am of the opinion that the global offer made by the assembled pilots at the Gravesend pilot station is not an offer within the meaning of s 30 (3) for the purposes of the movement of this ship which is in question in this case. In my judgment that concludes the matter in any event in favour of the appellant, whatever the result of the argument on the other points may be, and I would accordingly allow the appeal and quash the conviction.

**ASHWORTH J:** I agree. I would only say that on the question whether there was an offer to pilot the ship within the meaning of s 30 (3) of the Pilotage Act 1913 I have felt perhaps more doubt than LORD WIDGERY CJ and BRIDGE J, but I agree with the result and with the order which LORD WIDGERY proposes.

**BRIDGE J:** I also agree. Counsel for the respondent's argument that an offer of the services of a pilot by a global advertisement of the location and availability of pilots is effective for the purposes of s 30 (3) of the Pilotage Act 1913 as an offer to all who are de facto aware of it, seems to me to be contrary to the scheme of the 1913 Act. LORD WIDGERY pointed out in his obiter observations on this point in *Babbs v Press* (1)

(1) 135 JP 604; [1971] 3 All ER 654.

the distinction which is drawn in s 30 (4) between the position of the master of a ship employing an unlicensed pilot on an outward bound voyage which will constitute an offence by him if he has not taken reasonable steps to obtain a licensed pilot, and his position on an inward voyage in which he will only commit an offence by employing an unlicensed pilot if he has previously had the offer of a licensed one. For my part I find it impossible to understand how that distinction can validly be drawn if counsel for the respondent's argument is right.

I find further support for the conclusion, as LORD WIDGERY put it in *Babbs v Press*, that an offer for the purposes of sub-s (3) must be an offer made or communicated in relation to the particular movement of the vessel which is in question, in the provisions of ss 43 and 44. Section 43 (1) places on the master of the ship the obligation

'when navigating in circumstances in which pilotage is compulsory under this Act, [to] display a pilot signal, and keep the signal displayed'

indicating that he requires a pilot. Section 44 envisages how the services of a pilot are to be offered to him. I need not read the section. It contemplates a visual signal being made, possibly from a shore station, more likely from a pilot cutter, to a ship which is navigating and displaying the appropriate signal. When the master of the ship has received such a signal he is then to facilitate the pilot getting on board the ship. What is quite clearly not contemplated, to my mind, is the means of offer and acceptance envisaged by counsel for the respondent's argument, namely, an offer by an advertisement which is known to the master of the ship and the unlicensed pilot and acceptance by a telephone message. I agree that this appeal should be allowed on the ground that there was no offer.

Conviction quashed.

Solicitors: *Inglelew, Brown, Bennison & Garrett; Freshfields.*

Reported by T R Fitzwalter Butler, Esq, Barrister.



## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND BRIDGE, JJ)

19th November 1971

## NORTHERN IRELAND TRAILERS LTD v COUNTY BOROUGH OF PRESTON

*Nuisance—Statutory nuisance—Notice of abatement—Failure to comply—Proceedings by local authority—Information laid before justices—Jurisdiction of justices to hear information—Non-compliance with notice of abatement an 'offence'—Information proper method of commencing proceedings despite use of word 'complaint'—Public Health Act, 1936, s 94 (1), (2)—Magistrates' Courts Act, 1952 s 42.*

*Nuisance—Statutory nuisance—Failure to comply—Nuisance order made by justices—Appeal to quarter sessions—Relevant date for considering circumstances of offence—Public Health Act, 1936 s 94 (2).*

Notices under the Public Health Act, 1936, and the Noise Abatement Act, 1960, requiring the abatement of a statutory nuisance arising from excessive noise were served on the appellants who failed to comply with them, and an information was laid on behalf of the respondent local authority alleging that the appellants had made default in complying with the requirement of the notices. The justices adjudged that the complaint (sic) was true and made a nuisance order under s 94 (2) of the Public Health Act, 1936. The appellants appealed to quarter sessions where they took the preliminary point that, as the proceedings had been commenced by information instead of by complaint, the magistrates' court and a fortiori quarter sessions had no jurisdiction to make the nuisance order. Quarter sessions overruled the preliminary point and began the hearing of the appeal. During the hearing the appellants sought to rely on the state of affairs then existing and contended that quarter sessions ought to look at the circumstances of the alleged offence at the date of the appeal and not those at the date of the hearing before the magistrates' court. Quarter sessions ruled against the appellants on this point also, and the hearing was then adjourned. On appeal by the appellants to the Divisional Court,

**HELD:** (i) on the true construction of s 94 of the Public Health Act, 1936, non-compliance with a notice of abatement constituted an offence, and, accordingly, notwithstanding that complaint was described in the section as the correct initiating procedure, an information was, by virtue of s 42 of the Magistrates' Courts Act, 1952, a proper way to initiate the proceedings, and therefore, both the magistrates' court and quarter sessions had jurisdiction to hear the information; (ii) as the appeal to quarter sessions was by way of re-hearing quarter sessions had to consider the appeal in the light of the circumstances prevailing at the time when the order appealed from was made, and so the proper date for considering the circumstances of the alleged offence was that of the hearing at the magistrates' court.

## CASE STATED by Lancashire County Quarter Sessions.

On 26th August 1970 an information was laid on behalf of the respondents, Preston Corporation, before the Preston borough magistrates stating that on 6th February 1970 notices under the Public Health Act 1936 and the Noise Abatement Act 1960, requiring the abatement of a statutory nuisance arising from excessive noise alleged to emanate from the appellants' premises were served on the appellants, and that the appellants had made default in complying with the requirement of the notices in that they had failed within 21 days of the service of the same to abate the nuisance. A summons was issued on 7th September 1970. The information was heard by the Preston borough magistrates on 9th and 23rd November 1970 and they adjudged that the complaint (sic) was true and made a nuisance order under s 94 (2) of the Public Health Act 1936. The appellants appealed to quarter sessions, and as a result of matters arising during the hearing of the appeal they were granted an adjournment and at their request a Case was stated for the opinion of the High Court.

*R J H Collinson for the appellants.*

*M Kershaw for the respondents.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated from Lancashire County Quarter Sessions in respect of two decisions which have been described, not inaptly, as interlocutory proceedings, reached by them when sitting at Preston on 6th-8th April 1971.

The situation which presented itself to the quarter sessions on 6th April was this. On 26th August 1970 an information, and I stress the word 'information', was laid on behalf of the respondents, Preston Corp'n, before the Preston borough magistrates alleging

'that on the 6th February, 1970 a notice under the provisions of the Public Health Act 1936 and the Noise Abatement Act 1960 dated the 5th February 1970 requiring the abatement of a certain statutory nuisance arising from excessive noise emanating from the appellants' premises, namely, the compound situate on the Preston Dock Estate on the southern perimeter of Riversway in the said borough was duly served on the appellants the occupier thereof and that the appellants made default in complying with the requirement of the said notice, namely, within 21 days of the service of the same to abate the said nuisance and to take such steps as might be necessary for that purpose.'

A summons consequent on the information was issued on 7th September 1970.

I think it is not unhelpful to look at the legislation and see the circumstances in which the notice was served. Section 94 (1) of the Public Health Act 1936 provides:

'If the person on whom an abatement notice has been served makes default in complying with any of the requirements of the notice, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the authority shall cause a complaint to be made to the justice of the peace, and the justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.'

That is exactly what happened in this case save only for the fact that the nuisance alleged was a noise nuisance, and the authority for using what one might call s 94 procedure in respect of a noise nuisance is to be found in the Noise Abatement Act 1960,

I will read s 94 (2) of the 1936 Act before proceeding further with the case:

'If on the hearing of the complaint it is proved that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, then, subject to the provisions of subsections (4) and (5) of this section the court shall make an order (hereafter in this Act referred to as "a nuisance order") for either, or both, of the following purposes . . .'

Again I stress the word 'complaint'. The purposes are set out, one being to require the defendant to comply with the notice, the other being to prohibit a recurrence of the nuisance. Then are added these words, 'and may also impose on the defendant a fine not exceeding five pounds', a phrase which again is of some relevance in this matter.

When the matter came before the Preston borough magistrates on 9th November 1970, and later on 23rd November, the justices adjudged that the information was correct. They found, in other words, the existence of the nuisance, they found the service of the notice and failure to comply with the notice, and they accordingly made a nuisance order under s 94 (2). They could have imposed a fine of up to £5, but they did not impose a fine of any amount.

The matter was then appealed to quarter sessions, and, as I have already said, the case came on before quarter sessions on 6th April 1971. Two points were taken. The first point taken by the appellants was one going to jurisdiction. It was contended that whereas s 94 contemplates that proceedings of this kind shall be initiated by complaint, in fact the initiation of the proceedings was by information. It is clear as a fact that that is so, and that an information was used and not a complaint as required by the literal terms of s 94.

It was then contended that that was a fundamental defect in the jurisdiction, that the magistrates had no jurisdiction to make the nuisance order which they had purported to make, and, although logically the proper remedy may well have been an application to this court for certiorari to quash the order, it was agreed between the parties that, if the quarter sessions upheld the contention, a convenient course would be to allow the appeal. The quarter sessions did not uphold the contention, and we have had the advantage of reading a very careful, and if I may say so very helpful, judgment delivered by the chairman. I have had great assistance in reaching a conclusion on this case by considering the chairman's judgment, but I do not propose to try and traverse all the ground which he covered.

Briefly, in my view, this preliminary point should be disposed of as follows. It is perfectly true that the word 'complaint' is used in s 94 to describe the nature of the proceedings on which this application is to be based, and, as was pointed out in argument, at the time when this Act was passed there was a measure of confusion in various statutory provisions of this kind between the use of 'information' and the use of 'complaint' respectively as the initiating course. In 1952 when the Magistrates' Courts Act of that year was passed, this distinction was made very much clearer, because it is quite clear under the 1952 Act that, in general, criminal matters are initiated by information and civil matters by way of complaint, a distinction which was not as clearly made in the Acts passed before that year. One finds in s 42 of the Act of 1952 this provision:

'In any enactment conferring power on a magistrates' court to deal with an offence, or to issue a summons or warrant against a person suspected of an offence, on the complaint of any person, for references to a complaint there shall be substituted references to an information.'

In my judgment there can be no doubt but that the effect of that section is to say that an information should be used in preference to or in substitution for a complaint notwithstanding that an earlier statute uses the word 'complaint', provided of course that the matter being dealt with is an offence.

Argument on this preliminary point thus really turns on whether the failure to comply with the nuisance notice under s 94 gave rise to an offence which was to be enforced by the local authority. If it was an offence, then, notwithstanding that a complaint is described in s 94 as the correct initiating procedure, it would in my judgment mean that an information was proper by virtue of s 42 of the Act of 1952. In deciding whether or not that which was done by the appellants is an offence for the present purposes, I think considerable importance should be attached to the fact that a fine is a possible consequence of failure to comply with the abatement notice. The word 'fine' is characteristic of a penalty for a criminal act, and the fact that Parliament used the word 'fine' to describe the penalty which can be imposed in these circumstances is in my judgment a powerful indication that that which is committed as a result of failure to comply with the notice is an offence for the present purposes.

I am much reinforced in that view by the judgment of LORD GODDARD CJ in *Brown v Allweather Mechanical Grouting Co Ltd* (1). That dealt with an infringement of

(1) 117 JP 136; [1953] 1 All ER 474; [1954] 2 QB 443.

the Vehicles (Excise) Act 1949, the infringement being the showing of one particular type of licence on a vehicle when the vehicle was of a character which required a different type of licence. The point raised in that case was whether a breach of the licensing regulation carried out in that way was a criminal offence which would make the owner of a vehicle liable to prosecution as an aider and abettor of the driver. The facts thus were considerably distant from those of the present case, but there is a statement of principle which I would adopt. LORD GODDARD there said:

'I do not think the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt.'

I would apply that reasoning to the construction of s 42 of the Act of 1952, and would hold that the word 'offence' in that section is appropriately used for a failure to do something prescribed by an Act. Accordingly, whether or not it is in fact a criminal offence, in my judgment the failure to comply with the notice is an offence for present purposes, and that is really an end of the matter as far as the preliminary point is concerned.

I ought, however, in deference to the argument of counsel for the appellants to refer to another provision from which he draws considerable force in the course of his argument. It is the Public Health (Recurring Nuisances) Act 1969. This Act, which has to be read as one with Part III of the Public Health Act 1936, introduces an additional form of remedy available in the course of recurring public health nuisances. It introduces a new form of remedy in the form of a prohibition notice which, on disregard of its contents, gives rise to the hearing of a complaint under s 2 of the Act. Counsel for the appellants argues that the fact that Parliament as late as 1969 is referring to a complaint as being the appropriate method of initiation of what one might call 'public health nuisance cases' is indicative of the fact either that s 42 of the Magistrates' Courts Act 1952 should not have the effect which I have already said in my opinion it has, or, alternatively, should be regarded as having, been to that extent repealed. His contention is that Parliament would not have used the word 'complaint' in an Act of 1969 if it had known that by virtue of the earlier legislation, 'complaint' was to be read as 'information'.

I find very little support for the argument of counsel for the appellants in this aspect of the matter because it seems to me entirely logical and normal drafting that when a new Act is to be read as one with an earlier, it should use the same language as the earlier, in other words, should use words in the same sense as they were used in the earlier. It is as though the provisions of the 1969 Act had appeared as part of the 1936 Act.

Against counsel's argument on this point, on the other hand, I find some considerable reinforcement in the terms of the Criminal Justice Act 1967, which by s 92 makes certain upward adjustments in fines for a wide range of offences. Those offences are specified in Sch 3 to the Act of 1967, and one finds among the offences so listed failure to abate or remove a danger or recurring nuisance under s 94 of the Public Health Act 1936. One there finds Parliament in 1967 regarding a failure to comply with an abatement notice under s 94 as an offence. Accordingly in my judgment the sessions were entirely right to reject the preliminary point and to proceed with the hearing of the appeal.

The second point, which is quite independent of the first, arises in this way. There had, as I have already indicated, been a substantial interval of time between the date when the justices made the nuisance order on 23rd November 1970, and the date when quarter sessions considered the appeal on 6th April 1971. It was not disputed

below or before us that when the matter was before the magistrates' court it was essential for the respondents to show that the alleged nuisance still existed at that time. The phrase in s 94 (2) is: 'If on the hearing of the complaint it is proved that the alleged nuisance exists', and accordingly when the matter was before the magistrates' court, proof was directed to the existence of the nuisance at that date. However, when the matter was opened before quarter sessions it became apparent at an early stage that counsel for the appellants was proposing to relate his argument on the appeal to the situation then prevailing in April 1971. The learned chairman was invited to give a ruling whether that was the correct approach to this case, and he ruled that it was not; in other words, he ruled that on the hearing of the appeal the issue for quarter sessions was whether or not the nuisance had existed on 23rd November 1970, the date when the matter was before the magistrates' court. Counsel challenges that conclusion, and says that the fact that the proceedings at quarter sessions are a rehearing means, in the context of s 94, that one looks to the circumstances prevailing at the date of the rehearing in order to see whether the nuisance exists for present purposes.

For my part I think that the ruling of the chairman to the effect that the relevant date was the date of the hearing before the justices is entirely correct, and is fully supported by another judgment of LORD GODDARD CJ, that in *Rugman v Drover* (1), a case in which a girl had been sent to an approved school at a time when she was under 17 years of age. There was an appeal, and at the date of the appeal she was over 17 years of age. It became relevant, therefore, to consider whether the date on which the decision of the court turned was the earlier date or the later. LORD GODDARD, having referred to the quarter sessions' acceptance of the proposition that the later date was relevant, said:

'That seems to me to be completely wrong. An appeal to quarter sessions is an appeal by way of re-hearing, but that is only a procedural matter, there being no formal record of proceedings in a justices' court. When a case goes to quarter sessions it is re-heard and the person seeking an order must prove the case over again. That means that the appeal committee takes the place of the petty sessions, but it is none the less an appeal, and the order appealed from was properly made so far as jurisdiction was concerned at the time it was made. Quarter sessions have to re-hear the case as in the same state of affairs as those in which the justices below heard it. If the matter could be made any clearer, it seems to me it is only necessary to look at the Summary Jurisdiction (Appeals) Act, 1933.'

Then LORD GODDARD set out the terms of the section.

I consider that it is a statement of general application that when appeals are brought to quarter sessions under the general appellate machinery the quarter sessions have to consider the appeal in the light of the circumstances prevailing at the time when the order appealed from was made. I think that, as I have already indicated, the chairman's view on this second point was the right one, and I would simply dismiss this appeal.

**ASHWORTH J:** I agree. I would only add on the first point that it seems to me that the use of the word 'fine' in s 94 (2) of the Public Health Act 1936 goes a long way to establishing the proposition relied on by the respondents here. This is not the first time that this subject has come before the courts, although in the earlier cases it was the Public Health Act 1875. I note from *R v Whitchurch* (2), which counsel for the

(1) 114 JP 452; [1950] 2 All ER 575.

(2) (1881), 46 JP 134; 7 QBD 534.



appellants referred to, that there was provision in that case for the imposition of a fine, although in fact none was imposed. In the course of the argument counsel for the justices, who were seeking to support the decision below argued:

'It is true that they might have fined the defendant; but they have adopted the alternative remedy and have simply ordered him to abate the nuisance.

'BRETT, L.J. Suppose that a fine had been imposed by the justices; could this case have been distinguished from *Mellor v Denham*? (1)'

That was an earlier authority to which we have been referred and there was no answer. Accordingly, it was there made quite plain that in respect of a nuisance order under the Public Health Act 1875 the wrongdoing which led to the order could properly be regarded as an offence and a criminal matter so long as there was a possibility of imposing a fine. But to complete the matter, in the case to which LORD WIDGERY has referred, I cite from LORD GODDARD's judgment from *Brown v Allweather Mechanical Grouting Co Ltd* (2) where he said:

'It is true that, if the word "penalty", as distinct from the word "fine", is used in a section, the general rule is that the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and a fine always goes to the Crown.'

I have no doubt that the preliminary point taken by counsel for the appellants was rightly rejected and I agree with the result proposed by LORD WIDGERY.

**BRIDGE J:** I agree on both points. On the second point I wish to add nothing. On the first point I am persuaded by the same considerations as have been referred to by ASHWORTH J that an offence in contravention of s 94 (2) of the Public Health Act 1936 is indeed a criminal offence. For my part I think that s 42 of the Magistrates' Courts Act 1952 applies only to criminal offences. The Act of 1952 makes a clear distinction between criminal jurisdiction and procedure on the one hand, and civil jurisdiction and procedure on the other, treating of the first in Part I of the Act and the second in Part II. The criminal jurisdiction of the Magistrates' Courts Act 1952 is invoked by information, as s 1 makes clear at the beginning of Part I; the civil jurisdiction is invoked by complaint as s 43 makes clear at the beginning of Part II. Section 42 of the Act is found at the conclusion of Part I, and when the section provides that in any enactment conferring power on a magistrates' court to deal with an offence on the complaint of any person, for references to a 'complaint' there shall be substituted references to an 'information', I cannot avoid the conclusion that the section is dealing only with criminal offences.

*Appeal dismissed.*

Solicitors: *Vizards*, for *Backhouse, Isherwood, Bennett & Scholes*, Blackburn; *W E E Lockley*, Preston.

Reported by T Fitzwalter Butler, Esq, Barrister.

(1) (1880), 44 JP 472; 5 QBD 467.

(2) 117 JP 136; [1953] 1 All ER 474; [1954] 2 QB 443.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND BRIDGE, JJ)

15th, 16th November 1971

INGLETON v DIBBLE

*Criminal Law—Obstructing constable in execution of duty—Distinction between refusal to act and positive act constituting obstruction—Act not unlawful per se—Defendant required to provide specimen of breath for breath test—Drinking whisky prior to test—Purpose and effect to prevent statutory laboratory test—Police Act, 1964, s 51 (3).*

Although a refusal to act on the part of a defendant cannot amount to the wilful obstruction of a police officer in the execution of his duty under s 51 (3) of the Police Act, 1964, unless the law imposes on the defendant some obligation in the circumstances to act in the manner requested by the police officer, there is no ground for saying that, where the obstruction consists of a positive act, the obstruction must be unlawful independently of its operation as an obstruction of a police officer under s 51 (3) (a).

The defendant, who was driving his car at night, had been stopped by a police constable. Observing that the defendant's breath smelt of alcohol, the constable, in the exercise of his powers under s 2 of the Road Safety Act, 1967, required that defendant to provide a specimen of breath for a breath test. The defendant informed the constable that he had had his last drink only five minutes previously, and it was, therefore, necessary to wait for some time before the breath test could be properly administered. The constable agreed to the defendant in the meantime using a lavatory at his brother's house, which was close by. On his way the defendant met his brother accompanied by a man who had been a passenger in the defendant's car and was carrying a bottle of whisky. The defendant took the bottle from him and drank from it with the intention of making it impossible for it to be ascertained from a laboratory test of any specimen which he might subsequently provide whether the quantity of alcohol which he had consumed before he had ceased to drive was such that he had committed an offence under s 1 of the Act.

**HELD:** the positive act of the defendant in drinking the whisky with the object and effect of frustrating the procedure under ss 2 and 3 of the Road Safety Act, 1967, amounted to a wilful obstruction of the police constable, contrary to s 51 (3).

**CASE STATED** by Folkestone Borough Quarter Sessions.

On 5th April 1971 the deputy recorder allowed an appeal by the respondent, Alan Alexander Dibble, against his conviction by justices for the borough of Folkestone on an information preferred by the appellant, Roy Dennis Ingleton, a chief inspector of police, for having wilfully obstructed a constable in the execution of his duty contrary to the Police Act 1964, s 51 (3). The prosecutor appealed to the Divisional Court.

*Brian Clapham* for the appellant.

*F J M Marr-Johnson* for the respondent.

**BRIDGE J:** This is an appeal by Case Stated from a decision of Folkestone Borough Quarter Sessions given by the learned deputy recorder on 5th April 1971. On 9th February 1971 the respondent, Alan Alexander Dibble, was convicted by a magistrates' court of wilfully obstructing a police constable in the execution of his duty. The respondent appealed from that conviction to quarter sessions. At the hearing before quarter sessions and at the close of the evidence called for the prosecution a submission was made on his behalf that the evidence disclosed no offence in law, and that submission was upheld by the deputy recorder, who accordingly allowed the appeal against the conviction by the justices. From that decision the prosecutor appeals to this court.

The facts disclosed by the evidence called for the prosecution are these. On 15th October 1970 in the early hours of the morning Pc Tully was on duty in uniform in

Folkestone when he saw the respondent driving a motor car which was not showing proper lights. He stopped the respondent and immediately smelled alcohol on his breath, whereupon in the exercise of his powers under s 2 of the Road Safety Act 1967 he required the respondent to provide a specimen of breath for a breath test. Pausing there, no point is taken as to the propriety of that requirement under the Act.

The respondent got out of his car, which was moved away presumably by another police officer. The respondent then told Pc Tully that he had had his last alcoholic drink only about five minutes before, whereupon the officer appreciated that it would be necessary to wait some time before the provision of a specimen of breath for a test. That necessity to wait arose from the circumstance, now widely known, that the manufacturer's directions issued with the Alcotest device used by the police in this country, as approved by the Secretary of State, for taking breath tests, indicate that a specimen given within twenty minutes of the last consumption of alcohol may give a false reading on the device because of alcohol in the mouth. The respondent agreed to wait, but after a little while he asked if he could go to the lavatory. The police constable agreed. They went to a nearby public lavatory which was found to be in a dirty condition. The respondent then suggested that he should go to his brother's house which was nearby and use the lavatory there. Again the police constable agreed. On the way to the brother's house the respondent and the constable met the respondent's brother accompanied by a man who had been a passenger in the respondent's car while it was being driven. The passenger was carrying a bottle of whisky. The respondent took it from him and drank from the bottle. On the basis that that evidence was accepted, the deputy recorder inferred, in my judgment quite rightly, that the respondent deliberately drank the whisky with the intention of making it impossible for it to be ascertained from a laboratory test of a specimen which he might subsequently provide under s 3 of the Road Safety Act 1967 whether the quantity of alcohol which he had consumed before he had ceased to drive was such that an offence under s 1 of the Act was committed. The deputy recorder nevertheless held that that action did not in law amount to a wilful obstruction of the police constable under s 51 (3) of the Police Act 1964.

To understand the submissions made to this court, it is first necessary to remind oneself briefly of the relevant provisions of the Road Safety Act 1967, and of certain decisions of the House of Lords as to the construction of those provisions. It will be remembered that a person commits an offence under s 1 (1) of the Act if he drives a motor vehicle having consumed alcohol in such quantity that the proportion thereof in his blood as ascertained from a laboratory test for which he subsequently gives a specimen under s 3 of the Act exceeds the prescribed limit. The procedure leading to the provision of a specimen which can be tested in the laboratory is laid down, as is now well known, in ss 2 and 3. It begins with a suspicion that the driver has alcohol in his body under s 2 (1) (a), or a suspicion that he has committed a traffic offence while his vehicle was in motion under s 2 (1) (b), or on the other hand with the occurrence of an accident under sub-s (2). Given one of those foundations, a constable may require the driver to provide a specimen of breath for a breath test, and if he either fails to do so or provides a specimen which proves positive, he may then be arrested and taken to the police station where the procedure under s 3 begins. It is unnecessary to go in detail through the procedure under s 3. It is an elaborate procedure leading in the end to the provision by the suspect driver of a specimen either of his blood or of his urine which can be analysed.

The House of Lords has decided in *Rowlands v Hamilton* (1) that on the true construction of s 1 of the Act the quantity of alcohol consumed by a driver before he

ceased driving can be validly ascertained only from a laboratory test within the meaning of s 1 (1) so as to prove an offence under the subsection if the specimen is taken at a time when no additional alcohol has entered the driver's body after he ceased to drive and before the specimen was provided.

The question arose in that case because the accused had been involved in an accident, and, being shaken and shocked as a result of the accident, before the police arrived he went into a public house and drank a quantity of whisky. At his trial for an offence under s 1, the prosecution sought to prove that he had consumed alcohol in the necessary quantity to constitute an offence under sub-s (1) by calling expert evidence to establish that a test of his blood would have shown him to be above the prescribed limit even if his blood had been tested before he drank the whisky in the public house. In other words the expert was saying: Making all allowances proper to be made for the quantity of alcohol consumed after this driver ceased to drive, the laboratory test still shows that before he ceased to drive he was a person who had consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit. The House of Lords, as I have said, held that that was not a legitimate way to prove an offence under s 1. The effect of their Lordships' decision is that as soon as a person who has been driving, after he has ceased to drive, consumes any alcohol, it becomes once and for all impossible to test his blood under s 3 in such a way that the test will be available to prove an offence under s 1.

Counsel for the appellant has also drawn our attention to an earlier decision of the House of Lords which was concerned with the problem arising when a police officer discovers that a suspect driver whom he has stopped and whom he has required to provide a specimen, has had a drink recently, so that some time must be allowed to elapse in order that the breath test shall be valid. This is *Director of Public Prosecutions v Carey* (1), where LORD DIPLOCK advertent to this problem said:

'In any of these cases where a constable believes that the suspect has consumed alcohol within 20 minutes of his being stopped a test conducted by the constable before 20 minutes had elapsed since the suspect's last drink would not be a bona fide use of the device for the purpose of obtaining a reliable indication of the proportion of alcohol in the suspect's blood. But the object of the Act cannot be evaded in this way. The statutory right conferred on a constable by s. 2 (1) of the Act to require a person "to provide a specimen of breath for a breath test" carries with it by necessary implication the right to require that person to remain there or nearby until a "breath test" is completed, even if this means that he must wait there until the effect of recently consumed alcohol has worn off sufficiently to enable him to provide a specimen of breath which when used in the approved device will give a reliable indication of his true blood alcohol level.'

It is in reliance of those two authorities that counsel for the appellant makes his submission that this was a plain case of wilful obstruction of the constable in the execution of his duty. He refers us to the decision of this court approving and adopting an earlier definition of what is necessary to show a wilful obstruction, *Rice v Connolly* (2), where LORD PARKER CJ said:

'To carry the matter a little further, it is in my view clear that to "obstruct" under s. 51 (3) [of the Police Act 1964] is to do any act which makes it more difficult for the police to carry out their duty. That description of obstructing I take from . . . *Hinchcliffe v Sheldon* (3). It is also in my judgment clear that it is part of the

(1) 134 JP 59; [1969] 3 All ER 1662; [1970] AC 1072.

(2) 130 JP 322; [1966] 2 All ER 649; [1966] 2 QB 414.

(3) [1955] 3 All ER 406.

obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.'

So, counsel for the appellant submits, here was Pc Tully setting in motion the statutory machinery under the Road Safety Act 1967 with the object of detecting whether or not the respondent had committed an offence under s 1, and, if so, of obtaining the evidence to bring him to justice therefor. The respondent's act deliberately done with the object of frustrating that procedure not only, so counsel for the appellant submits, in LORD PARKER's language made it more difficult for Pc Tully to carry out his duty, it made it impossible.

Counsel for the respondent, at the end of the argument, accepts, and in my judgment quite rightly accepts, first that Pc Tully was acting in the execution of his duty; and secondly that he was de facto obstructed by what the respondent did in taking the whisky bottle and drinking whisky from it. Counsel for the respondent nevertheless submits that there was no offence under s 51 (3) of the Police Act 1964 because the obstruction was not wilful. The essence of the submission, as I understand it, is that the act which is relied on by the prosecution as constituting the obstruction must in addition to being an act which makes it more difficult for the police to carry out their duty, be unlawful per se, i.e. unlawful as contravening some law independently of the law which prohibits the obstruction of police officers.

Counsel for the respondent has referred to two cases of AA scouts warning passing motorists of police speed traps, *Bastable v Little* (1) and *Betts v Stevens* (2). For my part I do not find that those authorities throw any light whatever on the question which we have to decide. More to the point is *Rice v Connolly* (3) to which I have already referred. That was a case on its facts concerned with a defendant who appeared to a police constable to have been acting suspiciously and the police constable asked him to give his name and address which the defendant refused to do. That refusal was the subject-matter of the prosecution; that was the alleged obstruction of the police constable. Counsel for the respondent relies on a passage from the judgment of LORD PARKER following the passage I have already quoted where he said:

'The only remaining element of the alleged offence, and the one on which in my judgment this case depends, is whether the obstructing of which the appellant was guilty was a wilful obstruction. "Wilful" in this context in my judgment means not only "intentional" but also connotes something which is done without lawful excuse, and that indeed is conceded by counsel who appears for the prosecution in this case.'

LORD PARKER went on to consider whether there was a lawful excuse in the circumstances of that case for the appellant refusing to answer the police officer's question, and refusing to disclose his name and address. LORD PARKER decided that there was; accordingly in the circumstances no offence of wilful obstruction had been committed. He drew a distinction between a person giving false information to a police constable which he thought would clearly amount to an obstruction, and a person declining to give information which he held could not amount to obstruction unless the situation was one in which the law placed him under an obligation to give the information required.

(1) 71 JP 52; [1907] 1 KB 59.

(2) 73 JP 486; [1910] 1 KB 1.

(3) 130 JP 322; [1966] 2 All ER 649; [1966] 2 QB 414.



For my part I would draw a clear distinction between a refusal to act, on the one hand, and the doing of some positive act on the other. In a case, as in *Rice v Connolly* (1), where the obstruction alleged consists of a refusal by the defendant to do the act which the police constable has asked him to do—to give information, it might be, or to give assistance to the police constable—one can see readily the soundness of the principle, if I may say so with respect, applied in *Rice v Connolly*, that such a refusal to act cannot amount to a wilful obstruction under s 51 unless the law imposes on the person concerned some obligation in the circumstances to act in the manner requested by the police officer.

On the other hand, I can see no basis in principle or in any authority which has been cited for saying that where the obstruction consists of a positive act, it must be unlawful independently of its operation as an obstruction of a police constable under s 51 (3) of the Police Act 1964. If the act relied on as an obstruction had to be shown to be an offence independently of its effect as an obstruction, it is difficult to see what use there would be in the provisions of s 51 (3) of the 1964 Act.

In my judgment the act of the respondent in drinking whisky when he did with the object and effect of frustrating the procedure under ss 2 and 3 of the Road Safety Act 1967 clearly was a wilful obstruction of Pc Tully. The learned deputy recorder, in my judgment, erred in upholding the submission of no case which was made to him, and I would allow the appeal and send the case back to quarter sessions with a direction to continue the hearing.

**ASHWORTH J:** I agree.

**LORD WIDGERY CJ:** I agree with the judgment of **BRIDGE J.** Particularly I would emphasise the importance of his distinction between obstruction which is alleged to consist of a default, and obstruction which is alleged to consist of a positive act.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co*, for *A C Staples*, Maidstone; *Worthington-Edridge, Hulme & Court*, Folkestone.

Reported by *T R Fitzwalter Butler, Esq*, Barrister.

(1) 130 JP 322; [1966] 2 All ER 649; [1966] 2 QB 414.

COURT OF APPEAL (CRIMINAL DIVISION)

(STEPHENSON, LJ, THOMPSON AND BRIDGE, JJ)

28th October, 23rd November 1971

R v MORGAN

*Criminal Law—Assisting offender—Indictment—Act with intent to impede arrest—Specification of particular offence committed by principal offender—Need to prove assistant knew nature of offence—Relevance to punishment of state of mind of assistant—Criminal Law, 1967, ss 4 (1), (3), 6 (3).*

By s 4 (1) of the Criminal Law Act 1967: 'Where a person has committed an arrestable offence, any other person who knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence'.

On a charge under this subsection it is not necessary to prove, as it was under the old law, that the assistant knew the nature of the particular offence committed by the principal offender. It is, however, still necessary that the indictment should specify the particular offence committed so that the jurisdiction of the court to entertain it and the maximum punishment to which the defendant would be liable under s 4 (3) may be known from the outset. A count will, however, be sufficient if it states that the principal offender has committed a specified arrestable offence and that the defendant, knowing or believing him to be guilty of that or some other arrestable offence, without lawful authority or reasonable excuse did the act particularised with intent to impede the arrest or prosecution of the principal offender.

APPEAL by Martin Meldrum Morgan against his conviction at the Central Criminal Court of acting with intent to impede the arrest or prosecution of two persons who, it was alleged, had committed an arrestable offence, and against the sentences amounting to fourteen years' imprisonment then passed on him.

N T Salts for the appellant.

D B Watling for the Crown.

*Cur adv vult*

23rd November. **BRIDGE J** read the following judgment of the court: The appellant was convicted at the Central Criminal Court on 15th February 1971 of an offence under s 4 (1) of the Criminal Law Act 1967 which provides:

'Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.'

Three co-accused, Phillips, Walsh and Kiley, were indicted for the murder of one Cunningham. The appellant was charged with the offence under s 4 of the 1967 Act in a second count of the indictment, the particulars alleging that he

'without lawful authority or reasonable excuse... arranged for Phillips and Kiley to stay in a flat with intent to impede their apprehension for the arrestable offence of murder which they had then committed.'

the appellant then knowing or believing them to be guilty of the said arrestable offence.

Phillips and Walsh stabbed Cunningham to death at his flat. Kiley was present, but took no part in the killing. The appellant with knowledge of what had happened provided or arranged a hideout for Phillips and Kiley where the police eventually

found them. At the close of the case for the prosecution Kiley was acquitted by direction of the judge and at some time count 2 against the appellant was consequentially amended by deleting the reference to Kiley. Phillips's defence was that he had been provoked by Cunningham and the jury were invited on his behalf to return a verdict of manslaughter. In the light of this, counsel for the Crown, before the defence of the appellant was presented, proposed to amend count 2. He apprehended that if the count stood unamended and Phillips was convicted of manslaughter, or conversely if the count was amended to refer to Phillips's offence as manslaughter and Phillips was then convicted of murder, it might be technically impossible in either case to convict the appellant. He sought escape from this dilemma by proposing to amend the particulars by substituting 'unlawful killing' for 'murder', and leave to make this amendment was granted. In the circumstances the phrase 'unlawful killing' was no doubt intended and understood as a convenient shorthand to cover murder or manslaughter. In due course Phillips was, in fact, convicted of murder and the appellant was convicted on count 2. The appellant now appeals against that conviction by leave of the full court on the ground that count 2 as amended was defective 'in that there is no arrestable offence of "unlawful killing" known to the law'.

The submission made on behalf of the appellant is that it is essential when charging an offence under s 4 (1) of the 1967 Act to specify correctly the particular offence actually committed by the person whom the accused has assisted. It is common ground that under the old law when charging an accessory after the fact to felony it was necessary to specify both the particular felony which had been committed and that this was known to the accessory. The Act clearly changes the law in the latter respect. Under s 4 (1) it matters not that the assistant does not know the nature of the other person's offence. But we see nothing in the language of the subsection to suggest an intention to change the law so that it should no longer be necessary to specify the particular offence committed. In any event, the later provisions of s 4, in our judgment, really put the matter beyond doubt. Under s 4 (3) a scale of maximum penalties is laid down for offences under sub-s (1), which varies 'according to the gravity of the other person's offence'. Thus, for example, to assist a murderer carries a maximum of ten years' imprisonment; to assist a manslaughterer a maximum of only seven years. Again, by s 4 (5) it is the character of the offence committed by the person who receives assistance which determines whether or not the assistant may be tried summarily. It must follow that the actual offence needs to be specified in the charge so that the court's jurisdiction to entertain it and the maximum punishment to which the accused will be liable on conviction may be known at the outset. Accordingly, counsel for the appellant makes good his complaint that count 2 as amended was defective. The next question is whether this irregularity led to any miscarriage of justice.

We have heard argument as to what steps in relation to the appellant ought to have been taken to cover the contingency that Phillips might be convicted of either murder or manslaughter. Counsel for the appellant at one stage submitted that the contingency could only be met by alternative counts. He said that at the stage of this trial when the question arose, it was too late to amend the indictment to introduce a new count against the appellant. In the end, however, counsel on both sides before us have accepted that in truth no amendment was necessary, because the situation was covered by s 6 (3) of the 1967 Act, which provides, so far as material:

'Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly

or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence . . .'

This language is applicable to the situation envisaged because the allegation 'A having killed B with intent (murder) you, X, assisted A' obviously includes the allegation 'A having killed B without intent (manslaughter), you, X, assisted A'.

Accordingly, if the court had been referred to s 6 (3) instead of being asked to allow the offending amendment, the jury could have been properly directed to convict the appellant, if satisfied (i) that Phillips was guilty of murder or manslaughter, (ii) that the appellant knew or believed that Phillips was guilty of one or other of those offences or of any other arrestable offence, and (iii) that the appellant assisted Phillips with intent to impede his apprehension. In fact, the directions given by the learned judge to the jury in relation to count 2 as amended were in substance either to that effect or (insofar as they differed) to an effect more favourable to the appellant. The vice of uncertainty or ambiguity in the amended count was of no practical consequence, because the jury's verdict that Phillips was guilty of murder on the first count made clear for the purposes of s 4 (3) the scale of gravity of the appellant's offence of assisting him. The appellant was in no way prejudiced by the circumstance that the route to his conviction was technically a deviation. The correct route, had it been followed, would inevitably have led to the same result. In our judgment there was no miscarriage of justice. We uphold the conviction.

We wish to refer to a further submission made by counsel for the appellant. He says that in any case under s 4 (1) the court must know before passing sentence not only what offence was committed by the person assisted, but also what the assistant knew or believed it to be, and to this end, he submits, the jury must be asked for a special verdict. We cannot accept this. It appears to us that the deliberate policy of the legislature embodied in s 4 is that those who assist fugitives from justice act at their peril. The graver the fugitive's offence the heavier is the punishment to which the assistant renders himself liable irrespective of his state of knowledge. We do not, of course, mean to imply that the state of mind of the accused may not be a material factor in mitigation or that the court might not in an exceptional case think it useful to invite the jury to return a special verdict on the point. But this cannot be the norm and it was wholly unnecessary in the present case.

It is fair to add, however, that counsel for the appellant's submission on this point derives some support from the actual form of the indictment, which, by alleging that the appellant acted with intent to impede Phillips's apprehension 'for the arrestable offence of murder', appeared to make the appellant's knowledge of the nature of the offence material. This allegation went beyond what was necessary to prove an offence under the subsection. A count in an indictment particularising an offence under s 4 (1) will be sufficient if it states that the other person has committed a specified arrestable offence and that the accused, knowing or believing him to be guilty of that or some other arrestable offence, has without lawful authority or reasonable excuse done the act particularised with intent to impede the other person's apprehension or prosecution. For the reasons stated earlier in this judgment, the appeal against conviction is dismissed.

[The court then heard submissions on appeal against sentence.]

**STEPHENSON LJ** delivered this judgment of the court on sentence: The appeal of the appellant against conviction having been dismissed, we now have to consider whether the appeal against sentence should be allowed, and we think it should. The sentences passed on this appellant were for four years for the offence of assisting two villains who were convicted of murder, three years for burglary, and

seven years for robbery, all consecutive. In passing that total of 14 years on this 19 years' old appellant, the judge said:

'I simply pass the appropriate sentence for each of the three offences which, in my view, should be consecutive sentences because each offence followed upon but was independent of the other. The sentence on the count of the indictment relating to the theft in Sussex of weapons is three years' imprisonment, the sentence for going and taking part in the armed robbery afterwards is seven years' imprisonment, consecutive, and the sentence for trying to hide two brutal murderers is four years' imprisonment. They will be consecutive sentences, making fourteen years'

Counsel for the appellant has stressed on us the youth of this appellant, the fact that he comes from a home where his brothers, much older than himself, have been involved in serious trouble with the criminal law, and his statement that all he was doing as regards the first offence was helping a friend or friends. This court does not wish to go again into the facts of the offences. Suffice it to say that the offences of burglary and robbery were grave offences, and this court cannot do other than take a very serious view in these days. Of the offence of assisting a murderer or murderers to avoid apprehension, even if friendship is the principal motive, this court finds it impossible to thwart the logic of the trial judge. Looked at logically, this court thinks that of these sentences, each is individually right and ought to be made consecutive. But bearing in mind the matters which have been urged on us by counsel for the appellant, in particular the youth of the appellant, this court thinks that the right course is to make the sentences for the burglary and robbery concurrent, but consecutive to the sentence of four years for the offence of assisting the murderers, with the result that the total period of the appellant's imprisonment will be reduced from fourteen years to one of eleven years' imprisonment, still a long sentence, but it is for three very serious crimes. The appeal against sentence will be allowed to that extent.

*Orders accordingly.*

Solicitors: *Sampson & Co; Director of Public Prosecutions.*

Reported by T. R. Fitzwalter Butler, Esq, Barrister.

### FAMILY DIVISION

(SIR GEORGE BAKER, P AND REES, J)

21st, 22nd July, 13th October 1971

COLLISTER v COLLISTER

*Husband and Wife—Maintenance of wife—Provisional maintenance order—Jurisdiction—Husband resident and matrimonial offences alleged to have been committed outside United Kingdom—Wife ordinarily resident in England—Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1)—Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a).*

*Child—Custody—Order—Jurisdiction—Application for provisional maintenance order—Power of court to make order—Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1).*

By s 3 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, it was provided that provisional maintenance orders might be made against persons resident in British dominions outside the United Kingdom.



A wife applied to a court of summary jurisdiction at M for a provisional maintenance order against her husband who was resident in the Isle of Man where she had been married to him and lived with him after the marriage and where, she alleged, he had been guilty of cruelty and constructive desertion. She had left her husband and become ordinarily resident at M, within s 1 (2) (a) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

**Held:** the court at M had jurisdiction to entertain the complaint.

**PER CURIAM:** There is no power on an application under s 3 (1) of the Act of 1920 for the court to make an order for the custody of a child.

**APPEAL** by the wife against an order made by Manchester justices dismissing her application for a provisional maintenance order under s 3 (1) of the Maintenance Orders (Facilities for Enforcement) Act 1920, against her husband who was resident in the Isle of Man.

*I T R Davidson* for the wife.

*M L Brent* for the husband.

*Cur adv vult*

13th October, 1971. **SIR GEORGE BAKER P** read this judgment of the court: This is an appeal against the dismissal by the Manchester justices on 18th December 1970, of what is described in the heading of the notes of evidence as an

'application for a provisional maintenance order under the provisions of the Maintenance Orders (Facilities for Enforcement) Act 1920, on the grounds of cruelty and constructive desertion.'

The memorandum of dismissal entered in the register of the court describes the matter of complaint as: 'Application for a provisional maintenance order on the grounds of cruelty and desertion'. It is important to see exactly what the justices were dealing with, because the notice of appeal first refers to the dismissal of

'the applicant's application for a provisional maintenance order on the ground of cruelty and for custody and maintenance of the child Diane'.

Then it asks this court

'to make a provisional order on the ground of cruelty, or alternatively on that of desertion, and for custody and maintenance of Diane, or in the alternative to remit the matter to the said justices for re-hearing and determination by them.'

Having heard this appeal on 21st and 22nd July 1971, we intimated that the appeal would be dismissed and that we would give our reasons at a later date.

The Maintenance Orders (Facilities for Enforcement) Act 1920, which we will refer to hereafter as 'the 1920 Act', provides by s 3 (1):

'Where an application is made to a court of summary jurisdiction in England or Ireland for a maintenance order against any person, and it is proved that that person is resident in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such part of His Majesty's dominions as aforesaid.'

A right of appeal against a refusal to make such a provisional order is given by s 3 (6) of the 1920 Act.

The expression 'maintenance order' is defined in s 10 as

'an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made'.

'Dependants' are there also defined as

'such persons as that person is, according to the law in force in the part of His Majesty's dominions in which the maintenance order was made, liable to maintain'.

We are not satisfied that the justices understood that they had before them, or adjudicated on, the issue as to the custody of and maintenance for the child, Diane, born on 30th December 1962, who was living with the wife in Manchester. The absence of any reference to the custody or maintenance of the child in the description of the nature of the application in the heading of the notes of evidence and in the memorandum of dismissal in the court register, taken together with the fact that the justices' reasons are likewise silent on the point, in our opinion fully justify the conclusion which we have expressed above. In our judgment this conclusion is well founded notwithstanding that the wife in the course of her evidence is recorded as having said: 'The child is with me and I apply for custody', and produced the birth certificate.

In the last of the additional grounds of appeal, it is said that the justices were wrong in not committing custody of the child of the family to the wife even though they dismissed her application in her own behalf, but there is no power on an application under the 1920 Act for the court to make an order for custody of a child. As counsel well put it, there can be no export of a custody order. In any event, no court could have made a custody order on the information available in this case. If, however, the court of summary jurisdiction has power apart from the 1920 Act to make a custody order in respect of a child so as to render that child a 'dependant' whom the husband is liable to maintain, then the machinery of the 1920 Act may be set in motion to enforce a maintenance order in respect of such child: see by analogy *Harris v Harris* (1) in which a Divisional Court of the Probate, Divorce and Admiralty Division upheld such an order made under reciprocal Australian legislation and enforced in England. That concludes the matter of the child.

The brief undisputed facts of the case are that the parties were married on 15th April 1965 in the registrar's office in Douglas, Isle of Man, in the terms of the Acts of Tynwald. They lived together in Douglas until 15th June 1970, when the wife left the husband, stayed two or three weeks in the Isle of Man, and then took herself, with the child, to Manchester. The wife's complaints, as given in her evidence, are that the marriage had never been happy, that in 1968 there had been a quarrel about her going out with girls, and that in March 1969, when she again went out, she was locked out. There was a fight and she was told that if she went out like that again she would have to get out of the house. Later that year she again went out with a girl called Pamela Crellin, aged 19, got home about midnight, and found that she had been once more locked out of the house. She stayed away for some three weeks, and then returned and got into the house by using her own key. In June 1970 she again went out with Pamela Crellin, and was once more locked out. On the following day she broke down the door, but when she entered her husband, so she said, hit her and bruised her. She left, staying for a week with Mr and Mrs Crellin, Pamela's parents, stayed three weeks with friends, and finally went to live in a flat in Manchester in the same house as that in which Mr Crellin—who appears to

(1) 113 JP 495; [1949] 2 All ER 318.

have left Mrs Crellin—is living. The wife is about 33 or 34 years of age. Mr Crellin, who was a verger at a church in the Isle of Man, gave evidence that there had been no improper behaviour between them, but, perhaps not surprisingly, the husband, clearly suspected adultery. He wrote a number of very strongly worded letters at the end of 1970, containing numerous threats and allegations.

The justices did not accept the wife's evidence. They say in their reasons:

'In this particular case we are at great disadvantage in only being able to hear the evidence of the [wife] and her witness, but at the outset must say that we feel unable to accept the truth of the evidence either of them gave before us. The [wife] in particular was most hesitant and, it almost seemed, reluctant to give full details of the allegations she was making against the husband, and we feel unable to attribute this solely to nervousness.'

They then dealt with the various allegations made by the wife, found her statement that she went out with Pamela Crellin, a girl of 19, incapable of belief, and came to the conclusion that the husband was bound to draw the inference that there was an association with Mr Crellin. They concluded:

'Taking all the above factors into account, we feel that the [wife] is the author of her own misfortunes and accordingly dismiss her application.'

Counsel for the wife has argued the appeal on the facts of the case with great clarity and skill, but we cannot see any reason for upsetting the clear conclusion to which the justices came. They saw the two witnesses and read the letters, and they alone were in a position to judge whether they could accept the truth of the evidence given to them. They did not accept that evidence. The decision whether to accept or reject is the primary function of justices. It is quite impossible for us to say that they must, or, indeed, ought to have, come to any other conclusion in this case. Finally, note the words of s 3 (1) of the 1920 Act: 'the court may . . . if after hearing the evidence it is satisfied of the justice of the application, make any such order'. The court was not satisfied of the justice of this application, and that was the end of the matter.

This case, however, raises an interesting and important question, which has been fully argued before us and on which we consider we ought to state our opinion. It is whether the court has in any event jurisdiction on such an application as this to make an order against a man who not only is not, but never has been, resident in England or Wales or within the ordinary jurisdiction of the court.

It is at first sight a somewhat surprising proposition that a lady can come to Manchester (or elsewhere in England or Wales) from any of the many territories to which the 1920 Act extends (see Rayden on Divorce, 11th edn, pp 2044, 2045), and obtain from the justices a provisional order against her husband with whom she has always hitherto lived in that territory and who has always been and still remains there. She may have arrived from Christmas Island, or the Falkland Islands, or the Niger Delta, not from the Isle of Man. If, as is possible, legislation is passed with a view to ratification by the United Kingdom of the United Nations Convention of 1956 on the recovery abroad of maintenance, the catchment area could become almost universal. The question does not appear ever to have been directly decided, and we understand that such orders have from time to time been made.

The only textbook reference that we have been able to discover is in Bromley's Family Law (3rd edn, 1966, p 236; 4th edn, 1971, p 148: 'A magistrates' court has no jurisdiction if the defendant resides outside the United Kingdom . . .'). *Macrae v Macrae* (1) is cited as authority, but the text does not mention the 1920 Act, and it is true that

(1) 113 JP 342; [1949] 2 All ER 34; [1949] P 397.

except where the 1920 Act applies a maintenance order cannot be made where the defendant is resident outside the United Kingdom since the summons cannot effectively be served on him.

Section 3 of the 1920 Act is silent about jurisdiction, but it is plain that the 'application' for a 'maintenance order' therein referred to is an application made pursuant to the jurisdiction and powers of the court of summary jurisdiction to which the application is made.

The 1920 Act enables such an order to be made against the defendant who is resident at one of the places outside the United Kingdom to which the 1920 Act has been extended and who is absent when the order is made, and the Summary Jurisdiction Acts are applied to those proceedings by s 7 of the Act. Accordingly, a complainant seeking a provisional order under s 3 of the 1920 Act must establish that the court to which the application is made has jurisdiction and power to make the order sought, and also that, being absent when the hearing takes place, the defendant is resident in one of the places to which the Act extends. The object of the 1920 Act is to provide reciprocal arrangements to enforce maintenance orders against persons resident in the places to which the Act has been extended, but living outside the territory of the court making the order. No provisions for the service of process on the defendant are included and, indeed, the court may only make the order 'in the absence' of the person against whom it is sought.

The interests of the defendant are protected by the elaborate provisions of s 3 (2) (5) inclusive. It is unnecessary to set out these provisions in detail, and it is sufficient to emphasise that the order made in the first instance is provisional only, and of no effect unless and until confirmed by an order of the court in the place where the defendant resides.

When the 1920 Act was passed, the jurisdiction of the court to which the application was to be made was governed by s 4 of the Summary Jurisdiction (Married Women) Act 1895 ('the 1895 Act'). This section restricted the jurisdiction to the petty sessional area (i) in which the husband had been convicted of a specified assault on the wife, or (ii) in which the wife's cause of complaint against him (i.e., the matrimonial offence) wholly or partially arose. This remained the position until 16th December 1949 when the Married Women (Maintenance) Act 1949 was passed ('the 1949 Act'). It was during this period and while the jurisdiction was thus restricted by the, as yet, unamended provision of the 1895 Act that the two cases of *Forsyth v Forsyth* (1), and *Macrae v Macrae* (2) were decided by the Court of Appeal. In each of these cases however, the husband resided in Scotland, and therefore the 1920 Act did not apply, since he did not reside 'outside the United Kingdom' (see s 3 of the 1920 Act). Accordingly, the Court of Appeal did not consider—nor is there any reference to—the provisions of the 1920 Act in the report of either case. In the *Forsyth* case there is only a possibility that the husband's desertion arose partly in England. In the *Macrae* case the husband certainly deserted the wife within the jurisdiction of the court which issued the summons. SOMERVELL LJ said:

'The fact that the desertion took place in England and that he was ordinarily resident in England up to a short time before does not seem to me to affect the matter. Ordinary residence... can be changed in a day.'

Therefore, at least in the *Macrae* case, the requirements of s 4 of the 1895 Act as to jurisdiction were satisfied, because the cause of complaint initially arose within the jurisdiction of the English court. But the complainant failed in the *Macrae* case on the basis of the principle stated in the *Forsyth* case, namely, that unless the

(1) 112 JP 60; [1947] 2 All ER 623; [1948] P 125.

(2) 113 JP 342; [1949] 2 All ER 34; [1949] P 397.

defendant was ordinarily resident or 'resident'—or possibly merely 'present'—in England when the summons was issued, there was no jurisdiction. In *Forsyth v Forsyth* BUCKNILL LJ cites with approval the following passage from Dicey's *Conflict of Laws*, 5th edn, p 403:

'presence is enough, or in other words . . . residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced.'

BUCKNILL LJ in the *Forsyth* case, without deciding the point, was 'disposed to think' that the mere presence of the defendant within the jurisdiction when the summons is issued is sufficient. Of course, if there were no jurisdiction the use of mere procedural provisions as to the issue and service of process cannot confer it. The result, therefore, of the *Forsyth* and *Macrae* cases, taken together, may properly be said to be that even though the cause of complaint may have arisen within the jurisdiction of the court, it has no power to adjudicate when the defendant is not resident—or possibly not even 'present'—within the jurisdiction when the summons was issued and served, and a fortiori when he is ordinarily resident outside it and has never resided within it. In his statement of the principle in *Berkley v Thompson* (1) LORD SELBORNE LC recognised that a person resident abroad may be brought within the jurisdiction by 'special statute or legislation'. He said:

'not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is prima facie not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it.'

Section 6 of the 1949 Act amended the 1895 Act by giving jurisdiction to the court of summary jurisdiction for the area in which the married woman or the husband 'ordinarily resides', as well as to the court within whose area the cause of complaint wholly or partially arose. This amendment would not, by itself, have affected the decisions in the *Forsyth* (2) or *Macrae* (3) cases, because the principle excluding jurisdiction in those cases was effective even where—as in the *Macrae* case—the cause of complaint arose wholly within the jurisdiction. But s 1 of the Maintenance Orders Act 1950 expressly gave an English court jurisdiction to make a maintenance order against a man residing in Scotland or Northern Ireland provided the applicant wife resided in England and the parties last ordinarily resided together as man and wife in England. This statute certainly would have given jurisdiction in the *Macrae* case, but not in the *Forsyth* case.

In the light of the foregoing, we must now consider whether the magistrates' court at Manchester had jurisdiction to entertain this application for maintenance apart from the facts proved that the husband was resident in the Isle of Man and was absent at the date of the hearing. The jurisdiction is now to be found consolidated in s 1 (2) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 ('the 1960 Act') which (in addition to the place where the husband was convicted of an assault on his wife) gives jurisdiction to the court for the petty sessional area where either the complainant or the defendant 'ordinarily resides', or in which the cause of complaint wholly or partly arose. The wife's case undoubtedly was that at the material time she 'ordinarily resided' within the petty sessional area of the city of Manchester.

(1) 1884, 49 JP 276; 10 App Cas 45.

(2) 112 JP 60; [1947] 2 All ER 623; [1948] P 125.

(3) 113 JP 342; [1949] 2 All ER 34; [1949] P 397.



It was assumed throughout the hearing of the appeal before us that there was evidence on which the magistrates could find that they had jurisdiction on the basis that the wife 'ordinarily resided' within their petty sessional area. It is not, therefore, necessary to consider the quality of her residence or the decisions dealing with that point, such as *Matalon v Matalon* (1) or *Lowry v Lowry* (2). The requirements of s 3 of the 1920 Act were also satisfied, because it was proved that the husband was resident outside the United Kingdom and in a part of Her Majesty's dominions to which the Act extends—namely the Isle of Man—and was absent at the date of the hearing. Prima facie, therefore, all the conditions necessary to give the court jurisdiction were satisfied. No difficulties as to the service of process on an absent defendant, such as arose in the *Forsyth* (3) or *Macrae* (4) cases, existed because of the provisions of the 1920 Act. The crucial question is whether the terms of the 1920 Act, taken together with those of the 1960 Act, constitute (in LORD SELBORNE LC's phrase) a 'special statute or legislation' which bring the defendant within the jurisdiction of the court concerned, or whether some other essential requirements not expressed in the statute must also be satisfied.

Clearly, unless the express terms of the 1920 Act are to be ignored, the conditions stated in the *Forsyth* case that the husband must be ordinarily resident or, at least, present in the jurisdiction where the summons was issued cannot apply—because the whole basis of the statute is that he is not only resident abroad but actually not present when the application is heard. Is a condition to be implied that the cause of complaint, e.g. the alleged cruelty or desertion, shall have wholly or partly arisen within the jurisdiction, that is in England or Wales? If so, then the 1949 Act must have been intended only to enable a wife, who had moved from one petty sessional area (e.g. Bristol) in which her cause of complaint arose to another (e.g. Manchester) to take out a summons in and have her case heard in Manchester. Before the 1920 Act was passed there was the essential condition arising from s 4 of the 1895 Act that the wife might

'apply to any court of summary jurisdiction acting within the city, borough, or petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen'

That was her sole remedy and means of enforcement. That was the only jurisdiction the magistrates possessed, and, of course, it follows that the cause of complaint must have arisen in England or Wales. However, from December 1949 up to the present time the jurisdiction has remained extended so as to include the petty sessional area in which the married woman or the husband ordinarily resides, irrespective of where the cause of complaint arose. Section 1 (2) of the 1960 Act is clearly disjunctive.

No case was cited to us nor have we been able to discover any authority which decides the point whether it is an essential condition of the exercise of the power to make an order under s 3 of the 1920 Act that the cause of complaint shall have arisen wholly or partly within the petty sessional area of the court to which the application is made. But the point did arise and was considered by a Divisional Court of the King's Bench, consisting of LORD HEWART CJ, AVORY and HUMPHREYS JJ in relation to the reciprocal South African legislation in *Re Wheat* (5). In that case a wife resident

(1) [1952] 1 All ER 1025; [1952] P 233.

(2) 116 JP 243; [1952] 2 All ER 61; [1952] P 252.

(3) 112 JP 60; [1947] 2 All ER 623; [1948] P 125.

(4) 113 JP 342; [1949] 2 All ER 34; [1949] P 397.

(5) 96 JP 399; [1932] 2 KB 716; [1932] All ER Rep 48.

in East London in South Africa in July 1931 obtained a provisional order for maintenance for herself against her husband, a doctor, then resident and domiciled in England, pursuant to a statute of the legislature of the Union of South Africa, Act No 15 of 1923. This statute enacted reciprocal provisions to the English Act of 1920. The order was made on the ground of desertion. A metropolitan magistrate in November 1931 confirmed the provisional order (subject only to a reduction in the amount) pursuant to the powers given by s 4 of the 1920 Act. The husband appealed to the Divisional Court, *inter alia*, on the ground that it was an essential requirement of South African law to found jurisdiction that the husband's desertion should be proved to have taken place in South Africa, and that there was no evidence of such desertion. The considered judgment of the court was delivered by HUMPHREYS J, who said this:

'In the year 1923 the legislature of the Union of South Africa enacted such reciprocal provisions by Act No. 15 of 1923 of the statutes of South Africa, and s. 4 of that Act enables a magistrate's court in the Union to which application is made for a maintenance order against a person resident in England to make, in the absence of that person, "any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing," but provides that such order shall be provisional only and shall have no effect until confirmed by a competent court in England. This Act affords no guide as to the jurisdiction of a magistrate's court to make a maintenance order in any particular case, and we are thrown back upon the language of Act No. 7 of 1895 to ascertain whether the order in this case is one which the court "might have made" under that Act.'

The provisions of s 4 of the reciprocal South Africa Act 15 of 1923 appear to be similar in all relevant respects to s 3 of the 1920 Act, and likewise silent as to the jurisdiction to make the order for which application was made. Accordingly, the Divisional Court turned to the South Africa Statute No 7 of 1895, which gave power to a South African magistrate to make a maintenance order in favour of a deserted wife. The relevant parts of this Act are set out in the report and need not be repeated. By s 2 jurisdiction was given to the resident magistrate in the district in which the wife resided in these terms:

'When any husband unlawfully deserts his wife or leaves her without means of support . . . if complaint thereof be made on oath to the resident magistrate of the district in which such wife . . . shall . . . reside . . . such resident magistrate'

may initiate the procedure leading to the making of the order. The metropolitan magistrate's view on this point of jurisdiction and the Divisional Court's opinion thereon are stated in the following passage of the judgment:

'Upon the third point the opinion of the learned magistrate is stated in para. 7 (d) of the Case as follows: "That the jurisdiction given by Act No. 7 of 1895 is not in the district in which a husband deserts or leaves his wife destitute, but in the district in which the wife (who has previously been deserted or left destitute, whether in that district or elsewhere) resides at the time of making her complaint." This court must not be taken to assent to that proposition of law in the form in which it is expressed, but in our judgment the decision of the learned magistrate may be supported on other grounds.'

The 'other grounds' on which the Divisional Court supported the decision of the metropolitan magistrate were based on a finding of fact and law that 'the wife was

deserted and left without means of support in East London'; that is, within the area of the court in South Africa which made the order.

The Divisional Court were not considering the English Acts of 1920 or of 1895, nor is their decision a binding authority on the point we have to decide. If they had considered the point in its relation to English law, the only conclusion they could have reached was that it was an essential requirement that the desertion or other cause of complaint must have arisen wholly or partly within the area of the court making the order, because in 1931 that was the sole ground giving jurisdiction under the English 1895 Act (except the place of conviction of the husband for assault).

The cruelty alleged by the wife took place, if at all, in the Isle of Man, and the inception of the alleged constructive desertion also took place there. There was evidence which, if accepted, and taken together with the husband's letters, might have supported a finding that desertion being a continuing offence, also arose while the wife was in Manchester. This aspect of desertion is fully considered, together with some of the authorities in the judgment of the court in *Re Wheat* (1). As stated earlier the point plainly does not arise for decision before us, but in deference to the arguments addressed to us, and in view of the importance of the issue, we have thought it right to express an opinion on it. We are of opinion that, provided the complainant wife satisfies s 1 (2) (a) of the 1960 Act by proving that she or her husband ordinarily resides within the petty sessional area for which the court acts, that court has jurisdiction, notwithstanding that the cause of complaint arises wholly outside the area of that court, and even outside England or Wales altogether. No authority requires us to hold otherwise. Section 1 (2) of the 1960 Act specifies alternative grounds on which jurisdiction may be based, and to imply any condition such as that suggested involves disregarding the terms of the Act. No aspect of public policy seems to us to demand a different approach. The defendant's interests are protected by the machinery of the 1920 Act. In the wider field of divorce law, once a court (usually, but not always, the court of domicile of the parties) has jurisdiction, it has been a commonplace for a decree of dissolution of a marriage to be based on a finding of a matrimonial offence which took place wholly outside the territorial jurisdiction of the adjudicating court.

Finally, we find it difficult to think that when the legislature passed the 1960 Act it could have overlooked the interrelation of the 1920 Act with the Summary Jurisdiction Acts, which since 1949 had provided two distinct and alternative bases for jurisdiction. We recognise the force of a possible argument that when Parliament gave a court of summary jurisdiction power to adjudicate on the basis of the ordinary residence of the complainant or defendant, it was contemplated that the cause of complaint, though arising outside the petty sessional area of the court, at least arose within the territorial area of the United Kingdom. But, having regard to all the circumstances prevailing in 1960, including the long-standing provisions of the 1920 Act and the movements of population within the Commonwealth, we do not think that the courts should be astute to impose by implication a restriction which Parliament did not choose to express.

*Appeal dismissed.*

Solicitors: *Waterhouse & Co*, for *Maddocks, Dodds & Miller*, Manchester; *Rowlands*, Manchester.

Reported by G F L Bridgman, Barrister.

(1) 96 JP 399; [1932] 2 KB 716; [1932] All ER Rep 48.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BROWNE AND BRIDGE, JJ)

8th November 1971

RIGGALL v HEREFORD COUNTY COUNCIL

*Quarter Sessions—Civil proceedings—Costs—General rule—Highway—Non-repair—Proceedings by householder against highway authority—Proprietary right of complaint directly affected by outcome of proceedings—Complainants' right to costs.*

The appellant, a householder, served on the respondent highway authority a notice under s 59 (2) of the Highways Act 1959, requiring them to state whether they admitted that a piece of road about two miles long which, for about 600 yards provided the only means of vehicular access to his house, was a highway maintainable at the public expense. The respondent authority declined to make the admission, and the appellant brought proceedings at quarter sessions under s 59 (3) of the Act for an order that the piece of road in question be put into proper repair and maintained by the respondent authority. Quarter sessions held that the road in question was for all purposes maintainable by the respondent authority and ordered them to put the relevant part of it into proper repair by a specified date, but, although they had allowed the appellant's application, they declined to make an order for costs in his favour on the grounds that the work of making up the relevant portion of the road would involve great expense, most of which would be of no or little value to the public, that the appellant's success would mean an accrual to him of a substantial and uncovenanted advantage, and that it was possible that the public highway established as such might be stopped up under other provisions of the Act. On appeal by the appellant to the Divisional Court,

**HELD:** the ordinary rule in civil proceedings at quarter sessions was that costs followed the event, but there might be cases where the complainant was acting merely as a member of the public in which quarter sessions might have a discretion to deprive him of his costs after success on the ground that he was no more than a member of the public and the public themselves had not benefited adequately from the bringing of the proceedings; the appellant in the present case was not just a member of the public, for he had a proprietary right which was directly affected by the outcome of the proceedings; accordingly the ordinary rule *prima facie* applied, and, in the absence of any adequate reason for depriving the appellant of costs, an award should be made in his favour.

**CASE STATED** by Herefordshire Quarter Sessions.

The appellant, Patrick Hugh Riggall applied to Herefordshire Quarter Sessions for an order under s 59 (3) of the Highways Act 1959 that the respondents, Hereford County Council, the highway authority, should put into proper repair within such period as might be specified a way known as Croft Lane over its length between places known as 'The Broad' and 'Barr's Croft'. The appellant contended that this way was a highway for all purposes maintainable by the respondents and that it was out of repair. Quarter sessions decided that the relevant part of Croft Lane was a highway maintainable by the respondents and that it was out of repair and they ordered the respondents to put it into proper repair within twelve months. They made no order as to the appellant's costs and he requested quarter sessions to state a Case with regard to their liability to do so, which they did.

*F A Allen for the appellant.*

*D W Keene for the respondents.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated by Hereford Quarter Sessions who on the application of the appellant made an order against the respondents, the Hereford County Council, that a certain piece of road known as Croft Lane in that county was a highway maintainable at public expense

under s 59 of the Highway Act 1959. No question arises as to the propriety of the quarter sessions' decision that this road was a highway of the kind described. The only question put before us as a question of law is whether or not quarter sessions erred in refusing to make an order for costs in favour of the appellant.

From that somewhat unpromising material an extremely interesting and quite important debate has resulted, and we would like to thank counsel on both sides for their assistance. The matter can be put quite shortly. Under s 59 there is a procedure whereby any person, and I stress the words 'any person', who alleges that a way or bridge is a highway maintainable at public expense may serve notice on the highway authority requiring that authority to state whether or not it admits that the way or bridge in question is a highway and that it is liable to maintain it. The section goes on with further machinery depending in its application on whether the original recipient of the notice does or does not admit the facts alleged. In particular, if the authority on whom the notice is served does not within a specified time agree that the way or bridge in question is a highway and repairable at public expense, then the complainant, who is the man who originally served the notice, may bring proceedings at quarter sessions for an order that the highway be maintained by the highway authority.

All that was done in the present case. The appellant served what is admittedly a proper notice under the section; the highway authority, the respondents, were not prepared to accede to what he had alleged in the notice. Initially the respondents maintained that there was no public highway over the road in question at all, but at a later stage, some month or so before the hearing, the respondents did concede that there was a public bridleway over the road in question, but disputed to the end the claim of the appellant that there was a public right of way for all purposes. In the end, the justices found in favour of the appellant, and in a judgment which is incorporated in the Case they review the evidence, and it is fair to say that the evidence was all one way and that the ultimate conclusion that this was a highway repairable by the public was not one to be escaped.

Then came the question of costs. The parties had left the matter, when quarter sessions reserved their judgment, with mutual submissions that he who succeeded in the issue should have his costs. But somewhat to the surprise of the appellant, when the sessions made a conclusion in his favour they directed that there should be no order as to costs. Their reasons for making no order have been explored and are set out in detail in the Case before us. It is worth observing, in order to understand the reasons, that the road in question was some two miles long and for some 600 yards of it, it formed the only means of vehicular access to the appellant's premises. It was therefore right to say that he had a special interest in the outcome of these proceedings, special and superior to the interests of the ordinary public at large. In deciding not to make an order for costs in his favour, quarter sessions relied on the following reasons. They stated that:

"The work of making up the relevant part of Croft Lane would involve great expense most if not all of which would be of no value to the public."

This is clearly reflecting the special interests of the appellant to which I have referred. They go on to say: "The success of the application meant that there would accrue to the [appellant] and possibly others a substantial and uncovenanted advantage..." and that this anomalous result was created by the provisions of the Highways Act 1959, to which I have referred. They went on:

"It was not suggested by the [appellant] that the price he paid for his farm failed to reflect the financial burden of maintaining the length of Croft Lane fronting his farm. It was not suggested by the [appellant] that he purchased the farm in



the belief that the length of Croft Lane leading to it was maintainable at public expense.'

Finally they observed, and I paraphrase their wording here somewhat, that the matter is not finalised by their decision because under other provisions of the Highways Act 1959 it is possible that this public highway, now established as such, may nevertheless be stopped up under machinery contained in the Act, to the details of which I do not refer.

Before us, the argument of counsel for the appellant has been that the reasons given by quarter sessions are reasons on which their conclusions could not properly be based. He says they are irrelevant considerations not proper to be used in determining this issue, and he says that since this argument, in his submission, applies to all the reasons the justices have given, one must conclude that there are no good reasons to sustain their decision to refuse costs. He asks us to give effect to that argument by making an order for costs in his favour now.

Counsel for the respondents opened an entirely new window on the scene by pointing out that this kind of litigation is not in all respects similar to ordinary party and party litigation. In ordinary civil litigation between parties counsel would accept the ordinary rule that costs follow the event, but here, he says, it is not litigation between the appellant as one party and the respondents as another party. The application initiated by the appellant, so the argument goes, is an application on behalf of the public and not on behalf of himself and counsel for the respondents argues that in those circumstances it is perfectly open to the quarter sessions to say that in their view the public will gain very little as a result of all that has been done, and inferentially that the costs involved in the proceedings were not really merited by the advantage to the public which would follow. Accordingly, he said it was open to quarter sessions to say that the public should not be expected to pay the costs of the proceedings when the benefit to them is so minimal and there was here a sufficient reason for the justices to exercise their discretion in the way in which they did.

I would approach this problem on these lines. In criminal cases any conception that costs follow the event is a very dangerous conception, and one which I would not attempt to encourage. But in the case of purely civil proceedings at quarter sessions, I would have thought the general principle that costs follow the event should apply in the same way as it applies in litigation in ordinary civil proceedings in the civil courts.

We were referred to a dictum of SIR GEORGE JESSEL MR in *Cooper v Whittingham* (1), where he said:

'As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it.'

For my part I think that that ought to be a general guiding line in regard to costs in the civil jurisdiction of quarter sessions. But I still recognise the argument put forward by counsel for the respondents that there will be cases where the circumstances are such that the litigation is not on a par with ordinary civil litigation inter partes. I

(1) (1880), 15 Ch D 501.

for my part reserve for further consideration on another day the submission made by counsel for the respondents that if the complainant in proceedings such as the present is acting merely as a member of the public, there may well have to be some discretion left in quarter sessions to deprive him of his costs after success, on the footing that he is no more than a member of the public, and the public themselves have not benefited adequately out of the bringing of the proceedings. I would leave that as I say for further and more detailed consideration on another day. But where as here the complainant is not just a member of the public but has in fact a proprietary right which is directly affected by the outcome of the proceedings, in those circumstances, in my judgment, the ordinary rule in regard to costs in civil proceedings should *prima facie* apply, and in the absence of any adequate reason for depriving such an appellant of his costs, I think it would follow that an award of costs should be made in his favour. I accordingly for my part would allow this appeal and order that the costs of the appellant in the court below should be paid by the respondents.

**BROWNE J:** I agree.

**BRIDGE J:** I agree.

*Appeal allowed.*

Solicitors: Owen, White & Catlin, for Durrad, Davies & Co, Nantwich; Gibson & Weldon, for Clerk to Hereford County Council.

Reported by T R Fitzwalter Butler Esq, Barrister.

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### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, BROWNE AND BRIDGE, JJ)

12th November 1971

**R v METROPOLITAN POLICE COMMISSIONER. Ex parte RUXTON**

*Licensing—Permitted hours—Exemption order—Special occasion—Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions—Function to be held by outside local organisation—Licensing Act, 1964, s 74 (4).*

By s 74 (4) of the Licensing Act 1964: 'Justices of the peace may—(a) on an application by the holder of a justices' on-licence for any premises, or (b) on an application by the secretary of a club registered in respect of any premises, make an order (in this Act referred to as a special order of exemption) adding such hours as may be specified in the order to the permitted hours in those premises on such special occasion or occasions as may be so specified'.

The applicant, who was the secretary of a club, held a justices' on-licence in respect of the first floor of certain premises which restricted the sale of intoxicating liquor to members of the club and their bona fide guests. He held a further justices' on-licence in respect of the ground floor and basement under which intoxicating liquor might be sold, in addition to the aforementioned persons, to 'a person attending a dinner, dance,

reception, or other similar social function'. It was agreed that the underlying intention of the last-named extended facility was that a large hall on the ground floor might be let to various local organisations requiring to hold functions. The club desired to let the hall for a plumbers' dinner, and the applicant applied under s 74 (4) to the Commissioner of Police for the Metropolis for a special order of exemption for the occasion of the dinner. The commissioner refused to grant the order on the ground that the organisation which desired to hold the function was unconnected with the club, and, therefore, the occasion was not a special occasion meriting a special order of exemption under s 74 (4). On an application by the applicant for an order of mandamus to the commissioner,

**HELD:** the character of the body holding the function could not in itself determine whether the function was a special occasion or not, and so the reason given by the commissioner for refusing the application was irrelevant and could not be supported; the discretion of the commissioner had, therefore, not been validly exercised, and mandamus must issue and the case be remitted to him for consideration of the application on valid and admissible grounds.

**PER CURIAM:** The fact that a wide variety of different organisations use club premises week after week does not make each occasion a special occasion when similar activity on the part of the club itself would lose the quality of being special.

**MOTION** by Anthony Joseph Ruxton for an order of mandamus directed to the Commissioner of Police for the Metropolis requiring him to hear and determine according to law an application for a special order of exemption made under s 74 (4) (a) of the Licensing Act 1964 in respect of premises known as the Catholic Association of Social Activities Club at Dagenham in the London borough of Barking.

*D W T Price* for the applicant.

*D H Spencer* for the commissioner.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicant, who is the holder of a justices' on-licence for the ground floor and basement of premises known as Catholic Association of Social Activities Club which is situated in Oxlow Lane, Dagenham. He applies for an order of mandamus directed to the Commissioner of Police for the Metropolis requiring him to hear and determine according to law an application for a special order of exemption made under s 74 (4) (a) of the Licensing Act 1964. The special order of exemption is sought in respect of tomorrow, 13th November 1971, and is in respect of a function organised by a local organisation of plumbers. Section 74 (4) provides:

'Justices of the peace may—(a) on an application by the holder of a justices' on-licence for any premises, or (b) on an application by the secretary of a club registered in respect of any premises, make an order (in this Act referred to as a special order of exemption) adding such hours as may be specified in the order to the permitted hours in those premises on such special occasion or occasions as may be so specified.'

In the metropolis that function is exercised not by the justices of the peace but by the Commissioner of Police.

There is a little history which cannot be avoided in leading up to the point which arises before the court today. These premises in Oxlow Lane, Dagenham, which are in their entirety in the ownership of the trustees of the diocese of Brentwood, are in fact on three floors, basement, ground, and first floor. There are two justices' licences in force in respect of the premises. The first, which by common consent of the parties is confined to the first floor, is a licence for supply of intoxicating liquor with a condition restricting such supply to

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'(a) a member of the [Dagenham Catholic Social Club] who has been a member for at least two days or whose nomination or application for membership was made at least two days before his admission (b) a guest of such a member bona fide entertained by him at his own expense.'

That is no doubt a licence granted under s 55 of the Act, although we take the point made by counsel for the applicant that it seems now to have got itself on to an inappropriate form. The other licence in the name of the applicant is concerned with the ground floor and basement and is in identical terms except that it refers to a club of a different name, the Catholic Association of Social Activities Club, and the condition restricting the supply of intoxicating liquor extends not only to the conditions of (a) and (b) which I have read from the other licence, but includes at (c) 'a person attending a dinner-dance reception or other similar social function'.

These two licences were originally granted in 1964, and we have an affidavit from Mr Mullis, who was the solicitor concerned with the applications at that time, which shows that it was a matter of deliberate policy to secure two licences for these premises, and to provide further that the licence in respect of the first floor should be restricted by normal club conditions, whereas the licence in respect of the ground floor and basement should be more extensive in that it permitted the supply of intoxicating liquor to a person attending a dinner/dance, reception, or other similar social functions. It is not for us to enquire what was passing through the minds of the justices in 1964 when these licences were granted, but I for my part am quite ready to accept what Mr Mullis says, that this was deliberately done with the full co-operation of the justices, and, indeed, with the underlying intention that the large hall on the ground floor might conveniently be let out to various local organisations requiring to hold functions, and that if such functions were held by such outside organisations, an extension of the authority to supply liquor would be necessary to cover such functions. It follows, I think, that condition (c), which I have read, in the licence relating to the ground floor and basement was intended to reflect this facility whereby the premises could be hired out to outside organisations for a function which they proposed to hold.

After those licences had been granted everything seems to have gone smoothly for a number of years, and it is clear on the evidence that from time to time, indeed perhaps very frequently, when the hall has been hired to an outside organisation, an application for a special order of exemption under s 74 has been made. The police have thought it right to look into the matter more closely in recent months, and the situation has come to a head by reason of the commissioner's decision to refuse a number of applications of this kind, and in particular to refuse the application in the present case for a plumbers' dinner.

The letter, it is agreed, in which the commissioner announced his conclusion in regard to this function is one dated 16th July 1971; it is signed on behalf of the assistant commissioner; it is written to solicitors acting for the applicant; and it states:

'I am directed by the commissioner to refer to your letter of 15 June in which you made application on behalf of [the applicant] for a special order of exemption for the above club on 21 August, and to say that as it is not considered that the occasion you specified would be a special occasion for the members of the Catholic Association of Social Activities Club, in respect of which association the justices' licence was granted, he feels unable to grant such an order.'

I draw attention to the fact that the application there referred to was one in respect of 21st August 1971, but it is, I understand, common ground that this letter in effect gives the commissioner's reason for refusing the later application relative to the function with which we are now concerned.

The matter is taken a little further by the affidavit of Mr Stonely, who is a principal working in the department of the Metropolitan Police which advises the commissioner. I find it unnecessary to go into the detail; he explains how the police have been somewhat concerned at the unusual situation provided in this building where there are two separate justices' licences. He goes on to set out the history in rather more detail than I have given it, and he sets out what I understand to be the commissioner's reasons for refusing the special order for exemption which is in issue before us. It reads as follows:

'The Commissioner of Metropolitan Police was advised by me that whilst each application had to be considered separately on its merits those that arose from the ordinary regular outside bookings for the use of the premises and were unconnected in any way with the Social Club would with difficulty rate as special occasions meriting special orders of exemption. I have no doubt that for this reason all such applications were refused.'

Counsel for the applicant says that when one looks at all the material which is before us, it becomes clear that the commissioner has refused this special order of exemption because the organisation which is to hold the function, which function is the special occasion in question, is an organisation other than the club itself. It is argued before us that it is not a proper ground for refusing the special order of exemption that the organisation to enjoy the facility, if the order is granted, is an organisation other than the club itself. Counsel for the applicant argues that this is an extraneous and irrelevant reason, and he draws his argument from the fact that the very form of the justices' licence held in respect of the ground floor and basement contemplates that there shall be functions of this kind and thus gives the lie, as it were, to the commissioner's argument that special occasions do not extend to occasions arising from foreign organisations and bodies hiring the hall for a particular day.

For my part I think that if one confines the argument of counsel for the applicant to the precise circumstances of the present case, he is right. I cannot for my part see that the character of the body holding the function in itself determines whether the function is a special occasion or not. I cannot on the face of it see why an occasion should be more or less special, if one can put it that way, according to whether the organisation organising the function was the club itself or an outside body. If it be the fact, and I feel bound to conclude on the material before us that it was the fact, that this was the only reason put forward by the commissioner for his decision, then in my view that was an irrelevant reason and one on which reliance cannot be placed. It follows from that that in my judgment the commissioner's discretion was never validly exercised, and it is right to send the matter back to him with instructions in the form of an order of mandamus that he is to exercise his discretion, in other words, that he is to consider this application on relevant and admissible grounds.

I hasten to say that that by no means secures the function planned for tomorrow evening, because I would not wish anything I have said to obscure the fact that the commissioner has a very wide, and often very difficult, discretion to exercise in these matters. It may well be that the commissioner now or hereafter will take the view that these functions occur with such frequency that they lose their special character. I am not attempting to say that that is so, but it is a matter which may well appeal to the commissioner. If all these functions were held by the club virtually every Friday and every Saturday night, an argument that they had lost their special quality might well be raised. In *R v Llanidloes (Lower) Justices, ex parte Thorogood* (1) those considerations were debated, and just as I do not see any reason for saying that the identity of the organisers prevents this from being a special occasion, so it seems to me

(1) ante p 67; [1971] 3 All ER 932.

that the fact that there is a wide variety of different organisers using this club week after week does not in itself make each occasion a special occasion when similar activity on the part of the club itself would lose the quality of being special.

It is unwise that I should say more, but I am anxious to emphasise that all we ought to do in my judgment is to declare that the single reason apparently relied on is an invalid reason, but to stress the great width of the commissioner's discretion in regard to a variety of other reasons, which I would not seek to canvass. In my judgment, the order of mandamus should go on the terms prayed.

**BROWNE J:** I agree.

**BRIDGE J:** I also agree.

*Order for mandamus.*

Solicitors: Monier-Williams & Keeling, for Mullis & Peake, Romford; Solicitor, Metropolitan Police.

Reported by T R Fitzwalter Butler, Esq, Barrister.

#### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND BRIDGE, JJ)

16th November 1971

CROUCH v McMILLAN

*Shipping—Pilot—Pilotage district—Offer by licensed pilot—Pilotage by unlicensed pilot after offer—Ship moving from one mooring to another—Pilotage district byelaws—Pilotage Act, 1913, s 30 (3), s 32—London Pilotage District Bye-Laws, Part IX, byelaw 2.*

At a time when a ship was about to be moved a distance of three quarters of a mile in the London pilotage district of the River Thames from moorings to another moorings two licensed pilots approached the master of the ship and offered pilotage. The offer was rejected and the ship was moved under the direction of the appellant, an unlicensed pilot. An information was preferred against the appellant for contravention of s. 30 (3) of the Pilotage Act, 1913, and the justices convicted the appellant.

HELD, following *Babbs v Press* (1971), 135 JP 604: by reason of byelaw 2 of the London Pilotage District Bye-laws, Part IX, the appellant was entitled to move the vessel when he did and s 30 (3) of the Act of 1913 did not apply; the conviction must, therefore, be quashed.

CASE STATED by Dartford, Kent, justices.

On 26th February 1971 an information was preferred by the respondent, Daniel Ivor McMillan, against the appellant, William James Crouch, charging that he on 24th October 1970 on board the ship Wadhurst lying at Littlebrook power station in the parish of Stone in the county of Kent, during and after the departure of the ship from Littlebrook power station did pilot the ship after a licensed pilot for the district had offered to pilot the ship, contrary to s 30 (3) of the Pilotage Act 1913.

The justices convicted the appellant, who appealed.

R F Stone QC and Geoffrey Brice for the appellant.

Gerald Darling QC and N A Phillips for the respondent.



**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices acting in and for the petty sessional division of Dartford in respect of their adjudication as a magistrates' court sitting at Dartford on 12th May 1971, whereby they convicted the appellant of an offence under s 30 (3) of the Pilotage Act 1913, the terms of the information against the appellant being these:

'On the 24th day of October 1970 on board the ship Wadhurst lying at Littlebrook power station in the parish of Stone in the county of Kent, during and after the departure of the said ship from Littlebrook power station did pilot the said ship after a licensed pilot for the district had offered to pilot the ship, contrary to s 30 (3) of the Pilotage Act 1913.'

The case has obviously been prepared as a test case, and the essential matters of fact were found by the justices. They are that two pilots duly licensed by Trinity House approached the master of the ship Wadhurst at a time when the ship was about to be moved a distance of three-quarters of a mile in the London pilotage district of the River Thames. The offer of pilotage given by these two persons was rejected by the master of the ship on instructions from his owners, and the ship was moved down the river by the appellant who was not a licensed pilot.

The case has not been argued in any detail before us, because it is agreed by counsel on both sides that, if this court considers that it should follow its own decision in *Babbs v Press* (1) that decision wholly disposes of the argument in the present case. In *Babbs v Press* this court reached a conclusion on the construction of the Pilotage Act 1913 which would produce a result different from that achieved by the Dartford justices in the instant case. We think we should follow our decision in *Babbs v Press*, and consequently have no alternative but to say that the justices were wrong, to allow the appeal.

**ASHWORTH J:** I agree.

**BRIDGE J:** I agree.

*Conviction quashed.*

Solicitors: Ingledew, Brown, Bennison & Garratt; Holman, Fenwick & Willan.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) 135 JP 604; [1971] 3 All ER 654.

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**COURT OF APPEAL (CRIMINAL DIVISION)**

(EDMUND DAVIES AND STEPHENSON, LJ AND WALLER, J)

2nd, 16th November 1971

R v ROWLANDS

*Criminal Law—Joint charge—Acquittal of one defendant—Conviction of second defendant—Need for evidence of joint action.*

Where two persons are jointly charged with an offence and one is found guilty, a jury is not entitled to convict the other without evidence that he acted jointly with the defendant who has been convicted, for otherwise two offences would be found when only one was charged. Where, however, one defendant has been found not guilty of the joint offence, there is no question of the other defendant being found guilty of a second offence and no need for evidence that he acted jointly. The joint offence disappeared with the acquittal of the first defendant and the second defendant can be convicted of the offence charged as if he had been charged in a separate count with an independent offence.

APPEAL by Andrew Malcolm Rowlands against his conviction at Oxford City Quarter Sessions of assault occasioning actual bodily harm and the sentence imposed on him of three months at a detention centre.

A R F Redgrave for the appellant.

J R A Rampton for the Crown.

*Cur adv vult*

16th November: **STEPHENSON LJ** read the following judgment of the court: The appellant was tried at Oxford City Quarter Sessions on an indictment containing three counts. On count 1 his brother Roger (Dick) Rowlands was charged with assaulting Lajos Nagy thereby occasioning him actual bodily harm on 23rd July 1971 in the city of Oxford. On that count he was convicted and sentenced by the deputy recorder to 18 months' imprisonment. On count 2 the appellant and a man named Woodward were charged with assaulting Nagy thereby occasioning him actual bodily harm on the same day and at the same place. On the direction of the deputy recorder the jury acquitted Woodward, but they convicted the appellant and he was sentenced to three months' detention in a detention centre. A third count charged Nagy's wife with maliciously wounding the appellant on the same date and at the same place. She was acquitted.

The appellant appeals against his conviction under s 1 (2) of the Criminal Appeal Act 1968 on a certificate granted by the deputy recorder on this ground:

[The appellant] and Barry Ronald Edward Woodward were jointly charged in one count of the indictment with an assault occasioning actual bodily harm to Lajos Nagy. I directed the jury to acquit Woodward at the close of the prosecution case for want of sufficient evidence against him. In summing-up I directed the jury in the case of [the appellant] that if they came to the conclusion that the charge against him of occasioning Nagy actual bodily harm was proved then it was their duty to convict him of it, and the fact that upon my direction they acquitted Woodward who was charged in the same count is no bar to that verdict. In the course of my summing-up I made no reference to any need for there to be evidence that [the appellant] was acting jointly with Woodward.'

Counsel for the appellant makes a second point, that the evidence did not establish that any injury suffered by Mr Nagy was inflicted by the appellant and therefore if

the appellant was guilty of anything it was of common assault. Counsel for the Crown concedes that this is so and asks us to substitute a verdict of common assault if we decide the point certified against the appellant.

All three counts arose out of incidents on the night of 23rd July 1971. Mr and Mrs Nagy were selling 'hot dogs' from a motor van in the street. Dick Rowlands and the appellant arrived in a car driven by Woodward (who was their brother-in-law); there was a fourth man with them. There was some cause of friction between Dick and Mr Nagy and they got into a fight. The case against the appellant was that he joined in to assist Dick. He claimed that he was never more than a spectator. At some stage the appellant suffered a wound as a result of a blow by Mrs Nagy and this, it was said, so infuriated Dick and the others that they attacked Mr Nagy with considerable ferocity. Mr Nagy said that Dick abused him and then struck him. He grappled with Dick who then butted him in the face. Then others from the car, including the appellant, joined Dick in attacking him. He was, however, not sure that Mr Woodward took part. He went to the ground and suffered a one inch cut over his nose and bruising on his head and body. Mrs Nagy said that she saw the appellant and others attacking her husband. She went to his assistance and punched the appellant. She forgot that she had a kitchen utensil in her hand, and this caused a serious cut on the appellant's throat.

The affair was witnessed by two men called Morris and Bellinger. Mr Morris said he saw Mr Nagy chasing Dick, then there was a cry from the appellant that his throat had been cut and thereafter 'all hell was let loose'. Mr Bellinger said there was a scuffle between Dick and Mr Nagy. Others including the appellant but not Mr Woodward joined in, and Mr Nagy went to the ground. After some fighting he saw that the appellant had a throat wound and after this Dick and others attacked Mr Nagy violently and he was kicked and punched. Dick Rowlands said that Mr Nagy was the aggressor at the outset. He agreed that later someone kicked Mr Nagy; he would not, or could not, say who it was. He said that after the appellant was hurt his only concern was to take him to hospital. He made a statement to the police in which he appeared to take sole responsibility for Mr Nagy's injuries. The appellant said that he only watched whilst Dick and Mr Nagy struggled. A man called Sparks joined in and kicked Mr Nagy. Then Mrs Nagy attacked him. At the hospital he at first told the doctor that he had got his injury by walking into a lamp-post. In a statement to the police he denied attacking Mr Nagy.

Counsel for the appellant does not now contend that the acquittal of Mr Woodward on count 2 is a bar to the conviction of the appellant on the same count. But he submits that once Mr Woodward was acquitted, the jury could not find the appellant guilty without some evidence that he was acting jointly with Mr Woodward in assaulting Mr Nagy, and as there was no such evidence of joint action the jury should have been directed to acquit him too. Counsel for the Crown concedes that there was no evidence of joint action with Mr Woodward, but says that there need not be.

If the submission made on behalf of the appellant is right, the results are startling. Take the case of two men indicted for burglary in one count, one as the person actively entering the premises as a trespasser, the other as the look-out man, together concerned in a joint enterprise. If the jury acquit the look-out man because they think that his explanation that he was waiting outside the premises for some innocent purpose may be true, the burglar caught red-handed inside must usually be acquitted. For the verdict that the look-out man is not guilty must negative any evidence of a common plan of concerted action between the two of them except where there is some evidence against the actual burglar which is not evidence against the look-out, such as an admission to the police by the burglar that there was such a plan of action. To avoid that injustice in many cases the two of them must be indicted

in separate counts. Is there any principle or authority which forces such a surprising conclusion on criminal courts?

It is suggested that authority is to be found in the cases of *R v Scaramanga* (1), *R v Parker* (2) and *R v Merriman* (3). An examination of those authorities has convinced us that they do not support, let alone compel, any such conclusion. What those cases establish is that where two persons are jointly charged in one count with one offence (and the use of the word 'jointly' or 'together' is not necessary to make the offence charged in the count a joint offence), and one of them is convicted whether by verdict (*R v Scaramanga*) or on his own confession (*R v Parker*), the other cannot be convicted of a second and independent offence, whether a separate act of malicious damage (*R v Scaramanga*) or an independent theft (*R v Parker*) or an independent wounding (*R v Merriman*), but only of taking part in the joint offence charged against both and proved against one.

We have considered with care the language of DONALDSON J in giving judgment of this court in *R v Parker* where he said:

'It is clear law that if a person is accused of stealing two articles, he can be convicted if it be proved that he stole one only. It is also clear that if two persons are accused of stealing jointly one or other or both may be convicted of that joint stealing. Alternatively either, but not both could be convicted of stealing independently . . . In each of these cases the essential feature is that one offence is charged and one offence is proved. *R v Scaramanga* and the other decisions therein cited all proceed on the basis that in the absence of statutory provisions, such as s 44 (5) of the Larceny Act 1916, if only one offence is charged it is not open to the court or jury to find two offences proved. In the present case the verdict of the jury is at least capable of the interpretation that a different offence was committed by the appellant from that to which Miss Overly pleaded guilty. Only one offence was charged and it was not open to the jury to find that a second offence was committed.'

We accept the submission of counsel for the Crown that where one of two persons jointly charged with one offence is guilty it is not open to a jury to convict the other without evidence that he acted jointly with the first because otherwise there would be two offences found when only one was charged, but that where the first accused is found not guilty of the joint offence charged there is no question of the other being found guilty of a second offence and no need for evidence that he acted jointly. In our view the joint offence has gone with the passing of the first accused from the case and the second can be convicted of the offence charged as if he had been charged in a separate count with an independent offence.

If Mr Woodward had been found guilty on this indictment, we should have felt bound to follow the earlier decisions to which we have referred. But we endorse the view of this court in *R v Merriman* (3) that the position which they establish calls for further consideration either by legislature or by another court and we have no wish to extend them to cases like the present case which they do not govern. As stated in the passage of the judgment in *R v Parker* (2) already cited, 'either but not both could be convicted of stealing independently', and the first of those two results is what has happened here. The appellant has been convicted of an independent assault after the acquittal of Woodward accused with him of a joint assault.

It is conceded that the appellant's assault was a common assault only. We therefore, instead of allowing or dismissing this appeal, substitute for the verdict found by

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(2) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

(3) 135 JP 469; [1971] 2 All ER 1424.

the jury a verdict of guilty of common assault in the exercise of the court's powers under s 3 of the Criminal Appeal Act 1968. We then have to consider whether on the application for leave to appeal against sentence we should pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the offence of common assault.

In considering this application we take into account, as did the deputy recorder, that the appellant was only 17 at the time, five years younger than his brother, that his part in the attack on Mr Nagy was not as great as his brother's, and that he had suffered substantially by having his throat seriously cut. There was also before the deputy recorder, as there is before us, the probation officer's opinion expressing doubts about probation or a financial penalty, and the appellant's record of two offences, both apparently committed shortly before this offence. On 1st June 1971 he had been bound over in the sum of £25 for 12 months for threatening behaviour, and on 2nd August for assaulting a police officer he was fined £10. The deputy recorder made no order forfeiting the £25, but ordered him to go to a detention centre for three months. This court does not see how any other or lesser punishment could meet this offence of common assault in all the circumstances, and this application for leave to appeal against sentence is refused.

*Order accordingly.*

Solicitors: Registrar of Criminal Appeals; Henry F Galpin & Co, Oxford.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, SACHS, LJ, AND ACKNER, J)

23rd November, 7th December 1971

R. v CLARKE

*Criminal Law—Insanity—Defence—Deprivation of power of reasoning—Retention of power, but failure to use it to the full.*

To establish a defence of insanity within the M'Naghten rules it must be established that the defendant, by reason of a disease of the mind, has been deprived of the power of reasoning. The rules do not apply to a person who retains the power of reasoning, but in a moment of confusion or absent-mindedness fails to exercise the power to the full.

On a charge of shoplifting the defendant's defence was that she had no intention to steal the articles named in the indictment, but had removed them from the wire basket provided by a supermarket into her own shopping bag in a moment of absent-mindedness. Two medical witnesses gave evidence that at the material time she was suffering from nervous depression, which one of them said was a minor mental illness. The assistant recorder ruled that this amounted to a defence of insanity within the M'Naghten rules and the defendant then pleaded guilty. On appeal.

**Held:** as the appellant's plea of guilty had resulted from a misdirection in law, the conviction must be quashed.

**APPEAL** by May Clarke against her conviction at Leicester City Quarter Sessions when she was conditionally discharged.

H R Mayor for the appellant.

G M Cursham for the Crown.

*Cur adv vult*



7th December. **ACKNER J** read the following judgment of the court: On 9th June 1971 the appellant, who was aged 58 years, was tried at Leicester City Quarter Sessions for what is commonly known as shoplifting. There was nothing out of the ordinary either in relation to the facts of her case or in relation to the nature of her defence. The only unusual feature was the course which the learned assistant recorder unhappily decided to take after the conclusion of the evidence.

The facts are simple. It was common ground that on 2nd March 1971 the appellant went to the International Stores supermarket at Leicester. She there shopped with the aid of a wire basket provided by the store to enable her, not only to carry the goods of her choice, but also to keep them separate and apart from any other goods and thus enable the cashier readily to calculate the cost of the goods she had purchased from the store. While she was in the store the appellant selected various items, three of which consisted of a pound of butter, a jar of coffee and a jar of mincemeat. At some stage before she went to the check-out point the appellant transferred those goods out of the wire basket and into her own bag so that when she presented her basket those three items were no longer in the wire basket and were not therefore paid for. Understandably enough it was alleged that these goods were secreted in the appellant's own shopping bag with the object of stealing them and taking them out of the store without paying for them.

The appellant's defence was that she had no intention of stealing these goods. She had not been feeling well on the morning in question nor for quite some time. She suffers from sugar diabetes. In the previous year she had gone down with 'flu and on the Friday previous to that occurrence her husband had broken his collar-bone. He had to look after her and was in fact, because of his own condition, off work for several months. What with one thing and another she had become very depressed. On a number of occasions she had been very forgetful. For example, she had put sugar in the refrigerator instead of in the cupboard and the sweeping brush in the dustbin and then put the dirt where the brush should have been put. In her own words 'everything seemed to get on top of me'.

On the morning in question she woke up with a very bad head which persisted despite her taking her pills. Her husband rang up at about 11.00 am to say that he would be home for lunch late. She put their meal in the oven on a low flame and went out to fetch the groceries. She had no recollection of putting these three items into her shopping bag and as for the jar of mincemeat neither she nor her husband ever ate this. In short her defence was that she had no intention to steal these articles, but in a moment of absent-mindedness had put them in her own shopping bag.

Had the matter rested there, there would have been no complications and the assistant recorder would no doubt have directed the jury to consider her explanation and ask themselves whether they were satisfied beyond reasonable doubt that she had the necessary intent to sustain the charge. However, to support the validity of her explanation medical evidence was called. These witnesses were her general practitioner and a consultant psychiatrist. These two gentlemen both spoke to the fact that she was suffering from depression, which one of them accepted to be a minor mental illness. The general practitioner described the symptoms. The patient feels a lack of energy—he finds it difficult to concentrate—he may be short-tempered or absent-minded. The psychiatrist stated that it can produce states of absent-mindedness in which the patient would do things he would not normally do in periods of 'confusion and memory lapses'. All this evidence was entirely consistent with the appellant's story.

Unfortunately the medical witnesses were pressed to, what it seems to us, an unreasonable degree to explain the workings of this particular illness. The psychiatrist stated that what happens in these cases is 'that there is a patchy state of affairs,

that the consciousness, if you like, goes off at times and comes on again, changing every few minutes and not in proper control of the patient'.

The effect of this evidence on the assistant recorder was to convince him that the defence was in truth a defence of 'not guilty by reason of insanity' under the rules in *M'Naghten's Case* (1). He was undoubtedly influenced to this decision by the evidence that the depression was an illness which he translated as meaning also a disease and by the fact that on the medical evidence, as he understood it, a possible explanation was that there had been a total lack of consciousness at the moment when the offence was committed. In order to sustain a defence under the *M'Naghten* rules it is necessary to show that the party accused was labouring under such a defect of reason from the disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know that what he was doing was wrong.

It may be that on the evidence in this case the assistant recorder was entitled to the view that the appellant suffered from a disease of the mind, but we express no concluded view on that. However, in our judgment the evidence fell very far short either of showing that she suffered from a defect of reason or that the consequences of that defect of reason, if any, were that she was unable to know the nature and quality of the act she was doing. The *M'Naghten* rules relate to accused persons who by reason of a disease of the mind are deprived of the power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use that power to the full. The picture painted by the evidence was wholly inconsistent with this, being that of a woman who retained her ordinary powers of reason but was momentarily absent-minded or confused and acted as she did by failing to concentrate properly on what she was doing and by failing adequately to use her mental powers.

Because the assistant recorder ruled that the defence put forward had to be put forward as a defence of insanity, although the medical evidence was to the effect that it was absurd to call anyone in the appellant's condition insane, defending counsel felt constrained to advise the appellant to alter her plea from not guilty to guilty so as to avoid the disastrous consequences of her defence, as wrongly defined by the assistant recorder, succeeding. Thus the appellant in this case ultimately pleaded guilty solely by reason of the assistant recorder's ruling. Since in the view of this court the assistant recorder mis-stated the law this court has jurisdiction to quash the conviction: see *R v Alexander* (2). The conviction is accordingly quashed.

Appeal allowed.

Solicitors: Gardiner & Millhouse, Leicester; Arthur Headley & Co, Leicester.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) (1843), 10 Cl & Fin 200; [1843-60] All ER Rep 229.

(2) (1912), 76 JP 215.

## COURT OF APPEAL (CRIMINAL DIVISION)

(RUSSELL, SACHS and STAMP, LJJ)

14th July 1971

## LONDON BOROUGH OF SOUTHWARK v PETERS AND OTHERS

*Housing—Council property—Obtaining possession from trespassers—Competency of proceedings—Proceedings instituted by authorised committee—‘Management of housing accommodation’—Cost of proceedings—‘Blanket’ decision to institute.*

By a resolution of the respondent council there was constituted for each standing committee of the council an ‘urgency sub-committee’ consisting of the chairman and vice-chairman of the committee, and it was provided that ‘there be hereby delegated to each urgency sub-committee power to exercise [in relation to urgent matters] all the powers . . . delegated to the standing committee from which it is constituted.’ Proceedings were taken by the council in the county court for the possession of certain houses, the property of the council, which had been occupied by the appellants as ‘squatters’. The appellants argued that these proceedings were instituted without authority because they were instituted by the sub-committee of the housing committee which had no power to institute them. A resolution of the council defining the housing committee’s powers included ‘management of housing accommodation’. The respondents contended that ‘management’ did not include the taking of proceedings for possession of houses. They also said that the sub-committee had no power to authorise the proceedings because the necessary expenditure would exceed the sum of £100 and such a sum could not be incurred without the special approval of the council which had not been obtained. Further, they maintained that the decision of the sub-committee to remove squatters from council property was a blanket decision and did not specifically authorise the town clerk to take proceedings in respect of any particular house.

HELD, by the Court of Appeal: (i) the resolution of the council was plainly a direct delegation by the council of housing committee functions to the urgency committee, and that position was not affected by the presence of the prefix ‘sub’ to the word ‘committee’; (ii) ‘management’ in the further resolution of the council was not to be construed so narrowly as to exclude from its scope the taking of proceedings to get possession of housing accommodation from trespassers therein; per SACHS, LJ: it was manifest as a matter of law that management of houses in the context of the Housing Acts must include the eviction of trespassers; (iii) the limits on expenditure imposed by the council were a purely internal affair which, if not followed, put at risk the person who paid out the money, but in any case the expenditure in the present case involved did not travel outside the estimates provided for the matter, and each proceeding in the county court was to be considered separately and would be within the £100 limit; as the urgency sub-committee was entitled to act as if it were the council they were entitled to come to a general or ‘blanket’ decision without consideration of the individual cases.

APPEALS by Joseph and Joan Peters, Zoila Bartley, and Kemal and Fatma Salih from a decision of Lambeth County Court.

The appellant Joan Peters in person.

S J Sedley for the appellants Bartley and Salih.

Glidewell Q.C., and P. Dunbury for the respondent council.

**RUSSELL LJ:** These are three appeals from His Honour Judge MOYLAN, who made an order for the possession of three houses, the property of the Southwark Council, against the appellants who are trespassers in the houses, having become so in their anxiety to obtain a roof over their heads and those of their families. There is no dispute that the council owns the houses; there is no dispute that the appellants are trespassers who have no right in law to occupy the houses; and there is no dispute that in properly initiated proceedings under Order 26 of the County Court Rules

there is no defence to the claim for possession and its enforcement. The argument for the appellants is based simply upon the allegation, made under various heads, that the proper machinery within the council has not been followed, with the result that the town clerk had no authority to launch the proceedings in the name of the council.

The first contention was that the instructions to take the proceedings were given by a sub-committee of the housing committee consisting of the chairman and vice-chairman of that committee of the council. Reference was made to *Cook v Ward* (1) in 1877 in this court, and it was contended that the housing committee could not delegate any of its functions to a sub-committee of that committee. In my judgment, that point is misconceived. These two councillors were not a sub-committee created by the housing committee with functions delegated to it by the housing committee, but were a committee, albeit that they were called a sub-committee of or for the housing committee, created by the council with authority delegated to it by the council. The constitution of the committee was by the following resolution of the council:

'(a) That for each standing committee of the council there be hereby constituted an urgency sub-committee consisting of the chairman and vice-chairman of the committee and that there be hereby delegated to each urgency sub-committee power concurrently with the standing committee to exercise (in relation to matters upon which in the opinion of the sub-committee it is desirable in order to secure the efficient and expeditious conduct of business for decisions to be made before it would be practicable to report the same to an ordinary meeting of the committee) all the powers now or hereafter delegated to the standing committee from which it is constituted. (b) That each standing committee do appoint from amongst their members a first reserve and a second reserve who shall be called upon in that order and be empowered to act as a member of that committee's urgency sub-committee in place of either the chairman or the vice-chairman in the event of one of the latter being absent or otherwise unable to act on any particular occasion. (c) That the town clerk be instructed to draw up a minute of each decision of an urgency sub-committee and to submit the same, together with a copy of the report submitted to the sub-committee upon the matter to which it relates, to the ordinary meeting of the relevant standing committee next following the date of the decision'

That was a resolution of the council, and, in my judgment, it is plainly a direct delegation of housing committee functions by the council in certain circumstances to the urgency committee, and that committee is not made any the less so by the presence of the prefix 'sub'.

The next point that was taken is that the proceedings were instituted without authority because the form of the authority for the proceedings to be taken which were given by the housing urgency committee was so wide as to extend beyond, or be capable of embracing, matters outside the field that was allotted to the housing committee. The relevant document was dated 25th September 1970 and was addressed to the housing urgency sub-committee. It was in the following terms:

"The committee of chairmen are recommending the housing committee not to accede to the request of the squatters association to allow them to use unoccupied council property in redevelopment areas, and also to authorise the deputy town clerk to take all necessary legal proceedings to obtain possession of any council property occupied without the licence or consent of the council; to apply for the council's costs in all cases; and to take all necessary steps to recover

(1) (1877), 2 DPD 255.

any costs so awarded. In view of the urgency in undertaking the necessary proceedings, the chief executive [the town clerk] seeks the authority of the housing urgency sub-committee to the implementation of the above recommendation of the committee of chairmen.'

At the end of that is typed

'Form of authorisation. To the town clerk: Subject to the concurrence of the other member of the urgency sub-committee, I authorise action in accordance with the recommendation contained in the above report'.

That document is signed by Mr Sawyer, and a document in identical terms is signed by Mrs Whitnall.

I think there are several answers to this second contention. The first and most immediate one is that it involves a point of law in support of the general contention of lack of authority to issue proceedings which was not taken in the county court and on which there was, therefore, no determination by the county court judge: see s 108 of the County Courts Act, 1959; and, therefore, the point is not open to be taken in this court. Secondly, if this point had been taken below it would, or might, have involved further evidence to explain the limit which was involved in the context in the phrase that I have just read out, 'any council property', and to have limited it to council property which was the concern, or was in the field of, the housing committee. For example, the contents of the note which was prepared by the chief executive at the request of the urgency sub-committee for the committee of chairmen might well have been relevant. Thirdly, *prima facie* in my view the reference to 'any council property' is to be construed by reference to the fact that it is the housing urgency sub-committee that is dealing with the matter. Without evidence to the contrary it should not, I consider, be construed in a manner involving any *ultra vires* action, and it is for those who are challenging the validity of the proceedings to produce evidence to support the challenge. Lastly on this point it appears to me that there is every reason to suppose that these properties which are now in question are within the powers of the housing committee. It was suggested that these houses were within the field of the planning committee and not the housing committee, but I can see no justification for, and there is certainly no evidence to support, that contention.

The next point that was taken for the appellants was that the taking of proceedings to oust the trespassers from property within the field of the housing committee is not itself within that field. It was contended that only a resolution of the council itself could authorise such proceedings. Therefore, it was said that the urgency sub-committee, being restricted to the housing committee field, could not authorise the proceeding. The council resolution which delimited the field of the housing committee included the following:

(1) Functions under the Housing Acts . . . (9) Management of housing accommodation . . . and ancillary non-commercial accommodation, including fixing and collection of rents and charges, conditions of tenancy and legal proceedings against tenants".

I should have thought that it was undoubted that the houses now in question are within the scope of the phrase 'housing accommodation'. It was argued that in the case of the appeal of the appellant Salih, by contrast with the evidence in the other two cases, there was no evidence that there was any intention that these premises should be used for housing purposes, but that does not show, as it seems to me, that it is outside the housing committee's field or within the planning committee's field. As to management, I cannot see why management ought to be construed so narrowly



as to exclude from its scope the taking of proceedings to get possession of housing accommodation from trespassers who are squatting there. It is plain on the language of para 9 that the taking of proceedings for possession against tenants is included in the field, and, to my mind, it would be absurd to hold that it does not include the obtaining of possession of housing accommodation in circumstances such as the present.

The next point is based upon the suggestion that the housing sub-committee had no power to authorise these proceedings without special authorisation or approval because of limitations on expenditure under the standing orders of the council. In this connection reference was made to standing order No 75, which says:

'Except in respect of those items of expenditure included in approved estimates on revenue and capital accounts no cost, debt or liability exceeding £100 upon any terms other than the remuneration of staff shall be incurred except with the approval of the finance committee, and no cost, debt or liability exceeding £1,000 shall be incurred except on a resolution of the council passed on an estimate submitted by the finance committee'.

Standing order 87, which deals with the delegation of powers to committees, provides in para (c) that

'the acts of every committee shall be in accordance with the standing orders of the council and with any other directions given by the council'.

It is suggested that the evidence shows that these expenditure limits had been exceeded in proceedings against squatters initiated by the town clerk in the name of the council on the authority of the decision of the urgency sub-committee of 25th September, 1970. It seems to me that initially there is a short answer to this point. These limits on expenditure are, I apprehend, a purely internal affair which, if not followed, put at risk the person who pays out the money. We are concerned with the question whether there was in the urgency sub-committee ability to authorise the initiation of proceedings, and it seems to me that it cannot be a correct approach to say, as is implicit in the argument, that the initiation of some of the possession proceedings which followed the decision of the urgency sub-committee were validly authorised because they did not involve more than certain financial limits whereas others, the later ones, once some financial figure had been exceeded, were not.

I think that on the evidence there is a somewhat less simple answer to this contention, which was put forward by the town clerk in his evidence. It is to be noted that when counsel below indicated at an early stage in the hearing that he was proposing to challenge under various heads the validity of the authority of the town clerk to initiate the proceedings this financial point was not mentioned, and as a result the town clerk, in his evidence in chief, said nothing on the point, but when it came to cross-examination he did give some evidence. He said that a large sum is included in the estimates for managing council property. I have already indicated my view that this comes in as part of the function of management of council property, and, though there were no actual estimates put in evidence, that is not surprising because the point was first raised in the cross-examination. It seems to me that one is well entitled to come to the conclusion that the expenditure involved in fact in acting upon the decision of the urgency sub-committee was not one which travelled outside the estimates which already provided for the matter. As to this I refer again to standing order 75.

The other point is that any committee is entitled, under standing order 75, to be involved up to £100 on any one item. I think there is much to be said for the argument that each county court proceeding following the decision of the urgency sub-committee is an item, and there is no doubt at all that the initiation of each proceeding

and the carrying through of each proceeding in the county court would be well within the £100 limit. I myself would prefer to deal with this point on the simpler approach that I first mentioned.

Counsel for the appellant then moved on to deal with his next point which was the suggestion that the two members of the urgency sub-committee had never met and deliberated on the question whether they should arrive at their decision to give the authority to the town clerk to take these proceedings in the squatters' cases. This is a new point, first taken in this court. It is, since it is an attack standing on its own feet on the validity of their decision, a point of law, and I have already mentioned the difficulties that face anybody who appeals to this court from the county court without a determination one way or the other by the judge on a point of law. But the matter goes further than that. It is on the evidence mere speculation that there was no communication between the two members of the urgency sub-committee. There was no evidence—and this is because the point was not taken below—and it seems to me that it is not a point (a) which should be allowed now to be taken, and in any event (b) it is not a point on which there is any evidence to upset the very proper presumption that everything that should have been done was done, a presumption which is all the more of importance and indeed of weight in a case such as this where all that is being said is in the last analysis that the town clerk had no authority to start these proceedings. I myself would wish to reserve the question to what extent, in such a case, there would have to be some conferring between the two members of the sub-committee. Counsel for the local authority was inclined to assent to the proposition that in some sense the members of a committee such as this must confer. As I say, I would wish to reserve my own view. We have not looked into authority on the subject and I do not wish to be thought, on the one hand, necessarily to accept what counsel said, or, on the other hand, necessarily not to accept it.

Finally it was argued—and again this was a new point attempted to be taken—that this was a blanket decision by the urgency sub-committee in that it did not specifically decide to authorise the town clerk to take particular proceedings in respect of any particular house, but simply said in effect that in the case of houses which squatters had entered in the development area he had authority in every case to take proceedings for possession under the recently instituted summary system. I myself cannot see—and no authority was produced to support the proposition—why it should be said that this decision, because it was a blanket decision, was in any way a bad one. In a sense it might be said that the council, and, therefore, the urgency sub-committee, were faced with something of a blanket problem. It does not need evidence, and it appears on the face of the documents that in the Southwark borough it is the organisation known as the "squatters' association" that, no doubt for humane reasons, is seeking to assist homeless people to occupy without authority these houses that are for the time being empty. If this had been a resolution of the council, so that no objection could have been taken against it on the various other grounds that counsel put forward, I think it would be extremely difficult for him to sustain an argument that the council's resolution authorising the proceedings in general terms was a bad one, and once one reaches the stage that the urgency sub-committee was able to act in this regard as if it were the council, then I see no reason why they should not take this general decision. In effect I think that counsel went so far as to say that you could not rightly come to a conclusion with a blanket decision without consideration of the individual cases. I am by no means to be taken as accepting that the sub-committee were not familiar with a great many of the individual cases, including perchance the ones we have before us. In fact there had been proceedings in respect of I think two of the three appellants, but not in respect of the particular houses in which they are now squatting.

I would add only that there was a suggestion at a very early stage, although it may not have been intended, that the system of taking summary proceedings against squatters in the Southwark Council's for the time being unoccupied housing accommodation was simply something which appealed, without too much consideration, to two individual councillors, namely, the two who constituted the housing urgency sub-committee. I think it only right to say, though this is not a matter of law at all, that it must be obvious to anybody concerned that the whole council had known, both formally and informally, ever since shortly after the decision to authorise the town clerk to take proceedings and certainly before proceedings were taken in February in the three cases now under appeal all about the matter, quite apart from the fact that no doubt it has been a considerable topic of conversation in the borough. This, allied with the fact that no steps have been taken either by the housing committee or by the council before the proceedings were launched against the appellants, I think would suffice to show that any suggestion that two individual councillors were so to speak out on a limb in their opinions as to the proper course to be adopted cannot possibly be justified. I say only that it has been suggested, though expressly not in a judicial capacity, in another case, *London Borough of Southwark v Williams* (1), by one of my brethren who is not sitting with me now, [EDMUND DAVIES, LJ] that the borough council might consider in effect whether to come to terms with the squatters' association as has another London borough. I can only say that it is not even for us to begin to think that we could know better how to run the affairs of the borough than those who have been elected to do so. For those reasons I would dismiss all three appeals.

**SACHS LJ:** I agree, and at the outset I call attention to a fact put on oath with regard to the premises occupied respectively by the appellant Mrs Bartley and the appellant Mrs Peters. Those particular premises at the time the appellants went into occupation were empty, awaiting patching repair, so that they could be offered to persons on the grievously long housing list of the Southwark Borough Council. In that respect (not controverted in any affidavit or challenged by cross-examination) they differed from those which were the subject of the proceedings in the *Williams* case where the houses were described as 'not worthy of repair'. On the contrary, these two houses were intended to be offered in proper order to those who reached the top of that long list. The effect of the instant proceedings has thus of its nature been to delay for some months opportunities to put those houses into repair and then to allocate them for the use of applicants in high places on the list.

No one can fail to have very deep sympathy with those who, through no fault of theirs, may be homeless or may be in need of larger accommodation than they have had. That, however, does not enable them to gain merit by flouting the law or doing anything which may have the effect of enabling them even temporarily to 'jump the queue' of others on the housing list, nor does it assist the case of those two appellants that both were the subject of proceedings, as regards other premises, at the same time as the proceedings in the *Williams* case.

In the end one comes back to the fact that the instant cases are ones in which no defence has been offered or could be offered except a series of technical points as to the powers of the housing urgency sub-committee of the respondent council and the way in which it exercised those powers.

At this juncture it is necessary to observe that nothing can be clearer, contrary to one of the submissions made to us, than that any responsible body must necessarily have some machinery to enable it to deal with urgent matters arising between the

(1) [1971] 2 All ER 175.

<b>NUISANCE</b> – Statutory nuisance – Notice of abatement – Failure to comply – Proceedings by local authority – Information laid before justices – Jurisdiction of justices to hear information – Non-compliance with notice of abatement an 'offence' – Information proper method of commencing proceedings despite use of word 'complaint' – Public Health Act, 1936, s 94 (1), (2) – Magistrates' Courts Act, 1952 s 42.		
<b>Northern Ireland Trailers Ltd v County Borough of Preston</b> .. .. .	<b>QBD</b>	<b>149</b>
<b>QUARTER SESSION</b> – Civil proceedings – Costs – General rule – Highway – non-repair – Proceedings by householder against highway authority – Proprietary right of complaint directly affected by outcome of proceedings – Complainants' right to costs.		
<b>Riggall v Hereford County Council</b> .. .. .	<b>QBD</b>	<b>172</b>
<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declaration by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (2) (10).		
<b>London Borough of Ealing v Race Relations Board</b> .. .. .	<b>HL</b>	<b>112</b>
<b>RENT CONTROL</b> – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Need of tenants' consent to reference – Reference of number of contracts together – Rent Act, 1968, s 72 (1).		
<b>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</b> .. .. .	<b>QBD</b>	<b>11</b>
<b>ROAD TRAFFIC</b> – Motorway – Hard shoulder – Part of verge – Marginal strip – Part of carriageway – Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f).		
<b>Wallwork v Rowland</b> .. .. .	<b>QBD</b>	<b>137</b>
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Pilotage by unlicensed pilot after offer – Ship moving from one mooring to another – Pilotage district byelaws – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws Part IX, byelaw 2.		
<b>Crouch v McMillan</b> .. .. .	<b>QBD</b>	<b>179</b>
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Ship moving from mooring to discharge berth – Pilotage by unlicensed pilot after offer – General offer insufficient – Need of specific offer communicated in relation to particular movement of ship – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2.		
<b>Montague v Babbs</b> .. .. .	<b>QBD</b>	<b>144</b>
<b>TOWN AND COUNTRY PLANNING</b> – Advertisements – Control – Display on walls of public houses – Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height – Advertisements showing cigarette packet, man holding glass of beer, and beer glass – Objects shown all above permitted height – Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).		
<b>McDonald v Howard Cook Advertising Ltd</b> .. .. .	<b>QBD</b>	<b>79</b>
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Land in area zoned for residential building – No prospect of permission being given for that use – Land Compensation Act, 1961, s 16 (2).		
<b>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</b> .. .. .	<b>CA</b>	<b>93</b>
<b>TRADE DESCRIPTIONS</b> – False description – Motor car – False mileage recorded on odometer – Sale by motor dealer – Defence of reasonable precautions and due diligence – Dealer ignorant of alteration of odometer – Condition of car consistent with mileage recorded on odometer – Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3).		
<b>Naish v Gore</b> .. .. .	<b>QBD</b>	<b>1</b>





meetings of such relatively large committees as it may set up. When one turns to the standing order which has been the subject of submissions to us and was brought into operation by a resolution of the full council dated 17th March, 1965, it is perfectly plain that proper machinery in fact exists for this council to deal with urgent matters.

In this behalf it is manifest that what are described as 'urgency sub-committees' are in substance small independent committees. Each has powers parallel to the larger committee ('the main committee') in cases of urgency and each has the jurisdiction to judge what is a matter of urgency. Those powers are specifically referred to as concurrent in relation to the main committee. It is plain that any action taken by the small committee cannot be reversed by the main committee, though, of course, the main committee may decide on a different policy for the future. The sub-committee is in no sense subordinate to the main committee.

In the course of his submissions counsel for the respondents properly argued such semantic points as could be raised because of the use in the standing order of the word 'sub' before the word 'committee'. The terminal question however is: Should the court look at the substance of the standing order or merely at the prefix 'sub'? One has only to state the question to provide the answer. As already stated, the urgency committee is independent; it is a committee to which the council had directly delegated powers, which in cases of urgency are exactly the same as the powers of the main committee—in this instance the main housing committee. None the less it would have been better if the word 'sub' had not been used, and reference had simply been made to the 'housing urgency committee'.

Having just dealt with what appeared to be the main point taken on behalf of the appellants, I turn, but briefly, to the number of other points of ingenuity raised, mostly involving questions of fact and of law not dealt with at first instance and thus not within the cognisance of this court (s 108 of the County Courts Act). Each in turn disregarded the fact that the onus of proof lies on whoever alleges that an action taken by a body corporate is ultra vires to prove the facts on which he relies to establish the lack of relevant vires, and nothing that I say will, I hope, be taken to encourage the idea that all defendants are entitled to make roving enquiries which would prolong proceedings and produce congestion in the courts.

Of the only two points to which I wish to refer, the first relates to the construction of the word 'management' in relation to para 9 of the list of the housing committee's functions already cited by my Lord. It suggested that the authorisation of the urgency sub-committee dated 25th September did not apply to the subject-matter of the proceedings in these appeals for two separate reasons—(i) that the houses were not property with the management of which the housing committee were concerned, and (ii) that the word 'management' did not include proceedings for the eviction of trespassers.

The first is a question of fact, and the onus was on the appellants. There is no evidence that the houses in question did not form part of that property which was the subject-matter of the housing committee's functions. There was indeed ample evidence to the contrary. When one has looked at s 111 of the Housing Act, 1957, which refers to 'general responsibility for local authority's houses'; at s 113, 'conditions to be observed in the management of local authority's houses'; and the reference in sub-s (1) to 'all the houses and dwellings in respect of which they are required to keep a housing revenue account'; at s 50 of the Housing (Financial Provisions) Act 1958, 'the housing revenue account, where one sees (s 50 (1) (a)) reference to 'all houses and other buildings which at any time after February 6 1919 have been provided by a local authority under the said Part (V)'; and has then finally turned to the evidence given by Mr Thomas before the county court judge, it is seen to be affirmatively established that these houses were houses within the purview of the housing committee's function.

As to the second point, it is manifest as a matter of law that management of houses in the context of the Housing Acts must include the eviction of trespassers.

The only further matter to which I desire to refer is the suggestion that the two members of the housing urgency sub-committee acted without having considered whether the houses the subject of their authorisation were houses with which their committee was concerned and further failed to give consideration to the relevant factors which they should have looked at before coming to a conclusion. That seems to me rather a wounding suggestion, all the more so since the members of that sub-committee were the chairman and vice-chairman of the housing committee who had long been familiar with all the grievous problems relating to housing in the borough of Southwark and all the factors relating thereto.

With regard to the rest of the points, I desire to add nothing to what my Lord has said, but simply to agree with those views he has expressed on the law relating to them. I too would dismiss the appeals.

**STAMP LJ:** For the reasons given by RUSSELL LJ, I too would dismiss the appeals.

*Glidewell:* May I be permitted to mention that the order of the county court judge will now come into effect immediately. In each case it was an immediate order, suspended only for 28 days for the purposes of the appeal.

**RUSSELL LJ:** You are entitled to your order for possession forthwith, which is what you got below. The appeal having been dismissed, that order will stand, and the stay pending the appeal automatically goes.

*Appeals dismissed*

Reported by G F L Bridgman, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, SACHS, LJ AND ACKNER, J)

22nd November 1971

R v MORRIS

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—‘Accident’—Broken down car pushed by other car—Interlocking of bumpers—Breath test—Damage to both cars—Road Safety Act, 1967, s 2 (2).*

By s 2 (2) of the Road Safety Act 1967: ‘if an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive at the time of the accident to provide a specimen of breath for a breath test . . .’

The word ‘accident’ in the aforementioned subsection should, as far as possible, be given its ordinary rather than a technical meaning. It connotes an unintended consequence which had an adverse physical result.

The applicant’s car broke down. The applicant remained at the steering wheel and arranged for the car to be pushed by a friend’s car. When the applicant sought to turn into a side road, the front bumper of the friend’s car slipped under the rear bumper of the applicant’s car. The two cars became interlocked and were separated with great difficulty. Both were slightly damaged. The police arrived and required the applicant to supply a specimen of breath for a breath test, which proved positive. The applicant was convicted of an offence under s 1 (1) of the Road Safety Act, 1967,

**HELD:** although the initial operation of one car pushing the other was deliberate the interlocking of the bumpers was an unintended occurrence which had an adverse physical result, and was, accordingly, an accident within the meaning of s 2 (2); the applicant had, therefore, been rightly convicted.

**APPLICATION** by Kenneth Morleen Morris for leave to appeal against his conviction at Buckinghamshire Quarter Sessions of attempting to drive a motor vehicle on a road when he had a blood-alcohol concentration above the prescribed limit contrary to s 1 (1) of the Road Safety Act 1967, he being then fined £50 and disqualified for 12 months.

*M R Bowley* for the applicant.

*G F B Laughland* for the Crown.

**LORD WIDGERY CJ** delivered this judgment of the court: In December 1970 at Buckinghamshire Quarter Sessions the applicant was convicted of attempting to drive a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He was sentenced to be fined and disqualified from driving. He now seeks leave to appeal against his conviction and sentence.

It was an unusual case, the circumstances of which were these. Shortly before 1.30 am on Monday, 16th February 1971, the applicant was at the steering wheel of a Vanden Plas car of which he was in charge, which was being pushed along Queen's Road, High Wycombe, as its engine would not start. It was being pushed by a Ford Consul which was driven by Mr Travis, a friend of the applicant, who was obviously trying to help the applicant out of the difficulty caused by the reluctance of the engine to start. To that end, Mr Travis drove his own car up to the back of the applicant's, so that they were bumper to bumper, and then proceeded to push the applicant's car for a distance. Nothing untoward happened for the first part of the journey, but when the applicant sought to make a turn into a side road, the bumper of the Consul slipped under the rear bumper of the Vanden Plas, and the two cars became locked together, locked together to such a degree that it ultimately took five or six men to separate them.

There was some dispute at the trial as to the extent to which the vehicles had been physically damaged as a result of this. There was some evidence of broken glass in the headlights and broken plastic in the rear off-side indicator of the applicant's car, but for reasons which will appear later the court is not concerned with the degree of any minor damage of that kind which there may have been. The police arrived shortly after the event, when the cars were still locked together, and, suspecting that the applicant had alcohol in his blood, they invited him to take a breath test. With similar suspicion in regard to Mr Travis, they invited him to take a breath test too. The tests were both positive, both men were arrested, they were taken to the police station, and on a laboratory sample being taken, pursuant to s 3 of the 1967 Act each was found to have a blood-alcohol concentration very much above the authorised limit of 80 milligrammes of alcohol per 100 millilitres of blood.

The whole question in this case turns on whether the arrest of the applicant and the subsequent procedure in the police station were valid having regard to the terms of s 2 of the Act. As is now well known, before the procedure in s 3 can be undertaken, it is necessary to show that the initial breath test at the roadside was properly taken in accordance with s 2. In this case it was not suggested that the police officer requesting the sample of breath at the roadside was acting on the basis that he had suspected the presence of alcohol while the applicant was driving or attempting to drive—the police arrived at a time when it was too late to suggest that the applicant

was driving or attempting to drive—and furthermore no one seems to have thought it appropriate to justify the initial breath test on the footing that the applicant had committed a moving traffic offence. The justification, if any, for the initial breath test had therefore to be found in s 2 (2) which provides:

'If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test. . . .'

It was on that footing, namely, on the footing that there had been an accident, and that the applicant was driving or attempting to drive at the time of the accident that the justification for the taking of the breath sample was placed.

Counsel for the applicant, who has argued his case with clarity and economy of language, does not seek to criticise the terms of the deputy chairman's summing-up in detail because he says that there was really a fundamental error in the approach to this case which vitiated the verdict of the jury. His submission is that if an act is deliberately done but has unexpected consequences, those unexpected consequences cannot amount to an accident. Accordingly, he says that since the initial manoeuvre of pushing the applicant's car by means of the presence of Mr Travis's car behind it was deliberate and intentional, one cannot say that the unexpected consequence of the interlocking of the bumpers was an accident within the meaning of the section.

The court is of the opinion that the word 'accident' in s 2 (2) should as far as possible be given its ordinary rather than a technical meaning. The word 'accident', unhappily, is well known in the context of road use and motor cars, and we would deplore any technical meaning being attached to this simple, ordinary word in the context in which it appears. It is evident that the accident referred to in the subsection is something which can happen when a person is driving or attempting to drive a car, and furthermore that it must be an accident which occurs owing to the presence of a motor vehicle on a road. Several attempts at defining the word 'accident' have been made in the course of the argument. We have been referred in particular to the words of LORD LINDLEY in *Fenton v Thorley & Co Ltd* (1), a case on the Workmen's Compensation Act 1897, in which the word 'accident' was a prominent word. In that case LORD LINDLEY said:

'The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.'

SACHS LJ in the course of the argument in the present case supplied an alternative, with which the other members of the court agree, in which he suggested that 'accident' in the present context means an unintended occurrence which has an adverse physical result. We think that it would be wrong to construe 'accident' in this context too narrowly. We are conscious of the fact that this is an interference with the liberty of the subject, but the Act does not make the having of an accident an offence, it merely provides it as a qualification for the taking of a breath test, and the underlying conception of s 2 (2) is that if some unintended occurrence which has adverse physical result arises out of the presence of a motor vehicle on a road, that is a fair basis on which a police officer may request the provision of a breath sample. Such an occurrence is one in which *prima facie* at any rate the circumstances of the occurrence, and of the driver involved in it, deserve consideration by authority, and accordingly we think

(1) [1903] AC 443.

that the definition suggested by SACHS LJ is one which fits the intention of Parliament and will not open the door unduly widely to the suggestion that random breath tests can be taken in purported consequence of it.

When one approaches the present case on that basis, it is quite true, as counsel for the applicant says, that the initial operation of pushing one car with the other was deliberate, but the interlocking of the bumpers—and not merely a mild interlocking but one which involved very considerable efforts of a number of men to disentangle them—was we think an unintended occurrence which had adverse physical result. We think therefore it comes within the meaning of the words in s 2 (2).

One ought to add, for completeness sake, that there will of course always be room for a *de minimis* argument, if the adverse physical result is so trivial that no ordinary person considering the circumstances would regard the occurrence as an accident at all, but we are quite satisfied that the consequences in this case, whether there was minor damage to the headlamp glass or not, is too severe to justify its dismissal on the ground of *de minimis* in any event.

In our judgment, therefore, the learned deputy chairman gave a direction which was a perfectly fair and proper direction in the circumstances of this case. We would add only one other point on this aspect of the case. It is now recognised and has been recognised in a number of instances that there will be cases under this section where the primary facts are not in dispute, and when the question of accident or no becomes a pure matter of law, in the same way that cases sometimes arise where the primary facts are not in dispute and in which the question of whether a person is driving or not becomes a pure matter of law. We think in this case that the learned deputy chairman would not have erred if he had directed the jury in that sense. We do not criticise him for not taking that line—he may well have been wise in seeking the verdict of the jury on the facts before it—but cases of this kind where there really is no factual dispute left, and the matter is one of law only, are cases in which the presiding judge can, if he thinks fit, give a ruling to that effect. If there is a dispute as to fact, the issue must, of course, be left to the jury (see *R v Seward* (1)).

The only other point taken by counsel for the applicant in support of this application is that he says that the verdict of guilty against this applicant is unsatisfactory because Mr Travis, who was charged on another occasion before a different deputy chairman, was acquitted. We are told that although the terms of the two summings-up naturally differed at various points, the issue was really the same in each case, and counsel for the applicant says, not without justification, that the applicant will at least think himself somewhat unlucky if, having been convicted of this offence, he finds that Mr Travis was acquitted of a comparable offence. That the applicant may think himself unlucky we would not seek to dispute, but there is no support for the proposition that in a case of this kind the acquittal of one defendant necessarily makes the conviction of the other unsafe or unsatisfactory. On the contrary, on the view which we have taken the conviction of the applicant is right, and it may well be that it follows that the acquittal of Mr Travis was wrong. Be that as it may, the acquittal of Mr Travis in our judgment does not justify any disturbance of the verdict of the jury in this case.

We would accordingly refuse the application.

*Application refused.*

Solicitors: *Allan James, Britnell & Co, High Wycombe; J Malcolm Simons, Kidlington, Oxford.*

Reported by T R Fitzwalter Butler, Esq, Barrister.



COURT OF APPEAL (CRIMINAL DIVISION)

(CAIRNS AND ORR, LLJ AND KILNER BROWN, J)

9th December 1971

R v BRITTAIN AND OTHERS

*Criminal Law—Forcible entry—Ingredients of offence—Need to prove intention to occupy premises—Forcible Entry Act, 1381.*

Intention to occupy the premises entered is not a necessary ingredient of the offence of forcible entry, contrary to the Forcible Entry Act, 1381.

Where, therefore, the defendants by force effected an entry into premises merely for the purpose of attending a party which was being held there,

Held: an offence under the Act of 1381 had been committed by them.

APPEALS by Raymond Brittain, Derek Brittain and Charles Trevor Henderson against their conviction at Maidstone Assizes of forcible entry contrary to the Forcible Entry Act 1381.

*M Gale for the appellants.*

*K T Simpson for the Crown.*

CAIRNS LJ delivered this judgment of the court: On 2nd February 1971 at Maidstone Assizes the three appellants, Raymond Brittain, Derek Brittain and Charles Trevor Henderson, together with a man called Day, were convicted of forcible entry contrary to the Forcible Entry Act 1381. The three appellants were sentenced by JOHN STEPHENSON J to nine months' imprisonment in respect of the forcible entry. By leave of the single judge they appeal against conviction.

The ground on which it is contended that they were wrongly convicted of that crime is that, although there was an entry by the appellants and although the entry was made by force, it was not made with the intention of entering into occupation of the premises. It was contended at the trial, and the contention has been renewed in this court, that the offence of forcible entry under the Act has as one essential element in it the intention to enter into occupation of the premises.

The circumstances were these. A Mr and Mrs Brooker lived in a house in Gillingham, Kent. On the night of 31st October 1970 they were giving a bottle party there. The three appellants and Day went to the house with the intention of joining the party. They apparently thought that one of the Brittains had been invited and that possibly Day also might have been invited. Raymond Brittain carried some sort of container and at least one other man had a pint mug with him. On arrival at the house they were refused admission by Mr and Mrs Bookers. They took that badly, and, having momentarily withdrawn using obscenities and abuse, one of them threw a pint mug through a window. They then tried to rush into the house, the door of which had been opened after the noise of the window breaking had been heard. When inside they were met by a large force of guests.

A submission of no case was made and rejected by the trial judge. In so far as this was a submission on the facts, there is no appeal on it because, as has already been indicated, it is conceded that there was an entry into the premises in the sense that the three appellants, in fact, went over the threshold of them and that that entry was effected by force. But the argument is that although the Act does not say anything about an intention to occupy, nevertheless it must be taken that at the time of the passing of the Act entry meant entry with a view to going into occupation and that the statute has been interpreted in that way ever since.

The actual language of the Act translated from the Norman French is as follows:

'None from henceforth make any entry into any lands or tenements, but in case where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do the contrary, and thereof be duly convict, he shall be punished by imprisonment.'

Certainly on the face of it unless the word 'entry' can be given a meaning other than its ordinary meaning, the section is prohibiting not merely forcible entry with the intention of going into occupation but any forcible entry. Is there any reason to suppose that the word 'entry' was intended to be construed in the restricted way contended for on behalf of the appellants here? This court can see no possible reason why it should be.

The common law forbade forcible entry by people who were not entitled to enter. The weakness of the common law was that the peace might be broken by people who were entitled to enter going in with force and terror. The Act was passed, therefore, to include, as its terms indicate, both the case of persons who had no lawful right to enter and those who had, and, in the view of this court, the intention of the Act was to prevent breaches of the peace in the case of forcible entry whether or not the person entering had a right to enter peaceably and that it was quite immaterial whether it was the intention to occupy or not.

The strongest point that can be made by counsel for the appellants, who has argued the case most persuasively, is that from 1381 to 1971 no case is to be found in the reports in which anybody has been convicted of forcible entry when he has not apparently entered with the intention of occupying. In the great majority of cases what has actually happened is that the person entering has by force expelled the original occupier and taken up occupation himself. It is conceded by counsel on behalf of the appellants that the intention to expel or an actual expulsion of the occupier is not a necessary ingredient of the offence. For that proposition it is sufficient, since it is conceded by the appellants, to refer to Archbold's Criminal Pleading Evidence and Practice, 37th edn, p 1160, para 3604 which sets out the proposition that expulsion is not a necessary element of the offence. A form of indictment containing these particulars of offence is set out:

'A B, on the—day of—, in the county of—, with many other persons unknown, made a forcible entry upon the freehold land of J N, of which J N was in occupation, and expelled him from the possession thereof.'

It being conceded that the expulsion is not a necessary element, there is no indication in that form of indictment of any necessity to show an intention that the accused person means to go into occupation.

In the authorities that the court has looked at the matter that was normally being discussed was whether there was such a degree of force as constituted forcible entry, never the question whether the defendant intended to go into occupation. Thus in *R v Smyth* (1) the person who was charged with forcible entry was a married woman who had entered her husband's house. She contended that she could not be guilty because a wife could not be a trespasser in her husband's house. LORD TENTERDEN CJ in summing up said:

'An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such a shew of force, as is calculated to prevent any resistance.'

Similarly in *Russell on Crime* (12th edn, vol 1, p 285) that same proposition is

(1) (1832), 5 C & P 201; 1 Mood & R 155.

repeated that mere trespass is not sufficient to constitute a forcible entry: there must in addition be a show of force. To quote Russell:

'whether he causes such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly indicates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance.'

Nowhere is there any suggestion that, if those elements are present, the entry will be deemed not to be a forcible entry unless there is an intention to occupy. One further sentence may be quoted from Russell: 'It is a forcible entry for a man to enter by force to distrain for arrears of rent . . .' If that is right (and we think it is) it is one example of a person entering otherwise than with the intention of occupying.

This court can see no reason why the Act should not apply in the case of persons who enter by force for the purpose of seeking to attend a party on the premises, whether indeed they have been invited to it or not. The matter was dealt with by JOHN STEPHENSON J, when the submission was made to him in the court below, in one sentence which this court adopts. He said:

'The authorities cited to me show the Act in operation in cases where there was an assertion of right and an intention either to gain possession or to resist the resumption of possession, but I see no reason why I should limit the words of the Act to such cases, and good reason in this day and age why I should give the words their plain meaning.'

For these reasons the appeal against conviction is dismissed.

*Appeal dismissed.*

Solicitors: *Stigant, Son & Taylor*, Chatham; *A C Staples*, Maidstone.

Reported by T R Fitzwalter Butler, Esq, Barrister

**COURT OF APPEAL (CIVIL DIVISION)**

**DUTTON v BOGNOR REGIS UNITED BUILDING CO LTD AND ANOTHER**

(LORD DENNING, MR, SACHS AND STAMP, LJJ)

26th, 27th, 28th, 29th October, 1st, 2nd, 3rd, 4th November, 17th December

*Local Authority—Negligence—Negligence of building inspector—Inadequate foundations of house passed as good—House after completion found to be defective—Liability of authority to purchaser from building owner.*

The legislature has given local authorities a great deal of control over building work and the way in which it is done, and the control thus entrusted to the authority is so extensive that it carries with it a duty and puts on an authority the responsibility of exercising that control properly and with reasonable care.

So, where the building inspector of an authority failed to carry out his inspection of the foundations of a house with reasonable care, and was negligent in the performance of his duty, passing work as good when it was bad, with the result that after completion the house was found to be defective owing to the subsidence of an internal wall caused by the inadequate foundation,

**HELD:** the authority was liable in respect of his negligence to the purchaser of the house from the building owner.

**APPEAL** by the second defendants, Bognor Regis Urban District Council, against a decision of CUSACK J by which he awarded the plaintiff, Mrs Saidee Dutton, £2,115 damages in an action brought by her against the council for damages for the negligence of their building inspector in approving the foundations of a house built by the first defendants, Bognor Regis United Building Co Ltd, and subsequently purchased by the plaintiff.

*Norman C Tapp QC and J J Davis for the council.*

*John K Wood QC, P S A Rosedale and Sarah Cockburn for the plaintiff.*

*Cur adv vult*

17th December. The following judgments were read.

**LORD DENNING MR:**

**1. The facts**

In Bognor Regis there was years ago a rubbish tip. It was filled in and the ground made up so that it looked like the land next to it. You would not have known there had ever been a rubbish tip there.

In 1958 a builder, Mr Holroyd (who called himself the United Building Co), bought all the land in that area and proposed to develop it as a housing estate. He called it the Gossamer estate, and laid it out in roads and plots. One of the plots was on the site of the old rubbish tip. It was plot 28, St Richard's Way. Mr Holroyd employed a local surveyor—Mr Lewis—to make plans and apply for planning permission, and also, of course, for byelaw approval.

On 16th October 1958 Mr Holroyd's surveyor submitted the plans. It was quite a straightforward plan, showing the house with normal foundations for the type of soil usually found in Bognor Regis. On 23rd October 1958 the Bognor Regis Urban District Council gave byelaw approval in their printed form. Their engineer and surveyor sent formal approval to Mr Holroyd's surveyor:

'I hereby give you notice that the plan(s) of proposed works, viz, det house & garage situate in plot 28 St Richard's Way for W Holroyd Esq which has been deposited by you in accordance with building byelaws with the local authority has been passed.

'The passing of the plan(s) operate(s) as an approval thereof only for the purposes of the requirements of the byelaws and of section(s) 37, 61, 63, 64 & 65 of the Public Health Act, 1936.

'Dated this 23rd. day of October, 1958.

E. B. Williams,

*Engineer & Surveyor.*

'Note. All foundations and drains must be first examined by the surveyor before being covered up.

'No new premises to be occupied before being certified by the surveyor. The accompanying notice forms are to be filled up and returned to the surveyor as the works proceed, and when completed.'

Together with that form, there were sent to Mr Holroyd's surveyor a batch of notice forms for him to notify the council's surveyor of the progress of the work. That bye-law approval was followed by planning permission. This was sent on 11th November 1958 by the clerk to the council to Mr Holroyd's surveyor. It said:

'the council, on behalf of the West Sussex County Council, hereby permit the following development, that is to say:—Detached house and garage, plot 28, St Richards Way, Gossamer estate, Aldwick, for W Holroyd Esq in the terms of, and subject to compliance with, the details specified in plan and application . . . submitted to the council on 16th October, 1958.'

Having thus got the necessary approval, Mr Holroyd, in 1959, started work on plot 28. He dug the trenches for the foundations. When he got down about two feet, he came upon the remains of the old rubbish tip, broken glass, tins and black slimy sludge. So he made the outer trench 3 ft 6 ins deep, which is much deeper than usual; and he reinforced the concrete floor with a steel mesh. But he did not bother much about the inner walls. He notified the council that the trenches were ready for inspection. The council sent a building inspector, Mr Griffiths, to inspect them. He came, and passed them. Mr Holroyd then filled in the trenches with concrete and built up to damp-course level. The council's surveyor came, and passed the work at that stage too. The house was finished towards the end of 1959.

Early in 1960 Mr Holroyd, the builder, sold the house to a Mr Clark. He was in it only for a few months. Then, in December 1960, he put the house up for sale again. Mrs Dutton went to see it. She liked it. She noticed a crack on the wall of the stairs. The agents told her: 'It's nothing. It's settlement. It's a new house, and you always have settlement.' She did not herself employ a surveyor, because it was a new house. But, to buy it, she borrowed money from a building society and their surveyor passed it. She signed the contract on 19th December 1960. She moved in on 11th January 1961. The deed of conveyance was dated 20th January 1961.

Soon afterwards, when Mrs Dutton had only been in a month or two, she became alarmed. The walls and ceiling cracked, the staircase slipped, the doors and windows would not close. She called in a surveyor, Mr Southall. In September 1961 he diagnosed the trouble. It was due to the subsidence of an internal wall. This was because that wall had inadequate foundations. The conditions got worse. Mrs Dutton had not much money. She could not afford to put it right. It would cost £2,000, even in 1962, plus surveyor's fees of £240. So it got worse and worse. In 1963 she went to solicitors. They called in an expert surveyor—Mr Carpenter. He had trial holes dug. He found out that the house had been built on a rubbish tip. He said that, at the time when the house was built, this could have been easily seen.



On 28th February 1964 Mrs Dutton issued a writ against the builder, Mr Holroyd, and the Bognor Regis Urban District Council. Her total damage was £2,740 (being as to £2,240 for cost of repair and £500 diminution in value). The builder, by his insurance company, claimed that he was exempted entirely from liability by the decision of *Bottomley v Bannister* (1) and *Otto v Bolton & Norris* (2). On that account Mrs Dutton settled the claim against the builder for £625. But Mrs Dutton went on against the Bognor Regis Urban District Council. She alleged that their building inspector was negligent in passing the foundations. The council did not call any evidence to deny this. Their building inspector had left and gone to Australia. The judge found that the council's inspector was negligent. He said:

'I find that it should have been detected. The strength of the foundation should be related to the nature of the ground. The distinction between building a house on rock and building a house on sand has been widely known for many centuries.'

The judge gave judgment in favour of Mrs Dutton for £2,115 (being the full sum of £2,740, less £625 recovered against the builder). The council appeal to this court.

Never before has an action of this kind been brought before our courts. Nor, so far as we can discover, before the courts of any other countries which follow the common law. It raises issues of far-reaching importance. In these days much work is subject to inspection to see that it is done properly. The inspector is usually the servant of a public authority. If the inspector negligently passes bad work, is the inspector liable himself? And also the authority which employs him? We have been treated to a wide-ranging argument well presented on both sides. Many points have been canvassed. In the end it will be found to be a question of policy which we, as judges, have to decide. But, before we come to it, I must deal with several preliminaries.

## 2. Building byelaws and regulations

At the time when this house was built, the work was subject to the Public Health Act 1936 and the byelaws made under it by the Bognor Regis council. The byelaws were in standard form and could not be relaxed except with the consent of the Minister. Byelaw 18 dealt expressly with foundations. It said:

'(1) The foundations of every building shall be—(a) so designed and constructed as to sustain [the loads of the building] and to transmit these loads to the ground in such a manner that the pressure on the ground shall not cause such settlement as may impair the stability of the building, or of any part of the building.'

It is plain that the builder in this case failed to comply with that byelaw. He did not construct the foundations properly. They were not strong enough to take the load of the house. Byelaw 6 required the builder to furnish the council

'with not less than twenty-four hours' notice in writing . . . before the covering up of any drain, private sewer, concrete or other material laid over a site, foundation or damp-proof course.'

We may, I think, assume that the builder in this case duly gave notice to the council. The council's inspector came and inspected the work, but did it so negligently that he passed the bad work. Byelaw 112 enacted that any person offending against any of the byelaws should be liable on conviction to a fine not exceeding £5.

Since 1965, building work has been subject to building regulations made by the Minister under s 4 of the Public Health Act 1961, and he alone can relax them: see

(1) [1932] 1 KB 458.

(2) [1936] 1 All ER 960; [1936] 2 KB 46.

s 6 (1). These regulations are much the same as the standard byelaws previously in force. But they are more specific. They require not less than 24 hours' notice in writing before the covering-up of any excavation for a foundation, any foundation, or any concrete or other material laid over a site.

### 3. Power or duty

Much discussion took place before us whether the council were under a *duty* to examine the foundations or had only a *power* to do so. The Public Health Acts do not make this clear. The 1936 Act simply says that it is the duty of the local authority to carry the Act into execution (see s 1 (1)). The 1961 Act says that it is the function of every local authority to enforce building regulations in their district. The word 'function' may mean either a power or a duty.

The reason for this discussion was the case of *East Suffolk Rivers Catchment Board v Kent* (1). The argument was that if the local authority had a mere *power* to examine the foundations, they were not liable for not exercising that power. But, if they were under a *duty* to do so, they would be liable for not doing it. This argument assumes that the functions of a local authority can be divided into two categories, powers and duties. Every function must be put into one or other category. It is either a *power* or a *duty*. This is, however, a mistake. There is a middle term. It is *control*.

In this case the significant thing, to my mind, is that the legislature gives the local authority a great deal of control over building work and the way it is done. They make byelaws governing every stage of the work. They require plans to be submitted to them for approval. They appoint surveyors and inspectors to visit the work and see if the byelaws are being complied with. In case of any contravention of the byelaws, they can compel the owner to remove the offending work and make it comply with the byelaws. They can also take proceedings for a fine.

In my opinion, the control thus entrusted to the local authority is so extensive that it carries with it a duty. It puts on the council the responsibility of exercising that control properly and with reasonable care. The common law has always held that a right of control over the doing of work carries with it a degree of responsibility in respect of the work. Such has long been the case where an employer has the right in control the way in which an independent contractor does his work: see *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd and McFarlane* (2). It is also the case when an owner or a local authority exercises control over property for the purpose of doing repairs: see *Mint v Good* (3), *Greene v Chelsea Borough Council* (4) and *Brew Bros Ltd v Snax (Ross) Ltd* (5), or over a grating in a highway: see *Macfarlane v Gwalter* (6) and *Scott v Green & Sons* (7). So here, I think, the council, having a right of control over the building of a house, have a responsibility in respect of it. They must, I think, take reasonable care to see that the byelaws are complied with. They must appoint building inspectors to examine the work in progress. Those inspectors must be diligent and visit the work as occasion requires. They must carry out their inspection with reasonable care so as to ensure that the byelaws are complied with. But, to whom is that duty owed? And what are the consequences if it is not done?

### 4. The position of the builder

Counsel for the council submitted that the inspector owed no duty to a purchaser of the house. He said that on the authorities the builder, Mr Holroyd, owed no duty

(1) 105 JP 129; [1940] 4 All ER 527; [1941] AC 74.

(2) [1946] 2 All ER 345; [1947] AC 1.

(3) [1950] 2 All ER 1159; [1951] 1 KB 517.

(4) 118 JP 346; [1954] 2 All ER 318; [1954] 2 Q.B. 127.

(5) [1970] 1 All ER 587; [1970] 1 QB 612.

(6) 122 JP 144; [1958] 1 All ER 181; [1959] 2 QB 332.

(7) [1969] 1 All ER 849.

to a purchaser of the house. The builder was not liable for his negligence in the construction of the house. So also the council's inspector should not be liable for passing the bad work. I would agree that, if the builder is not liable for the bad work, the council ought not to be liable for passing it. So, I will consider whether or not the builder is liable. Counsel for the council relied on the case of *Bottomley v Bannister* (1). That certainly supports his submission. But I do not think it is good law today.

In the 19th century, and the first part of this century, most lawyers believed that no one who was not a party to a contract could sue on it or anything arising out of it. They held that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on that account. The reason given was that the only duty of care was that imposed by the contract. It was owed to the other contracting party, and to no one else. Time after time counsel for injured plaintiffs sought to escape from the rigour of this rule. But they were met invariably with the answer given by ALDERSON B in *Winterbottom v Wright* (2):

'If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.'

So the courts confined the right to recover to those who entered into the contract. If the manufacturer or repairer of an article did it negligently, and someone was injured, the injured person could not recover: see *Earl v Lubbock* (3) and *Blacker v Lake & Elliott Ltd* (4). If the landlord of a house contracted with the tenant to repair it and failed to do it—or did it negligently—with the result that someone was injured, the injured person could not recover: see *Cavalier v Pope* (5). If the owner of land built a house on it and sold it to a purchaser, but he did his work so negligently that someone was injured, the injured person could not recover: see *Bottomley v Bannister* (1). Unless in each case he was a party to the contract.

That 19th century doctrine may have been appropriate in the conditions then prevailing. But it was not suited to the 20th century. Accordingly, it was done away with in *Donoghue v Stevenson* (6). But that case only dealt with the manufacturer of an article. The cases of *Cavalier v Pope* (5) (on landlords) and *Bottomley v Bannister* (1) (on builders) were considered by the House in *Donoghue v Stevenson*, but they were not overruled. It was suggested that they were distinguishable on the ground that they did not deal with chattels but with real property: see per LORD ATKIN and LORD MACMILLAN. Hence they were treated by the courts as being still cases of authority. So much so that in 1936 a judge at first instance held that a builder who builds a house for sale is under no duty to build it carefully. If a person was injured by his negligence, he could not recover: see *Otto v Bolton & Norris* (7).

The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence, so should the builder of a house be liable. After the lapse of 30 years, this was recognized. In *Gallagher v McDowell Ltd* (8), LORD MACDERMOTT CJ and his colleagues in the

(1) [1932] 1 KB 458.

(2) (1842), M & W 109.

(3) [1905] 1 KB 253.

(4) (1912), 106 LT 533.

(5) [1906] AC 428.

(6) [1932] AC 562; [1932] All ER Rep 1.

(7) [1936] 1 All ER 960; [1936] 2 KB 46.

(8) [1961] NI 26.

Northern Ireland Court of Appeal held that a contractor who built a house negligently was liable to a person injured by his negligence. This was followed by *NIELD J in Sharpe v E T Sweeting & Son Ltd* (1). But the judges in those cases confined themselves to cases in which the builder was only a contractor and was not the owner of the house itself. When the builder is himself the owner, they assumed that *Bottomley v Bannister* (2) was still authority for exempting him from liability for negligence.

There is no sense in maintaining this distinction. It would mean that a contractor who builds a house on another's land is liable for negligence in constructing it, but that a speculative builder, who buys land and himself builds houses on it for sale—and is just as negligent as the contractor—is not liable. That cannot be right. Each must be under the same duty of care and to the same persons. If a visitor is injured by the negligent construction, the injured person is entitled to sue the builder, alleging that he built the house negligently. The builder cannot defend himself by saying: 'True I was the builder; but I was the owner as well. So I am not liable.' The injured person can reply: 'I do not care whether you were the owner or not. I am suing you in your capacity as builder and that is enough to make you liable.'

We had a similar problem some years ago. The liability of a contractor doing work on land was said to be different from the liability of an occupier doing the selfsame work. We held that each was liable for negligence: see *A C Billings & Son Ltd v Riden* (3), and our decision was upheld by the House of Lords; see also *Miller v South of Scotland Electricity Board* (4). I hold, therefore, that a builder is liable for negligence in constructing a house—whereby a visitor is injured—and it is no excuse for him to say that he was the owner of it. In my opinion *Bottomley v Bannister* (2) is no longer authority. Nor is *Otto v Bolton & Norris* (5). They are both overruled. *Cavalier v Pope* (6) has gone too. It was reversed by the Occupiers' Liability Act 1957, s 4 (1).

##### 5. The position of the professional adviser

Counsel for the council then submitted another reason for saying that the inspector owed no duty to a purchaser. He said that an inspector is in the same position as any professional man who, by virtue of his training and experience, is qualified to give advice to others on how they should act. He said that such a professional man owed no duty to one who did not employ him but only took the benefit of his work; and that an inspector was in a like position. To support this proposition, counsel for the council brought out a long-forgotten case in the House of Lords called *Robertson v Fleming* (7). It was a Scottish case about the responsibility of a lawyer. LORD WENSLEYDALE said:

'He only, who by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect'

That observation was made in 1861 when the legal profession laboured under the fallacy which I have already mentioned—the fallacy by which it was thought that, when one contracting party was negligent, no one could sue him for that negligence except the other contracting party. That doctrine did not avail manufacturers after

(1) [1963] 2 All ER 455.

(2) [1932] 1 KB 458.

(3) [1956] 3 All ER 357; [1957] 1 QB 46; *aff'd* HL [1957] 3 All ER 1; [1958] AC 240.

(4) 1958 SC (HL) 20.

(5) [1936] 1 All ER 960; [1936] 2 KB 46.

(6) [1906] AC 428.

(7) (1861), 4 Macq 167.

1932: *Donoghue v Stevenson* (1); nor did it avail professional men after 1964: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (2). In neither of those cases, strangely enough, was *Robertson v Fleming* (3) referred to. But the result of them is to lessen the authority of that case and the observations in it.

Nowadays, since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, is the *reliance*. In *Hedley Byrne v Heller* it was stressed by LORD REID, by LORD MORRIS OF BORTH-Y-GEST, and by LORD HODSON. The professional man must know that the other is relying on his skill and the other must in fact rely on it.

#### 6. Reliance

Counsel for the council made a strong point here about reliance. He said that, even if the inspector was under a duty of care, he owed that duty only to those who he knew would rely on this advice—and who did rely on it—and not to those who did not. He said that Mrs Dutton did not rely on the inspector and he owed her, therefore, no duty.

It is at this point that I must draw a distinction between the several categories of professional men. I can well see that in the case of a professional man who gives advice on financial or property matters—such as a banker, a lawyer or an accountant—his duty is only to those who rely on him and suffer financial loss in consequence. But, in the case of a professional man who gives advice on the safety of buildings, or machines, or material, his duty is to all those who may suffer in injury in case his advice is bad. In *Candler v Crane, Christmas & Co* (4), I put the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is in fact poisonous; or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is in fact dangerous. It was accepted that the analyst and the lift inspector would be liable to any person who was injured by consuming the food or using the lift. Since that case the courts have had the instance of an architect or engineer. If he designs a house or a bridge so negligently that it falls down, he is liable to every one of those who are injured in the fall: see *Clay v AJ Crump & Sons Ltd* (5). None of those injured would have relied on the architect or the engineer. None of them would have known whether an architect or engineer was employed, or not. But beyond doubt the architect and engineer would be liable. The reason is, not because those injured relied on him, but because he knew, or ought to have known, that such persons might be injured if he did his work badly.

This view is in accord with a case in the USA, *Nelson v Union Wire Rope Ltd* (6). During the building of a court house, a lift plunged down six floors with 19 workmen aboard. It had been regularly inspected by an insurance company and passed as safe. The insurance company made these inspections gratuitously in order to promote their business. The inspector was negligent. He passed the lift as safe when it was unsafe. The Supreme Court of Illinois, by a majority, held that the insurance company were liable for the negligence of the inspector. They said that the defendant's liability

'is not limited to such persons as might have relied upon it to act but extends

(1) [1932] AC 562; [1932] All ER Rep 1.

(2) [1963] 2 All ER 575; [1964] AC 465.

(3) (1861), 4 Macq 167.

(4) [1951] 1 All ER 426; [1951] 2 KB 164.

(5) [1963] 3 All ER 687; [1964] 1 QB 533.

(6) (1964), 188 NE 2d 769.



instead to such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance.'

I quite agree.

## 7. Proximity

Counsel for the council submitted that in any case the duty ought to be limited to those immediately concerned and not to purchaser after purchaser down the line. There is a good deal in this, but I think the reason is because a subsequent purchaser often has the house surveyed. This intermediate inspection, or opportunity of inspection, may break the proximity. It would certainly do so when it ought to disclose the damage. But the foundations of a house are in a class by themselves. Once covered up, they will not be seen again until the damage appears. The inspector must know this or, at any rate, he ought to know it.' Applying the test laid down by LORD ATKIN in *Donoghue v Stevenson* (1), I should have thought that the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations—he ought to have realised that, if he was negligent, they might suffer damage.

### 8. Economic loss

Counsel for the council submitted that the liability of the council would, in any case, be limited to those who suffered bodily harm, and did not extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* (2).

I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If counsel's submission were right, it would mean that, if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable, but, if the owner discovers the defect in time to repair it—and he does repair it—the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.

### 9. Limitation of action

Counsel for the council also said that, if this action were allowed, it would expose the council to endless claims. The period of limitation would only start to run when the damage was done, i.e. when the cracks appeared in the house. This would mean that they might be liable many years hence. I do not think that is right. The damage was done when the foundations were badly constructed. The period of limitation (six years) then began to run. That appears from *Bagot v Stevens Scanlan & Co Ltd* (3). DIPLOCK LJ said that

'having regard to the nature of the duty . . . alleged to have been breached in this case . . . in effect to see that the drains were properly designed and built, the damage from any breach of that duty must have occurred at the time when the drains were improperly built, because the plaintiff at that time was landed with property which had bad drains when he ought to have been provided with property which had good drains, and the damage, accordingly, occurred on that date.'

(1) [1932] AC 562; [1932] All ER Rep 1.

(2) [1970] 3 All ER 245; [1971] 1 QB 337.

(3) [1964] 3 All ER 577; [1966] 1 QB 197.

The council would be protected by a six year limitation, but the builder might not be. If he covered up his own bad work, he would be guilty of concealed fraud, and the period of limitation would not begin to run until the fraud was discovered: see *Archer v Moss* (1).

#### 10. Policy

This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of LORD ATKIN in *Donoghue v Stevenson* (2), but it is a question whether we should apply them here. In *Home Office v Dorset Yacht Co Ltd* (3) LORD REID said that the words of LORD ATKIN expressed a principle which ought to apply in general 'unless there is some justification or valid explanation for its exclusion'. So did LORD PEARSON. But LORD DIPLOCK spoke differently. He said that it was a guide but not a principle of universal application. It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

In previous times, when faced with a new problem, the judges have not openly asked themselves the question: What is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.

Nowadays we direct ourselves to considerations of policy. In *Rondel v Worsley* (4) we thought that, if advocates were liable to be sued for negligence, they would be hampered in carrying out their duties. In *Home Office v Dorset Yacht Co Ltd* (3) we thought that the Home Office ought to pay for damage done by escaping Borstal boys if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* (5) some of us thought that economic loss ought not to be put on one pair of shoulders, but spread amongst all the sufferers. In *Launchbury v Morgans* (6) we thought that, as the owner of the family car was insured, she should bear the loss. In short, we look at the relationship of the parties, and then say, as a matter of policy, on whom the loss should fall. What are the considerations of policy here? I will take them in order.

First, Mrs Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.

Next I ask: Is there any reason in point of law why the council should not be held liable? Hitherto many lawyers have thought that a builder (who was also the owner)

(1) [1971] 1 All ER 747; [1971] 1 QB 406.

(2) [1932] AC 562; [1932] All ER Rep 1.

(3) [1970] 2 All ER 294; [1970] AC 1004.

(4) [1967] 3 All ER 993; [1969] 1 AC 191.

(5) [1970] 3 All ER 245; [1971] 1 QB 337.

(6) [1971] 1 All ER 642; [1971] 2 QB 245.

was not liable. If that were truly the law, I would not have thought it fair to make the council liable when the builder was not liable. But I hold that the builder who builds a house badly is liable, even though he is himself the owner. On this footing, there is nothing unfair in holding the council's surveyor also liable.

Then, I ask: If liability were imposed on the council, would it have an adverse effect on the work? Would it mean that the council would not inspect at all, rather than risk liability for inspecting badly? Would it mean that inspectors would be harassed in their work or be subject to baseless charges? Would it mean that they would be extra cautious, and hold up work unnecessarily? Such considerations have influenced cases in the past (as in *Rondel v Worsley* (1)). But here I see no danger. If liability is imposed on the council, it would tend, I think, to make them do their work better, rather than worse.

Next, I ask: Is there any economic reason why liability should not be imposed on the council? In some cases the law has drawn the line to prevent recovery of damages. It sets a limit to damages for economic loss, or for shock, or theft by escaping convicts. The reason is that, if no limit were set, there would be no end to the money payable. But I see no such reason here for limiting damages. In nearly every case the builder will be primarily liable. He will be insured and his insurance company will pay the damages. It will be very rarely that the council will be sued or found liable. If it is, much the greater responsibility will fall on the builder and little on the council.

Finally, I ask myself: If we permit this new action, are we opening the door too much? Will it lead to a flood of cases which the council will not be able to handle, nor the courts? Such considerations have sometimes in the past led the courts to reject novel claims. But I see no need to reject this claim on this ground. The injured person will always have his claim against the builder. He will rarely allege—and still less be able to prove—a case against the council.

All these considerations lead me to the conclusion that the policy of the law should be, and is, that the council should be liable for the negligence of their surveyor in passing work as good when in truth it is bad. I would therefore dismiss this appeal. In parting from the case I would like to pay my tribute to the help we have received from counsel on both sides and the very good research they have done in the course of the case.

**SACHS LJ:** The facts in the present case are simple, but they raise interesting and important issues of law, and at the outset I would like to pay my tribute to the admirable help received by this court from Mr Tapp and Mr Wood through the lucid and powerful submissions which they presented.

In 1958 application was made on behalf of one Mr Holroyd, a builder, who was developing an area known as Gossamer estate, Bognor Regis, for planning permission to erect a detached house for private occupation on plot 28 of which he owned the freehold. On 23rd October 1958 the council notified their approval of the plans deposited in accordance with the byelaws made by them under the Public Health Act 1936. He proceeded with the erection of a house on that plot and can conveniently be referred to as the 'building owner'. In due course an inspector from the offices of the Bognor Regis Council ('the council') came to inspect the foundations to see whether they complied with the above byelaws; without his approval the building work could not in practice have gone ahead. He in fact gave approval, but his inspection was so negligent that he failed to observe that the land in the centre of the plot was of such a nature that the foundations being laid were gravely inadequate. The building then went ahead and so the defective foundations were covered up and hidden from any normal subsequent inspection.

(1) [1967] 3 All ER 993; [1969] 1 AC 191.

After its completion the building owner sold the house on plot 28 to a Mr Clarke for £4,050, conveying the property to him on 21st January 1960. On 19th December 1960 Mr Clarke contracted with Mrs Dutton (the plaintiff in this action) to sell her the house for £4,800. It being a new house no surveyor was employed by her to inspect it—but it was in this court common ground that if such a surveyor had been employed he could not have been expected to find out this particular hidden defect.

The plaintiff moved into the house on 11th January 1961; by the autumn certain cracks commenced to appear in consequence of the hidden defect; the house began to subside with lamentable results which she had no financial means to remedy. The 1962 cost of the necessary work of curing the structural defects and of repairs was at trial agreed to be £2,240 (including surveyors' fees). To that sum there was added £500 described as the reduction in the value of the house; from the resulting £2,740 there was deducted £625 recovered from Mr Holroyd, and judgment was entered for £2,115. The plaintiff recovered nothing towards the rise over eight years in the cost of the work she could not afford, nor any sum for the gross inconvenience she suffered. The settlement of the claim against the building owner for a mere £625 was due to fears as to the effect on her rights of what later in this judgment is referred to as 'the *Bottomley v Bannister* (1) point'. After that settlement she continued to proceed against the council, claiming that they, as well as the building owner, were liable to her in the circumstances above set out. The council have not chosen to take third party proceedings against the building owner with a view to obtaining a further contribution from him—although it is common ground that this is something they could have done as between the defendants.

The various relevant provisions of the Public Health Act 1936 and the byelaws made thereunder by the council having been referred to in the judgment of Lord Denning MR, there is no need to recite them again. But so much depends on the position created by them that it is convenient at the outset to stand away from the points of detail and consider the overall object and the practical effect of the Act and the byelaws as a whole in regard to the erection of dwellings.

The object was clearly to ensure that through byelaws made by councils (or by the Minister if a council made none) as backed by powers to enforce them, that each dwelling erected in the council's area should have a standard of sanitation and soundness of construction that would be satisfactory for the health and well-being of those who might live in it. The byelaws were to lay down the requirements, which of course might vary according to the locality, whilst the Act itself provided the council with enforcement powers—'the teeth'. The practical effect of the Act and the byelaws taken together was to give the council through its appointed officers all-embracing control over most of the building operation—and in particular control over sanitation and foundation work. Any work that is not complying with a byelaw can be stopped by the council's officers on their ascertaining that non-compliance. Further, if any work has been done which failed to comply with those byelaws the council can require its alteration or removal and in default could itself remedy the defect. The teeth are to be found in the provisions of the Act, such as ss 65 and 287.

In the result no builder dare go ahead with sanitation or foundation work without the approval of the council's surveyor. The latter's control in practice can and often does override that of any site foreman or architect. It is, moreover, an obvious fact that when control is being exercised over work which is subsequently covered up (such as drains and foundations) any fault in the work thus covered will not in the nature of things be discovered on any normal subsequent survey made either on behalf of a purchaser or on behalf of any building society with whose aid the building is being acquired. It is plain that this control was designed to provide a protection against

(1) [1932] 1 KB 458.

jerry building, similar faults, and their effects—not least to guard against poor drainage, and foundations.

The question whether the Act and the byelaws result in the council having a duty to those who later purchased the dwellings is one as to which a considerable number of points have been raised in the course of the submissions in this court. I have formed the view that in the end the crucial approach is that indicated by LORD PEARSON when, in his speech in the *Dorset Yacht* case (1), he said:

‘It is true that the *Donoghue v Stevenson* (2) principle as stated . . . is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage. To some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just.’

In the course of that approach due regard must, of course, be had, inter alia, to how far-reaching may be the effect of holding that such a duty existed. In essence it is a matter of the policy of the common law. Before coming to this crucial stage, it is as well to dispose of certain points raised on behalf of the council which, if accepted, would result in a decision in their favour without really having to examine the final question as posed by LORD PEARSON.

As regards each point in turn any examination of the law will, of course, be concerned with the liability of a defendant for negligence which produces hidden or latent physical defects—that is to say defects not detectable on any normal earlier examination before they become apparent to the plaintiff who brings a claim. That is the type of defect with which this appeal is concerned and I would wish to guard against anything said later in this judgment being interpreted as affecting other defects: *Bottomley v Bannister* (3).

In limine comes the submission that the principles in *Donoghue v Stevenson* (2) have no application to realty. In this behalf it was argued that a building owner can never be under any liability to a purchaser or anyone else for defects in the building he has erected save by virtue of some liability created by contract; and that accordingly as a building owner cannot be liable in negligence for hidden defects which he has created then a fortiori the person who caused the defects to arise cannot be liable either. Arguendo this submission came to be styled the *Bottomley v Bannister* point because of what was said in that case, decided just before the judgment in *Donoghue v Stevenson* in the House of Lords. Particular reliance was placed on what SCRUTTON LJ said:

‘Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence.’

That passage on the face of it strongly supports the contention of the council as also does what was said in similar vein as to a landowner’s special position by LORD MACDERMOTT CJ in *Gallagher v McDowell Ltd* (4).

In the latter case, however, it was held that building contractors who had erected a house for the Northern Ireland Housing Trust would be liable in negligence to the wife of the first tenant of that house for a defect in the wooden floor of one of the rooms

(1) [1970] 2 All ER 294; [1970] AC 1004.

(2) [1932] AC 562; [1932] All ER Rep 1.

(3) [1932] 1 KB 458.

(4) [1961] NI 26.



which caused her to sustain an accident and ordered a new trial on that footing. Accordingly, the passages that relate to the liabilities of an owner of realty are obiter. Moreover, *Bottomley v Bannister* (1), being a pre-*Donoghue v Stevenson* decision, must now be looked at in the light of what was decided in the latter case. Such other post-*Donoghue v Stevenson* (2) decisions as were cited to us were at first instance, e.g., *Otto v Bolton & Norris* (3). As regards *Cavalier v Pope* (4), also much relied on by counsel for the council, the House of Lords were concerned with a case where the landlord had allowed the premises which he had let to the plaintiff's husband to get into a dangerous state of disrepair. It is perhaps sufficient for the purposes of the present case to observe that that was not perhaps a comparable instance of actually creating the dangerous state of affairs, nor does it appear that the defect was in any way hidden; on the contrary, the disrepair was so obvious that the plaintiff and her husband had threatened to leave the premises. The facts accordingly bear no relationship to those in the instant case. In the result there is thus nowhere to be found any authority binding this court to hold that the principles enunciated in *Donoghue v Stevenson* cannot apply to an owner of realty.

It is obvious that a builder who by his negligence creates a hidden defect is liable to anyone suffering damage from it just as a manufacturer is liable when a hidden defect in the goods he makes injures a workman using them and as a producer of consumable goods is liable when a hidden defect injures a consumer. I can find nothing in principle which absolves from liability a builder who creates a hidden defect because he happens to be or to become the owner of the premises built. On the contrary, as LORD MACDERMOTT CJ himself said in *Gallagher's case* (5), 'the doctrine of *Donoghue v Stevenson* can apply to defective houses as well as defective chattels' and in my judgment there is no exception behind which landowners as such can shelter. Thus the *Bottomley v Bannister* (1) point fails.

#### *East Suffolk Rivers Catchment Board v Kent*

Next it was urged on behalf of the council that the present case was one to which the well-known decision in *Geddis v Bann Reservoir Proprietors* (6) as to liability for the negligent exercise of powers did not apply having regard to what was said in the speeches in the *East Suffolk Rivers Catchment Board* case (7), where the board was held not to be liable for having failed to use in the exercise of its powers reasonable expedition in repairing a breach in a sea wall (which they do not appear themselves to have erected) with the result that the flooding of the plaintiff's land caused by the breach was not abated as promptly as it would have been had such expedition been used. Particular stress was laid on a passage in the speech of LORD ROMER where he summarised the principle he considered to be involved in that case. He said:

'Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power.'

He proceeded to emphasise that the only duty of the board was not to add to such damage as would have been suffered by the plaintiff had they done nothing.

As a matter of first impression that statement of the law seemed to provide a formidable point in favour of the council. But even on the basis that the instant case is

(1) [1932] 1 KB 458.

(2) [1932] AC 562; [1932] All ER Rep 1.

(3) [1936] 1 All ER 960; [1936] 2 KB 46.

(4) [1906] AC 428.

(5) [1961] NI 26.

(6) (1878), 3 App Cas. 430.

(7) 105 JP 129; [1940] 4 All ER 527; [1941] AC 74.

concerned with a 'mere power' there is a very relevant distinction between the facts in the *East Suffolk Rivers Catchment Board* case (1) and the facts now under consideration. Where in a case relating to the exercise of powers the issue arises whether on the facts the cause of any damage is non-feasance or whether that cause is a misfeasance the borderline can be difficult to discern. The *East Suffolk Rivers Catchment Board* case is one in which the failure to proceed with the building work sufficiently quickly was held to be in essence a case of non-feasance—although LORD ATKIN's dissenting speech shows how close it came to that borderline. In the present case, on the contrary, the negligence plainly occurred in the course of a positive exercise by the council of its powers. The moment it exercised its power under s 61 of the 1936 Act to make byelaws it assumed control over all such building operations within its area as were the subject of those byelaws. That assumption of control was a positive act and thereafter in my opinion any negligence in its exercise fell within the ambit of the decision in the *Geddis* case (2), had the council's surveyor failed to make any inspection at all of the foundations that, of itself, might, according to the circumstances, have constituted negligence. But be that as it may, it is quite plain that the approval of the foundations by the council's surveyor was a positive exercise of its powers of control—in the same way as would be the switching on of a green light by a signalman, to adopt the helpful analogy raised arguendo by STAMP LJ. In so far as in the present case we are concerned with the exercise of mere powers, we are dealing with a case of misfeasance.

It follows that on that ground there is, in my judgment, nothing in the decision in the *East Suffolk Rivers Catchment Board* case (1) which can afford a defence to the council; accordingly it is not necessary to consider the further point taken by counsel for the plaintiff, based on passages in the speeches of VISCOUNT SIMON LC, LORD THANKERTON and LORD PORTER respectively (see also the speech of LORD ATKIN) that the decision there in substance turned on the question of causation.

#### *Nature of loss*

It was strongly contended on behalf of the council that the nature of the loss suffered by the plaintiff was in essence economic and that for economic loss no action would lie in negligence. For my part, however, I would adopt what was said by SALMON LJ in *Ministry of Housing and Local Government v Sharp* (3):

'So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.'

That appears to me to accord with the views expressed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (4) by LORD DEVLIN and by LORD PEARCE. That proposition must, of course, be taken in conjunction with what LORD DENNING MR said in *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* (5), where he adverted to the need to apply common sense to the particular situation being considered so as to avoid too wide an area of liability for damages being recoverable for some act of negligence.

In the instant case there is ample evidence of physical damage having occurred to the property—but it has been argued that this damage is on analysis the equivalent of a diminution of the value of the premises and does not rank for consideration as physical injury. Counsel for the council found himself submitting that if, for instance,

(1) 105 JP 129; [1940] 4 All ER 527; [1941] AC 74.

(2) (1878), 3 App Cas 430.

(3) 134 JP 358; [1970] 1 All ER 1009; [1970] 2 QB 223.

(4) [1963] 2 All ER 575; [1964] AC 465.

(5) [1970] 3 All ER 245; [1971] 1 QB 337.

the relevant defect had been in the ceiling of a room then if it fell on somebody's head or on to the occupier's chattels and thus caused physical damage then (subject of course to his other points failing) there would be a cause of action in negligence, but not if it fell on to a bare floor and caused no further damage. Apparently in the former case damages would be limited so as to exclude repairs to the ceiling; in the latter case there would be no cause of action at all. That subtle line of argument failed to attract me and would lead to an unhappily odd state of the law.

If physical damage is, contrary to my view, a *sine qua non* before a cause of action can arise against a builder or a building owner, then it seems to me to have occurred in the present case. But in my judgment to pose the question is it physical damage or economic damage is to adopt a fallacious approach. In this case—and perhaps generally in cases concerned with the exercise of duties and powers by a public authority—the correct test is: what range of damage is the proper exercise of the power designed to prevent? In this way the question whether any particular damage is recoverable is brought back into the area of policy indicated by LORD DENNING MR in his judgment in the *SCM* case (1), and appropriate weight can, if necessary, be given to the fact that this case concerns a house and not a chattel. At this stage, it suffices to say that nothing in the nature of the loss sustained by the plaintiff of itself precludes a claim being maintained for that loss.

Before coming to this conclusion I have naturally considered the carefully marshalled submissions made with the aid of the most recent edition of the United States Restatement of the Law of Torts but I am unable to accept that in this country, at any rate, anything said there applies to the facts now under review.

#### *Proximity, reliance and statute of limitations*

Before turning to the crucial question in this case there still remain to be considered the submissions made on behalf of the council in relation to three points which can be conveniently considered as a group—although of course each was raised as of itself providing a defence to the action.

As to proximity, it was contended that there was not a sufficiently close relationship between the council's negligence and the plaintiff as regards the subject-matter of the claim on two grounds, each being said to be sufficient to sustain the council's contention, although of course they should also be looked at in combination. First, it was argued that as the defects were due to bad work by the building owner, any negligence on the part of the council was in law not sufficiently proximate to enable the plaintiff to claim against it. There is, however, no substance in this point—which seems somewhat reminiscent of the out-dated conception which led to arguments being adduced as to the distinction between *causa causans* and *causa sine qua non* and also those touching the one-time doctrine of 'last opportunity'. Nowadays, at any rate, the signalman who has fallen asleep and the engine driver who fails to see the obstacle on the line can both be liable (cf *Grange Motors (Cymbran) Ltd v Spencer* (2)); so can an architect, a building contractor, and a demolition contractor all concerned with the same site (*Clay v A J Crump & Sons Ltd* (3)).

Next came the suggestion that because the plaintiff in the present action was not the original purchaser from the building owner but was next in the line of succession in purchasers the relationship between her and the building owner was not sufficiently proximate. That suggestion overlooks the very essence of the *Donoghue v Stevenson* decision. As regards hidden defects the fact that there have been intermediate purchasers or users is not in point where the defect can only come to light at the stage

(1) [1970] 3 All ER 245; [1971] 1 QB 337.

(2) [1969] 1 All ER 340.

(3) [1963] 3 All ER 687; [1964] 1 QB 533.

when the plaintiff is injuriously affected. Here again there is no distinction in this respect between a defect in a house and a defect in a chattel; so that suggestion also has no substance.

Next came the much pressed point that the plaintiff ought to have established affirmatively that she personally or by her agents relied on the inspection by the council when she entered into the contract to acquire the house. It was correctly pointed out that there was no evidence of any such reliance. In aid of this submission were cited passages in the speeches of LORD REID, LORD MORRIS OF BORTH-Y-GEST and LORD PEARCE in the *Hedley Byrne* case (1), and also a number of passages to be found in judgments of appeal courts in the United States. Clearly there can be categories of cases in which the duty to a plaintiff may depend on whether he has placed reliance on the defendants' conduct, be it conduct by way of acts or by way of words. On the other hand, in the vast majority of cases the question whether a plaintiff actually thought about and relied on the defendants' conduct is quite irrelevant; the point in those cases is not whether he thought about the matter and can so state in evidence but simply whether he is entitled to the benefit of a duty owed by the defendant irrespective of whether at the time he thought about that question.

Finally, among this group came the submission that in this class of case the discovery of any defect in the foundations—or indeed generally in a building—might only occur after a considerable number of years and that to allow such claims to be maintained would in effect defeat the intent of the statute of limitations. Whatever be the moment a cause of action in negligence arises, there is again no difference in law applicable to negligence producing a defect in a building and negligence producing a defect in a chattel. There is, moreover, much force in the point made by counsel for the plaintiff that as regards buildings the worse the defect the sooner it is likely to be discovered, and the longer it remains undiscovered the less likely it is that negligence can be proved. This point raised on behalf of the council cannot of itself provide a defence.

In coming to that conclusion I have not sought to rely on the dictum of DIPLOCK LJ, sitting at first instance, in *Bagot v Stevens Scanlan & Co Ltd* (2). That dictum being concerned with doubts whether admissions to the contrary effect made by both parties were valid, the point does not appear to have been argued there; nor was it the subject of discussion before us. So I prefer to express no concluded view, as the point may be susceptible of argument—especially as the limitation period in this class of case might, having regard to ss 1 (3) and 7 of the Limitation Act 1963, on the basis adopted by DIPLOCK LJ, vary according to whether or not personal injury was suffered by a plaintiff. Much, moreover, may depend on whether the views expressed under the heading 'Nature of loss' are correct.

It follows that none of the above points which have been grouped together can of itself provide the council with a defence. They do, however, raise questions which it is proper to take into account when considering the final question on the lines of approach indicated by LORD PEARSON.

#### *A duty situation?*

Having thus cleared the way of a number of obstacles each submitted in turn to preclude the plaintiff succeeding in her claim, the stage has now been reached for approaching the final question: As between the council and the plaintiff was there 'a duty situation', to adopt the apt phrase used by LORD MORRIS OF BORTH-Y-GEST in the *Dorset Yacht* case (3)? For that purpose I will, as stated earlier in this judgment,

(1) [1963] 2 All ER 575; [1964] AC 465.

(2) [1964] 3 All ER 577; [1966] 1 QB 197.

(3) [1970] 2 All ER 294; [1970] AC 1004.

respectfully adopt the approach signposted by LORD PEARSON in a passage which follows closely the line taken by LORD MORRIS OF BORTH-Y-GEST.

Before, however, so doing, it seems convenient to pause and look around to see what is the area into which one has emerged. It is the area of the exercise of functions of bodies created by statute for the benefit of a community or of individuals who form part of that community. It is an area in which the essential purpose of the legislation is to provide a clear measure of protection which the common law does not of itself afford. That protection is its primary object. That area differs from those in which the courts concern themselves with the effects of operations resulting from contracts between parties (e.g. builder and site owner) whose primary object is their own pecuniary or other advantage and for whom the benefits accruing to others are at least secondary. A fortiori it differs from the area in which the courts are concerned with acts done voluntarily by persons for their own benefit (e.g. the insurers of lifts in the United States cases).

When first asked the direct question: 'To whom does the council owe a duty when exercising the powers derived from the fasciculus of sections in the 1936 Act commencing at s 61 and headed 'Byelaws with respect to buildings and sanitation?', counsel for the council seemed, if I may respectfully so suggest, hesitant in his reply. Having eliminated special cases—such as those in which some specific communication to the council could be said to produce reliance on the surveyor by the builder or by the site owner—the answer in due course came, 'It is under no duty to anybody.' The Act was submitted to be passed for the benefit of the community at large (without imposing any duty justiciable on its behalf), so that a proper standard of building be maintained in the area, but not for the benefit of any category of individuals or any individual. There was thus no duty to any individual and it was urged that no neglect by the council, however gross, could be justiciable at the instance of one who suffered damage.

That answer and those submissions I reject. The Act was passed to protect those who might come to own or occupy the relevant houses against jerry building and similar faults and was intended to benefit such persons. That protection and benefit was the primary purpose of the relevant provisions of the Act; and that is a purpose which falls within the instructions given to the council by the words in s 1, 'it shall be the duty of the following authorities to carry this Act into execution'. It follows that as between the council and the owners and occupiers of houses over the building of which it has control there exists at least in respect of hidden defects of the type under consideration a duty situation—unless (per LORD REID and LORD PEARSON in the *Dorset Yacht* case (1)) there are some countervailing factors which should on policy grounds lead to a contrary conclusion.

Early amongst the countervailing points relied on by counsel for the council was the suggestion that those who might suffer damage had a sufficient remedy against the building contractor (assuming that the *Bottomley v Bannister* (2) point was rejected). That seems a poor point for many reasons—for instance the common law does not normally limit the person who suffers damage to a remedy against one of two culpable persons. In the category of case with which we are here concerned it is moreover particularly important that a dual liability should exist. It is commonplace today that a development project involving the building of a group of houses by a site owner is often so arranged that everything is done by a specially formed company which may be dissolved when the project is completed; such an arrangement can have taxation advantages and can also afford financial protection if the project results in a loss. Those for whose benefit the Act was passed both need and should

(1) [1970] 2 All ER 294; [1970] AC 1004.

(2) [1932] 1 KB 458.



have the benefit of such dual liability as may be available in a state of affairs which could not have come about if the council had done what it ought to do.

Next came the suggestion that to uphold the plaintiff's claim in this case would open the way to a flood of similar claims against councils and—perhaps more importantly—against others who make inspections under statutory powers, such as factory inspectors and those who carry out annual tests on motor vehicles for which no renewal of a licence can be obtained without the aid of a test certificate. This could be a formidable point if established to the degree propounded by counsel for the council. But as regards similar claims under the 1936 Act there must be remembered the very great difficulties that normally beset a plaintiff on whom lies the burden of proving that a hidden defect resulted from a surveyor's negligence as opposed to, at highest, from an error of judgment. Practical experience points against any flood of such claims.

As regards inspections under other powers—here again it must be kept in mind that the instant case is concerned with negligence against which normal intermediate examination would not generally afford protection. No doubt there will be some claims made as regards the exercise of other statutory powers; but without a close examination of those particular powers and also of the chances of proving negligence in relation to their exercise no reliable forecasts can be made. For my part I do not find myself in that state of fear in which counsel for the council sought to envelop me. Indeed in the end I find nothing in this point to deter me from deciding this appeal in accordance with the justice of the case.

As regards the several other points raised, of which it was said that individually or in the aggregate they should on policy grounds lead to the instant claim being excluded from the general ambit of the main principle to be found in *Donoghue v Stevenson* (1), it seems sufficient, save in one instance, to refer to what I have said earlier in this judgment as to some of the points and to add that as regards the others I am in general agreement with what has been said about them by LORD DENNING MR.

The one point for further mention relates to the measure of damages. What is the answer to the question: what range of damage is the proper exercise of the relevant power designed to prevent? Primarily, it is designed to prevent owners and occupiers having to live in a dwelling built to a lower standard than that prescribed by the Act and the byelaws made under it. *Prima facie* the measure of damage must accordingly include the cost of the work required to raise the dwelling to the requisite standard. In addition the design being to avoid injury to health or to other property due to sub-standard construction, damage suffered under this head would (subject of course to the usual rules as to causation and mitigation) be recoverable and also something for general inconvenience suffered whilst occupying the premises and for disturbance during repairs.

For my part, however, I doubt whether a claim lies for any reduction in the market value of the premises over and above the cost of the relevant work, e.g. if, for instance, a house with underpinned foundations were shown to be worth £300 less in the open market than one with good original foundations. The Act is not concerned with market value as such and it could be consistent with the policy applicable to this class of case to draw a line which would preclude recovery of this type of economic loss (cf the *Gorris v Scott* (2) line of cases). The measure of damages for negligence is not the same as the measure for breach of warranty—and as regards negligence I would also wish to reserve the question whether the measure against a building contractor might not exceed that recoverable against a council. As, however, counsel for the council in the course of his reply specifically disclaimed reliance on any distinction

(1) [1932] AC 562; [1932] All ER Rep 1.

(2) (1874), LR 9 Exch 125.

between the two component parts (£2,240 and £500 respectively) of the £2,740 for which the council was held liable, it is not necessary further to consider this doubt of mine. (Some such sum would anyway presumably be appropriate for the wretched inconvenience suffered.)

The suggested countervailing points being found to be ineffective, it follows that as between the council and the plaintiff there existed a duty situation even if the former were exercising mere powers. A fortiori, of course, was there such a situation if, as I would hold, the council were under a duty, imposed by the 1936 Act, to exercise control. In either case the plaintiff is entitled to recover damages for the negligence that has been established.

The plaintiff has not raised the question whether a claim for breach of statutory duty would lie in this case in the absence of negligence. So it is unnecessary to consider whether the instant case is one that falls on the *Groves v Lord Wimborne* (1) or on the *Phillips v Britannia Hygienic Laundry Co* (2) side of the line. That is a point which may have to be considered on some future occasion, particularly since s 61 of the 1936 Act has been amended by the Public Health Act 1961, so that instead of byelaws there are now always regulations made by the Minister which it has become the duty of councils to enforce. I would dismiss the appeal.

**STAMP LJ:** Under s 1 of the Public Health Act 1936 the defendant council had the duty to carry the Act into execution within its area. Under s 61 of that Act it was provided that every local authority might, and, if required by the Minister, should, make byelaws for regulating (inter alia) the construction of buildings and the materials used in their construction. The council did make such byelaws. In my judgment they must be taken to have done so pursuant to the duty cast on them by s 1 of the Act. The byelaws so made imposed no duties on the council, but having made them, it became one of the functions of the council to see that the byelaws were complied with. They became part of the machinery enabling the council to perform its duty to protect the health and amenities of the local inhabitants. The byelaws did not impose on the council any duty to ensure that a house built within their area was not built on an insecure foundation, but contained machinery enabling them to perform that task, and a powerful sanction if the byelaws were not complied with.

By the joint effect of byelaws 2 and 6 (1) a builder intending to build a house was required to furnish the council, with not less than 24 hours' notice in writing—(a) of the date and time at which the operation would be commenced; and (b) before the covering up of any drain, private sewer, concrete or other material laid over a site, foundation or damp-proof course. A builder who failed to do this acted at his peril for, by para (2) of byelaw 6, it was provided that if the builder neglected or refused to give any such notice, he should comply with any notice in writing by the council requiring him, within a reasonable time, to cut into, lay open or pull down so much of the building, works or fittings as prevented the council from ascertaining whether any of the byelaws had been contravened. Byelaw 18 (1) provided in effect that the foundations of every building should be so designed and constructed that the stability of the building was not impaired.

The machinery set up pursuant to the Act was well designed to secure that houses built in the area of the council were not jerry-built houses or built on unsound foundations. The machinery gave the council the opportunity, which it took in this case, to see that the house which the plaintiff subsequently purchased was not such a house. The council, however, by its surveyor acted so carelessly that it did not

(1) [1898] 2 QB 402; [1895-99] All ER Rep 147.

(2) [1923] All ER Rep 127; [1923] 2 KB 832.

discover the house was built on unstable land. The council's surveyor told the builder that the foundations were passed as satisfactory and showed him the green light to build on what was in fact an unstable foundation. The result was he did build and the plaintiff, when she came to purchase the property, purchased a house which began to fall down. She has suffered loss.

Before examining the law, or approaching the authorities relied on, I find it convenient to deal first with the submission made on behalf of the council that the injury to the plaintiff was not caused by any act or default of the council. It was, so the argument ran, the builder, and not the council, who carelessly built the house on an insecure foundation, and so created the lack of stability of which the plaintiff complains. I cannot accept this submission. As I see it, the situation was essentially this. The council had power, derived from the Act and the byelaws made thereunder, either to give or refuse its approval to the foundations; to show the green light or the red. In error, because they had carelessly done their work, they showed the green. In my judgment he who shows the green light in such circumstances as these causes the consequential injury. Let me illustrate this. Let it be supposed that one side of a winding road be under repair and there be a man on duty to ensure that the traffic coming in opposite directions is not on the road at the same time. The man on duty holds up the green flag or shows the green lights or shouts 'Go on' to driver A, not observing, as he should have done, that driver B is coming in the opposite direction. Can it be doubted as a matter of common sense, that it is the man on duty who causes the damage suffered in the ensuing collision? The analogy, like most analogies, is not complete, but serves to illustrate the point. It is not complete because I have assumed no carelessness on the part of driver A, whereas in the instant case it is common ground that at the time the council illumined the green light, the builder had carelessly laid the foundations. It was, however, precisely to correct such earlier carelessness that the action of the council was taken; and because I accept the submission that but for the council's error the house would, on the balance of probability, never have been built on its insecure foundations, that I accept that the act of the council did cause the injury. In this connection, I refer to the speech of LORD REID in *Home Office v Dorset Yacht Co Ltd* (1), where he considers to what extent the law regards the acts of another person as breaking the chain of causation between the defendant's carelessness and the damage to the plaintiff, and where he concludes that if the intervening action—here the action of the builder—was likely to happen, it does not matter whether that action was innocent, tortious or criminal, and remarks that unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the careless act of the defendant. What happened in this case was in my judgment 'the very kind of thing' which was likely to happen if the council was careless.

If it be correct that the action of the council caused injury to the plaintiff, the questions which as I see it fall to be determined are, first, did the council owe a common law duty to the plaintiff not to injure the plaintiff by approving the foundations until they had taken proper steps to ensure that they were fairly laid; not to raise the green flag until they had seen that the road was clear; and secondly, was the injury which the plaintiff suffered an injury for which damages can be recovered?

If some of the remarks in the speech of LORD ATKIN in *Donoghue v Stevenson* (2) were to be applied without qualification there would, I venture to think, be no difficulty in answering the questions raised. LORD ATKIN said:

'The liability for negligence, whether you style it such or treat it as in other

(1) [1970] 2 All ER 294; [1970] AC 1004.

(2) [1932] AC 562; [1932] All ER Rep 1.

systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

Persons who might become the purchaser of a house built on an insecure foundation are in my judgment so closely and directly affected by the act of a local authority in passing or refusing to pass the foundations as secure, that the authority ought reasonably to have them in contemplation as being affected when the local authority apply their mind to the question whether they should or should not do so. It is common ground that the defects in the foundations in the instant case were, as they were bound to be, concealed; and no reasonable inspection of the property by any purchaser would disclose the defects, which could only become manifest as the foundations started to settle; and unless the local authority were carrying out an academic exercise, for what other purpose, except primarily to protect future owners of the house, was the exercise performed? And if this case does not fall precisely within any other authority, the court must have in mind what LORD MACMILLAN said in a much cited passage in his speech in *Donoghue v Stevenson*:

'The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.'

If, in the instant case, the council ought reasonably to have had one in the position of the plaintiff in contemplation as one who might be injured by what it did, I ask the rhetorical question, why should not the local authority be liable to the plaintiff for the injury which she has suffered?

Of course, the passage in the speech of LORD ATKIN, which I have quoted, is not to be read literally and without regard to the context, or, as has been said, it would comprehend careless conduct of any kind through any means, causing damage of any kind, whether physical or not, to anyone who could bring himself within the definition of a neighbour. LORD ATKIN was not formulating a complete criterion, as was indicated by LORD REID in the *Hedley Byrne* case (1):

'That decision [in *Donoghue v Stevenson*] may encourage [the courts] to develop existing lines of authority, but it cannot entitle us to disregard them.'

A host of authorities has been cited which it is submitted inhibit this court from concluding that the council was under a liability to the plaintiff. In my judgment, their relevance depends on the view one takes of the facts of the case. I turn in a moment to consider those principally relied on by the council.

In view of the course which the case took in the court below, counsel for the plaintiff felt unable to contend that this is a case where the council had a statutory duty to

inspect the foundations and accepted, as I understand it, that the council in doing what it did was exercising a statutory power. If then, as was submitted on behalf of the council, one came to the conclusion that the council as a result of the carelessness of its officer, merely failed to prevent damage which had already happened, it would, so I think, follow, on the authority of the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent* (1), that here there was no liability. That case is authority for saying that where a statutory body in exercise of a statutory power fails through foolish error to remedy a damaging situation which has already occurred, it is no more liable for the failure than if it had not exercised the power at all. To constitute a tort, there must be a duty owed to the plaintiff by the defendant not to cause injury and an act of omission which causes it; and on the facts of the *East Suffolk* case, the House of Lords concluded that the authority there had not caused any injury. On the facts of this case, however, I take the view that but for what the council did so carelessly, the house would, on the balance of probability, never have been built on the unstable foundation, and I would hold that that careless act did cause the injury and that this is not a case which is to be equated with one where the authority, while endeavouring to exercise a power to cure a damaging situation, fails to do so.

Nor, in my judgment, is the *East Suffolk* case an authority for the proposition advanced on behalf of the council that it would be wrong, because it would deter statutory bodies from exercising their functions, to hold that a council which had no duty to exercise a power may be in a worse position if, while endeavouring to exercise it, it does so in a way which causes injury to the plaintiff. So to hold would in my view be to fly in the face of the authorities which were analysed in the *East Suffolk* case and establish that although an authority exercising a power is not liable for injury which would have been suffered had it not exercised the power, it is liable to injury carelessly caused in the exercise. VISCOUNT SIMON LC in his speech in that case expressed the view that, if what was done had caused fresh damage, the authority would have been liable for that damage. None of their Lordships in the *East Suffolk* case dissented from the statement of the law by LORD PARKER OF WADDINGTON in *Great Central Railway Co v Hewlett* (2):

'it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered.'

I add only this in relation to the *East Suffolk* case, namely, that regarded as an authority on causation, the facts there were so very different from those in the present case, that I cannot regard it as authority to support the contention that in the instant case, the local authority cannot be regarded as having caused the injury suffered by the plaintiff. There, the event which caused the damage had already happened before the board did that of which complaint is made. Here, as I emphasise again—and this is the basis of my judgment—the house would on the balance of probability never have been built but for the carelessness of the council.

On behalf of the council, reliance was placed on the decision of the House of Lords in *Robertson v Fleming* (3), as authority for the proposition that where A does something on behalf of B for the benefit of others, including C, if as a result of the carelessness of A in the performance of his task, C loses an intended benefit which would have

(1) 105 JP 129; [1940] 4 All ER 527; [1941] AC 74.

(2) [1916] 2 AC 511; [1916-17] All ER Rep 1027.

(3) (1861), 4 Macq 167.



accrued to him had the act or service been carefully performed, C cannot recover damages against A. Accepting that *Robertson v Fleming* is authority for the proposition so stated, the proposition does not in my judgment assist the council, but merely shows that I have no duty so to act as to confer an advantage on my neighbour. The proposition assumes that what C loses is an intended benefit and his position after the act of carelessness by A is precisely the same as it was before.

Nor can I equate the facts of the instant case with those in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1), where liability for a careless misrepresentation was established. There, the liability was held to extend only in favour of one who acted in reliance on the misrepresentation; and since in the instant case the plaintiff did not rely on the council, so here, it is submitted, there is no liability. But the speeches in the *Hedley Byrne* case extended the area of liability and did not restrict it. The speeches there are to be read with regard to the question which fell to be decided, and I cannot accept that any of their Lordships would have regarded their language as exempting from liability C, a man who having taken on himself the task of directing the traffic, carelessly told B that the road was clear, with the result that A was injured in the ensuing collision. The distinction between the *Hedley Byrne* case and this case is that there there could be no damage suffered except by a person who relied on what was done and said by the defendant, and the defendant could only have had in contemplation as someone who might be injured by his carelessness, a person who might rely on his statement. Hence, the insistence in the speeches in the *Hedley Byrne* case on the necessity for reliance by the plaintiff and proximity as a necessary ingredient of the tort. Here, on the other hand, if my approach to the facts be right, injury could be and was suffered by the plaintiff as a result of the council's carelessness, and she was a person so closely and directly affected by the act of the council that they ought reasonably to have had her in contemplation as being so affected. Accordingly, in my judgment it is not necessary for the plaintiff here to establish that the plaintiff relied on the council in order to complete her cause of action.

Reliance was also placed on such cases as *Cavalier v Pope* (2) and *Bottomley v Bannister* (3), as establishing that where injury arises from the defective state of land or of a ruinous house sold or let by the defendant who ceases to be in occupation of the property he is not generally liable apart from contract unless he has acted fraudulently. It would, so the argument runs, be anomalous if the vendor who had erected the house was under no common law duty to a purchaser for injury caused by the careless way in which he or his builder had done so, but the local authority, who played no part in the construction, was nevertheless held to be liable. It is not in my view open to this court to question the true effect of this line of authority. Nor do I see any necessity so to do in order to hold the council liable; for as a matter of logic or common sense, there is, as I see it, no reason to acquit the council of negligence because the former owner or even the builder cannot be made liable. The fact that the owner or builder of a house has no common law duty to a purchaser not to put into the market a *dangerous* house, would not lead to the conclusion that the local authority, taking on themselves to satisfy themselves that the house is built on secure foundations, have no duty to a purchaser to carry out carefully the very task which they have set out to perform.

I now come to consider the submission advanced by counsel for the council to the effect that it would be an extension of the law to hold that the particular injury suffered by the plaintiff is an injury for which damages may be recovered. It is

(1) [1963] 2 All ER 575; [1964] AC 465.

(2) [1906] AC 428.

(3) [1932] 1 KB 458.

pointed out that in the past a distinction has been drawn between constructing a dangerous article and constructing one which is defective or of inferior quality. I may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose. The submission is I think a formidable one and in my view raises the most difficult point for decision in this case. Nor can I see any valid distinction between the case of a builder who carelessly builds a house which, although not a source of danger to person or property, nevertheless owing to a concealed defect in its foundations starts to settle and crack and becomes valueless, and the case of a manufacturer who carelessly manufactures an article which, although not a source of danger to a subsequent owner or to his other property, nevertheless owing to a hidden defect quickly disintegrates. To hold that either the builder or the manufacturer was liable, except in contract, would be to open up a new field of liability, the extent of which could not I think be logically controlled, and since it is not in my judgment necessary to do so for the purposes of this case, I do not, more particularly because of the absence of the builder, express an opinion whether the builder has a higher or lower duty than the manufacturer. But the distinction between the case of the manufacturer of a dangerous thing which causes damage and that of a thing which turns out to be defective and valueless lies I think not in the nature of the injury but in the character of the duty. I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it, but the duty does not extend to putting out carelessly a defective or useless or valueless thing. So again one goes back to consider what was the character of the duty, if any, owed to the plaintiff, and one finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but may embrace economic damage which the plaintiff suffers through buying a worthless thing, as is shown by the *Hedley Byrne* case (1). So the point that raises the difficulty in this case does not, as I see it, arise from the fact that the injury suffered here was the loss of the value of the house or the cost of putting it right. What causes the difficulty—and it is I think at this point that the court is asked to apply the law of negligence to a new situation—is that whereas the builder had, as I will assume, no duty to the plaintiff not carelessly to build a house with a concealed defect, yet it is sought to impute a not dissimilar duty to the defendant council. At this point I repeat and emphasise the difference between the position of a local authority clothed with the authority of an Act of Parliament to perform the function of making sure that the foundations of a house are secure for the benefit of the subsequent owners of the house and a builder who is concerned to make a profit. So approaching the matter there is in my judgment nothing illogical or anomalous in fixing the former with a duty to which the latter is not subject. The former by undertaking the task is in my judgment undertaking a responsibility at least as high as that which the defendant in the *Hedley Byrne* case would in the opinion of the majority in the House of Lords have undertaken had he not excluded responsibility.

In coming to the conclusion that the situation in the instant case was what LORD MORRIS OF BORTH-Y-GEST there called 'a duty situation', I derive assistance from the conclusion of the majority in the House of Lords in the *Dorset Yacht* case (2). There the defendant was held liable not on the ground that it had committed a breach of its

(1) [1963] 2 All ER 575; [1964] AC 465.

(2) [1970] 2 All ER 294; [1970] AC 1004.

statutory duty, nor on the ground that in exercise of its statutory powers it had itself done an act which caused the plaintiff damage, but, as here, for a careless failure or omission while exercising its powers to prevent the happening of that which caused the damage.

If I am correct in my view that the council here was, like the careless architect in *Clay v A J Crump & Sons Ltd* (1), in control of the situation, in that it had taken on itself to see whether or not the foundations were safe and that but for its carelessness the house would not have been built, I am also assisted to my conclusion that the council is here liable on the authority of that case. I too would dismiss the appeal.

I would particularly express my appreciation of the skill of counsel in leading me, however unsuccessful the journey may have been, through what was previously an unknown and at one time seemed an impenetrable forest.

*Appeal dismissed.*

Solicitors: Doyle, Devonshire, Box & Co, for Sparrow & Sparrow, Bognor Regis; Woodham Smith, Borradaile & Martin, for Hubbard & Co, Chichester.

Reported by G F L Bridgman, Esq, Barrister.

(1) [1963] 3 All ER 687; [1964] 1 QB 533.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, CAIRNS, LJ AND KILNER BROWN, J)

3rd December 1971

R v BLACKPOOL JUSTICES. Ex parte BEAVERBROOK NEWSPAPERS LTD

*Criminal Law—Publicity of proceedings—Committal proceedings—Application by some defendants for order permitting publication of reports of proceedings—Application of order to all defendants including defendants joined later—Criminal Justice Act, 1967, s 3 (2).*

Where a number of defendants are concerned in committal proceedings affecting them all and one or more of them has asked for an order under s 3 (2) of the Criminal Justice Act, 1967, permitting publication of reports of the proceedings, the order will apply to other defendants, including those joined in the proceedings at a later stage, as if they had applied under s 3 (2).

*Criminal Law—Publicity of proceedings—Committal proceedings—Application for order permitting publication of reports of proceedings—Application made before taking of depositions begun—Criminal Justice Act, 1967, s 3 (2).*

An application for and the grant of an order under s 3 (2) may be made as soon as the defendant is brought before the court and before 'committal proceedings proper', i.e., the taking of depositions, have begun.

MOTION on behalf of Beaverbrook Newspapers Ltd for an order of certiorari to bring up and quash a decision of Blackpool justices that s 3 (1) of the Criminal Justice Act 1967 should apply to prohibit the reporting of committal proceedings against Frederick Joseph Sewell and other persons.

*L Brittan* for the applicants.

*H E P Roberts QC* and *F E Hiorns* for the accused Sewell, Bond, Flannigan, Jermain, Palmer, Kerrigan, Panayiotou and Stavrou.

*J Rogers* for the accused Spry.

*J M Cope* for the accused Haynes.

*H K Goddard* for the respondent justices.

*I R Taylor* for the Director of Public Prosecutions.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of Beaverbrook Newspapers Ltd for an order of mandamus addressed to the justices for the petty sessional division of Blackpool requiring them to order that s 3 (1) of the Criminal Justice Act 1967 should not apply to certain committal proceedings currently being heard before those justices. Alternatively, he asks for an order of certiorari bring up to this court and quash a decision of those justices made on 29th November 1971 whereby it was ordered that s 3 (1) of the Criminal Justice Act 1967 should apply to the reporting of the said proceedings.

The facts on which this case depends are brief and not in dispute. On 24th August 1971 three men, Bond, Spry and Flannigan appeared before the Blackpool justices on charges of robbing one Lammond of watches and rings, and they were remanded in custody until 27th August. These charges arose out of an armed robbery of a jeweller in Blackpool, after which, or in the course of which, shots were fired and a police officer was killed. On 27th August at the same court another man called Haynes was charged with robbing Lammond, and he also was remanded in custody. On 30th August, Bond, Spry and Flannigan were remanded until 8th September, and Haynes was remanded for periods which subsequently extended to 8th September also. On that day, 8th September, which is a significant date, Bond, Spry, Flannigan and Haynes were brought before the justices and charged with additional offences of attempting to murder a police constable and of possessing firearms with intent to endanger life. On 3rd September, meanwhile, Barbara Palmer was charged with assisting one Sewell with intent to impede his apprehension, one Kerrigan was similarly charged with assisting Sewell, and a woman called Irene Jermain was also charged with assisting Haynes and Sewell to impede Sewell's apprehension and prosecution. These charges arose out of the same incident as that to which I have referred. On 8th September these three accused, Palmer, Kerrigan and Jermain were also brought before the justices and pursuant to applications by them the justices made an order under s 3 (2) of the Criminal Justice Act 1967 that the restriction imposed by s 3 (1) of the said Act should not apply to reports of the proceedings against Palmer, Kerrigan and Jermain.

I pause to remind myself of the terms of s 3. Subsection (1) of the section provides:

'it shall not be lawful to publish in Great Britain a written report, or to broadcast in Great Britain a report, of any committal proceedings in England and Wales containing any matter other than that permitted by subsection (4) of this section.'

However there are exceptions created by sub-ss (2) and (3). The important provision in this case is s 3 (2):

'A magistrates' court shall, on an application for the purpose made with reference to any committal proceedings by the defendant or one of the defendants, as the case may be, order that the foregoing subsection shall not apply to reports of those proceedings.'

Events were still moving. Other accused were being apprehended, and by 29th November, which was the first day on which the justices were ready to start taking depositions additional persons were before the court. At this time Sewell, Haynes, Bond, Spry and Flannigan were accused of the murder of the police officer who was killed, the attempted murder of other officers, and the robbery of Lammond. Jermain, Palmer and Kerrigan were charged in terms not significantly different from those to which I have already referred, and a number of other accused were also charged with playing a minor part in the affair. On the morning of 29th November when the taking of depositions was to begin, questions arose whether the Press were

to be at liberty to report the proceedings or not, and, of course, the answer to that question depended on the extent of the effect of the order made on 8th September under s 3 (2) in respect of the three accused to whom I have referred.

There is some authority to assist in the interpretation of this section, although it is still a relatively new one. The first case is a case in the Divisional Court of *R v Russell, ex parte Beaverbrook Newspapers Ltd* (1). I find it unnecessary to refer to the judgment in detail, and I think it suffices to say that the effect of that decision is that where there are a number of accused concerned in committal proceedings affecting them all, if one such accused asks for an order under s 3 (2), that order must be made and will apply to all the accused concerned in those proceedings. It is, I think, clear from *Russell's* case that there can be no instance in which, in any one set of committal proceedings, restrictions on reporting apply to some accused and not to others. The stark choice whether in such an instance reporting shall be permissible in respect of all or in respect of none is taken by the Act, and the effect of the Act is that, if one accused applies for an order and gets it, all other accused involved in those committal proceedings are also subject to the full glare of publicity which used to apply to all accused before 1967.

There is, I should say, one further authority which has been referred to, and is of some relevance here. It is *R v Bow Street Magistrates, ex parte Reginald Kray* (2) again a decision of the Divisional Court. For present purposes the importance of that decision is that it lays down that an application for an order under s 3 (2) and the grant of such an order may be made before the committal proceedings proper have begun. I use the phrase 'committal proceedings proper' because, by virtue of s 35 of the Criminal Justice Act 1967, when an accused person is brought before the magistrates' court charged with an indictable offence, the justices are to be treated as sitting as examining magistrates as soon as the accused appears or is brought before the court. In one sense, and for certain purposes, the committal proceedings may, therefore, be said to begin as soon as the accused is brought before the court, but I am referring in the phrase 'committal proceedings proper' to the moment when the taking of the depositions begins and the decision of this court in *Kray's* case shows that an order under s 3 can be sought and granted before the committal proceedings proper have begun. Furthermore, *Kray's* case is authority for the proposition that when an order is made under s 3 (2) the particular committal proceedings to which it relates must be ascertained in the light of the circumstances prevailing at the time when the order is made. In *Kray's* case this was a difficult and somewhat complex problem; in the present case in my judgment, it represents no problem at all.

Counsel who appears for eight of the accused and seeks to uphold the justices' order denying the right of publication has made a number of points. I begin with his second one, which in substance is this. He says that it is not practicable for one accused effectively to elect to ask for publicity for the proceedings until all the accused who are to be concerned in those proceedings are identified and known. He puts forward what are no doubt very sound practical reasons for saying that it is difficult or inconvenient for such a decision to be made by one accused when he is still unaware of the full scope of the intended committal proceedings and still unaware of precisely who will share the dock with him when those proceedings begin. He says, therefore, that we ought to take the view that any order applied for or made under s 3 (2) before the identity of all the accused was known should either be regarded as an ineffectual order or one which the justices can withdraw on application if they think fit.

For my part I can find no substance in that argument at all. It may well be that

(1) 133 JP 27; [1968] 3 All ER 695; [1969] 1 QB 342.

(2) 133 JP 54; [1968] 3 All ER 872; [1969] 1 QB 473.



there are inconveniences in an accused making a decision to apply for an order under s 3 at an early stage in the proceedings, but the answer must surely be that he can wait until it is convenient. The section does not provide that the application must be made at any particular time, and an accused who wishes to bide his time should bide his time. That seems to me to meet counsel's contention that difficulties will arise if a view other than that is taken. Furthermore, on the authority of *R v Russell* (1) it is abundantly clear that if one begins with ten accused and one or some opt for publicity the others must fall into line, and for my part I cannot see any reason why there should be a difference in this respect merely because some of the accused are only joined in the proceedings at a later stage. I cannot follow the argument that because some of the accused here came into the proceedings later, this in any way gives them rights which they would not have enjoyed had they been in the proceedings from the beginning. In that latter event *R v Russell* is authority for the proposition that the election of these three accused to have publicity for their proceedings would have bound them all.

The question as it has been posed by counsel on behalf of the applicants may really be expressed thus: What are the proceedings to which the order made on 8th September applies? In my judgment, there is no doubt at all about what those proceedings are. They are committal proceedings against the three accused who sought the order, Palmer, Kerrigan and Jermain, and they are committal proceedings in respect of a charge under s 4 of the Criminal Law Act 1967 against those three persons. Those proceedings, so defined, now include and embrace and are merged with the committal proceedings in respect of all the accused. The consequence, as in the case of *R v Russell* (1), is that all the accused, in my judgment, are now open to the publication of the details of their cases as though they themselves had applied for an order under s 3 (2). However, counsel for eight of the accused says that there is a further special reason in the present case why that general proposition should not apply, and the special reason is this. The charge against the three accused who opted for publicity was a charge under s 4 (1) of the Criminal Law Act 1967. By s 4 (4) it is provided:

'No proceedings shall be instituted for an offence under subsection (1) above except by or with the consent of the Director of Public Prosecutions: Provided that this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for such an offence, or the remand in custody or on bail of a person charged with such an offence.'

The argument, which indeed is an ingenious one, is this. It is said that the Director of Public Prosecutions did not authorise these prosecutions until 15th October. The correctness of that assertion is not proved before us beyond doubt, but there was apparently some remark made in the course of the proceedings yesterday which entitles counsel for eight of the accused to say that he understands that to be so. Given that fact, he says that the order under s 3 sought and made on 8th September is an ineffectual order because it was made in respect of the accused charged under s 4 of the Criminal Law Act 1967 at a time before the director had authorised the institution of proceedings.

I think, myself, that if one examined these circumstances in full detail, it would become abundantly apparent that the Director of Public Prosecutions had taken up this case and had assumed the obligation to prosecute long before 15th October. As soon as the director decides to prosecute, then no further consent on his part to the bringing of the prosecution is required, and from what we have been told I am

personally left in little doubt that the director assumed control over this matter long before 8th September.

However, even if that is wrong, I still find no substance in counsel's argument, because the proposition, which is derived from *R v Bow Street Magistrate, ex parte Reginald Kray* (1), that the application for an order under s 3 (2) can be made at anytime, and even prior to the beginning of committal proceedings proper, means to me that such an order could have been made on 8th September even though at that time the director had not given his consent to the proceedings. The accused would have been in custody by virtue of the warrant of arrest, and the proviso to s 4 (4) makes it perfectly clear that the arrest and charge of such person is legal even in advance of the consent of the director. For one, or other, or both of these reasons, I am satisfied that there is no objection to this application on the special basis derived from s 4 (4) of the Criminal Law Act 1967.

There remains only the question whether this court in its discretion should grant the relief which is sought. Some complaint has been made that the applicants were slow in bringing these proceedings. I find little substance in that. The order complained of was made on 29th November and the applicants were before this court seeking leave to move at 2.00 pm on 1st December. That is not the kind of delay which should deny an applicant a discretionary remedy. It is said with perhaps rather more force that the first two days of the committal proceedings, indeed the first three days of the committal proceedings, were carried on in circumstances in which it was assumed that there would be no publicity, and that the nature of the proceedings and the conduct of the proceedings was affected by that assumption. It is said now that certain disadvantages will flow because the accused did not know in time that this application was to be made. I think that the blow, if one may so describe it, contained in that allegation is much softened by what counsel has told us on behalf of the director, namely that facilities will be granted for the recall of witnesses if required, but I think in the end the reason for my view that the order of certiorari applied for should go is simply this. The law, as I have endeavoured to explain it, shows that the justices were wrong in the purported order which they made on 29th November purporting to restrict publication of these proceedings. It may be that the simple fact that this court has said so, would be enough to authorise the press to go ahead and report the proceedings. But if that result would follow in any event, it seems to me to be a futile exercise to talk about refusing the order itself on any discretionary ground. Accordingly, I for my part would allow the order of certiorari to go to set aside the justices' purported order of 29th November. I see no reason for mandamus to go because the original order under s 3 (2) with the consequences which I have endeavoured to explain is still in my judgment a valid order.

**CAIRNS LJ:** I agree.

**KILNER BROWN J:** I also agree.

*Certiorari granted: mandamus refused.*

Solicitors: Oswald Hickson, Collier & Co; Sampson & Co; Baldwin Mellor & Co; Montague Gardner & Howard; Cuddy, Woods & Co, Blackpool; Director of Public Prosecutions.

Reported by T R Fitzwalter Butler, Esq, Barrister.

QUEEN'S BENCH DIVISION

(LORD WIDGERTY, CJ, ASHWORTH AND GRIFFITHS, JJ)

8th December 1971

JEMMISON v PRIDDLE

*Game—Killing without licence—Exceptions and exemptions—Deer—Killing on enclosed lands—'Enclosed lands'—Farmland as distinct from moorland—Deer hit on land with permission running to and dying on neighbouring land—Game Licences Act, 1860, s 4, s 5.*

Under s 4 of the Game Licences Act, 1860, any person who takes, kills or pursues any game or deer without the appropriate licence being in force shall forfeit £20. Section 5 contains a number of exceptions and exemptions, and the exceptions include number 5 relating to 'the taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission'.

'Enclosed lands' within the meaning of s 5 are not restricted to lands in the nature of a deer park where deer are kept, but include lands used for farming and enclosed by normal agricultural hedges. The contrast is between land enclosed by hedges or otherwise and moorland where there are no enclosures and the deer can run free.

An information charged the appellant that he 'unlawfully did take and kill certain game, to wit, two red deer' without the appropriate licence, contrary to s 4 of the Act of 1860. The appellant, who did not hold a game licence, was shooting deer on B's farm with B's permission. He fired three shots, one of which missed, but the second hit and killed a deer which had left B's land and was on the land of P where the appellant had no permission to shoot. The third shot hit a deer on B's land, and the deer ran on to P's land and there died. Justices convicted the appellant, holding that B's land was not 'enclosed land' within the meaning of s 5. On appeal,

HELD: B's land was enclosed land within the exception in s 5; as regards the deer which had been hit on B's land and had run on to P's land, the shooting of that deer was a killing within the exception as being on B's land, even though it fell only when it reached P's land, and no offence had been committed in respect of that killing; but with regard to the other deer B had no permission to shoot on P's land, so in respect of that killing an offence had been committed.

*Information—Duplicity—Single activity involving more than one act—Information alleging killing of two deer—Shots fired within seconds from same point.*

An information is not bad for duplicity if it relates to one activity only, even though that activity may involve more than one act.

An information charged the appellant that he 'unlawfully did take and kill certain game, to wit, two red deer'. It appeared that a friend of the appellant put up two deer from a covert and when they appeared the appellant fired and killed them.

HELD: the information was not bad for duplicity.

CASE STATED by South Molton, Devon, justices.

An information was preferred at South Molton Magistrates' Court by the respondent, Gordon William Priddle, against the appellant, Raymond Ronald Jemmison, charging that he, on 6th February 1971 at Lower Sheepshyre Farm, Chulmleigh, in the county of Devon, unlawfully did take and kill and pursue certain game, to wit, two red deer, without having duly taken out and having in force such a licence as was required by s 4 of the Game Licences Act 1860. On 12th May 1971 the justices heard the information and convicted the appellant, who appealed.

Nigel Inglis-Jones for the appellant.

J B S Edwards for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the county of Devon sitting at South Molton, who on 12th May 1971 convicted the appellant, Raymond Ronald Jemison, on an information alleging the following offence:

'That he on the 6th February, 1971, at Lower Sheepsbyre Farm, Chulmleigh, in the county of Devon, unlawfully did take and kill and pursue certain game, to wit, two red deer, without having duly taken out and having in force such a licence as was and is required by the Game Licences Act, 1860.'

To look first at the legislation, the Game Licences Act 1860 requires the taking out of a licence by anyone who seeks to take and kill game in Great Britain and prescribes a penalty for neglect. But s 5 of the same Act contains a number of exceptions and exemptions, the exceptions dealing with the circumstances of the activity and the exemptions dealing with certain personalities who are exempted from the operation of the Act. Under the exceptions one finds in exception 5: 'The taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission.' For the present purpose the offence charged was committed by the appellant unless, in the circumstances of the offence or the alleged offence, s 5 applied to exempt him. The Case Stated is not, I am bound to say, quite as clear as it might be. Today is not the first time that this court has been faced with a Case Stated which does not clearly set out the facts proved. One cannot overstress the importance of clear findings of fact as the basis of an appeal by Case Stated. However, it seems to me that one can take as the basic circumstances which the justices must have found in this case the following. On the day in question the appellant with a friend was shooting deer; he had obtained permission to shoot on the farm of a Mr Burke, and to the farm of Mr Burke he and his friend repaired. The friend put up two deer from a covert and the appellant waited with his 12-bore shotgun, as it is described in the Case, to shoot them when they appeared. Two running deer appeared and the appellant fired three shots. One shot missed and is wholly unaccounted for, one shot hit a hind when it had left the land of Mr Burke and was already on the neighbouring land of a Mr Pincombe. This first hind was hit and killed when it was on Mr Pincombe's land, it having run there from the land of Mr Burke. In regard to the second hind, this was killed by the third shot fired by the appellant. This fell on Mr Pincombe's land, having run there from the land of Mr Burke, but there was apparently, according to the justices, some evidence of a veterinary surgeon to the effect that this second hind was hit when it was on Mr Burke's land and nevertheless ran on in a wounded state until it fell on Mr Pincombe's land. It is unsatisfactory that the justices do not say whether they accepted that veterinary evidence or not. I think in the circumstances that this court ought to assume that the justices found that as a fact, that both animals fell on Mr Pincombe's land, one of them being hit on Mr Burke's land and subsequently moving on to Mr Pincombe's land.

The relevance, of course, of the difference between the one land ownership and the other is that the appellant had permission to shoot on Mr Burke's land, but had no permission to shoot on Mr Pincombe's land, and, as I have already pointed out, in exception 5 one of the requirements of the exception is that the killing of deer should be by the owner or occupier of such land or by his direction or permission.

I should proceed to say something of the justices' own view. They had to consider whether the land on which all this happened consisted of enclosed lands within the meaning of exception 5. If the land did not consist of enclosed land, then the exception could not apply, and the offence was undoubtedly committed. Having given the matter careful attention, the justices took the view that enclosed lands in this context were lands in the nature of a deer park, lands in the nature of an enclosure

where deer were kept and where the landowner might require power to kill deer from time to time in order to maintain the herd and to cull out those animals which were weakly or sick. The justices, as I read their Case, eventually came to the conclusion that these lands were not enclosed lands because they were ordinary Devon farmland and were not in any sense a deer park or place where deer were artificially accumulated and kept.

The first point taken by counsel for the appellant today is that the justices were wrong in the meaning they gave to the phrase 'enclosed land'. All I can say on this point is that I agree with the argument of counsel for the appellant, an argument which is not seriously disputed by counsel for the respondent. I think in this context the contrast is between enclosed lands, such as lands used for farming and enclosed by normal agricultural hedges, and moorland where there are no enclosures and where the deer can run free. In my judgment, all land with which we are concerned here, whether it be the land of Mr Burke or of Mr Pincombe, being ordinary farmland, was enclosed land for present purposes. Thus counsel for the appellant makes his first point.

The second question is whether these two deer were killed on land where the appellant had the permission of the owner to kill them. So far as the deer which was shot on Mr Pincombe's land was concerned, the appellant clearly had no permission from the owner of that land to kill the deer—in fact Mr Pincombe was extremely angry about it, one gathers, and refused to allow the carcase to be removed. On the other hand, if it be right that the other deer was hit on Mr Burke's land and moved on to Mr Pincombe's land before it dropped, then, in my judgment, the shooting of that deer would be a killing within the meaning of the exception on land where the appellant had the permission of the owner or occupier to shoot. Accordingly, taking the matters raised so far, the position would be that the appellant would be guilty in respect of the first deer, but not guilty in respect of the second; in respect of the second the killing would have been within his legal rights although he had no game licence under the Act.

That brings us, however, to the third and last point taken by counsel for the appellant, and indeed perhaps the point which has given the court the most trouble, because now at the eleventh hour counsel for the appellant submits that the information was in any event bad for duplicity. He maintains that although no word of this was said in the court below, and therefore no opportunity was given to the prosecution to amend this information if it wished, nevertheless in this court, it being a matter going to jurisdiction, he is entitled to raise this question, and that it is conclusive of the appeal in his favour. With some reluctance on my part I feel bound to accept that it is open to counsel for the appellant to raise this matter in this court notwithstanding the history of the case. One, therefore, has to consider the correctness of the submission which he seeks to make. His argument briefly is that the information relates to two red deer, and that the killing of each of those deer was a potential offence in the absence of the appellant having a game licence, so, he says, the information is bad for duplicity because it contains within itself an allegation of two separate offences. The principles which determine the circumstances in which an information will or will not be bad for duplicity are not clearly laid down. There are various landmarks, as it were, in the subject for guidance, but there is a substantial area in between where the court must in my judgment retain a measure of discretion. I take as one landmark *R v Ballysingh* (1), and it suffices to read the headnote:

'Where, in a case of shoplifting, the evidence for the prosecution shows that a number of articles have been taken from different parts of a large stores, the proper course is to make each taking the subject of a separate count for larceny.'

(1) (1953), 37 Cr App Rep 28.



Thus, if the accused is alleged to have gone to one department and picked up a handful of tomatoes, or whatever it may be, it is perfectly legitimate to charge that as a single offence. If the accused spends a substantial time going round the floors picking up a separate article here and another article there, on the authority of *R v Ballysingh* those individual articles ought to be charged separately. One asks oneself why? What is the principle which distinguishes between these two cases, and one finds that the explanation is given in somewhat inappropriate language, namely, that the test is whether the acts were all one transaction. That is a phrase hallowed by time but not, in my judgment, of particular assistance in dealing with the present problem. I find some more assistance from somewhat different language used by LORD PARKER CJ in *Ware v Fox* (1). It is not necessary to deal with the facts of the case; it suffices to say that in it there was a charge under s 5 of the Dangerous Drugs Act 1965 in which an allegation was made that premises were being used for the purpose of smoking cannabis resin or for the purpose of dealing in cannabis resin, and a considerable argument developed whether that count was bad for duplicity or not. In dealing with this LORD PARKER said:

'I find it easiest to approach the matter by considering what would have been the position if this information had been laid under para. (a) [of s 5 of the Dangerous Drugs Act 1965]. If laid under para. (a), it would, as it seems to me, allege a user for two completely different activities, one for the purpose of smoking and the other for the purpose of dealing. Prima facie, therefore, it is alleging two separate offences. It is quite different from the sort of case which alleges one activity achieved in one of two different respects.'

I think that that phraseology of LORD PARKER is more helpful to me than the phraseology often found in the textbooks, and I think that what it means is this, that it is legitimate to charge in a single information one activity even though that activity may involve more than one act. One looks at this case and asks oneself what was the activity with which this man was being charged? It was the activity of shooting red deer without a game licence, and although as a nice debating point it might well be contended that each shot was a separate act, indeed that each killing was a separate offence, I find that all these matters, occurring as they must have done within a very few seconds of time and all in the same geographical location, are fairly to be described as components of a single activity, and that made it proper for the prosecution in this instance to join them in a single charge. I would find, therefore, that the information was not bad for duplicity, and I would find that the conviction was justified, at all events in regard to the deer which on any view of the matter was hit after it had reached Mr Pincombe's land.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Appeal dismissed.*

Solicitors: *Field, Fisher & Co*, for *J Furse, Sanders & Frith*, South Molton; *Sharpe, Pritchard & Co*, for *N B Jennings*, Exeter.

Reported by *T R Fitzwalter Butler, Esq, Barrister.*

(1) 131 JP 113; [1967] 1 All ER 100.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

14th December 1971.

CRAWFORD v HAUGHTON

*Road Traffic—Regulations relating to construction, etc., of vehicles—Using vehicle on road in contravention of regulations—'Using'—Vehicle driven by person other than owner's servant at owner's request—Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 6 (1).*

For the purposes of s 64 (2) of the Road Traffic Act, 1960, as substituted by s 6 (1) of the Road Traffic (Amendment) Act, 1967, and regulations made thereunder with regard to the construction, weight, etc., of vehicles, the owner of a vehicle may be 'using' it when it is being driven by his servant within the scope of his authority, but when it is being driven by a person other than his servant, although at the owner's express order and with his full knowledge, the owner cannot be 'using' the vehicle, as distinct from causing or permitting it to be used.

CASE STATED by the justices for the city of Liverpool.

The respondent, James Haughton, chief constable of Liverpool and Bootle, preferred an information against the appellant, Carl Crawford, charging that he on 17th May 1970 did use a motor vehicle on the road without a valid licence or insurance and other offences under the Motor Vehicles (Construction and Use) Regulations 1969 made under s 64 of the Road Traffic Act 1960. The justices convicted the appellant, fined him £10 on each charge and ordered his licence to be endorsed. The appellant appealed.

*J Briggs* for the appellant.

*E Somerset Jones* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the city of Liverpool sitting as a magistrates' court at Liverpool on 19th April 1971. In the course of their adjudication they convicted the appellant of ten offences all concerned with the condition and use of a particular motor vehicle on a particular occasion. The motor vehicle is described as a stock car, but all that the Case Stated tells us by way of amplification of that information is that it seemed to have failed to comply with practically every known regulation affecting motor cars. There was an unauthorised use of trade plates, the vehicle had not got an excise licence, it had not got any wings, it had not got a mirror, it had not got an instrument capable of giving audible and sufficient warning of approach, it had not got lights, and so the catalogue goes on, ten offences altogether. At 1.20 p.m. on 17th May 1970 a somewhat astonished police officer saw this vehicle being driven on the highway by a Mr Gaule. The vehicle was stopped, and after a short interval the appellant arrived on the scene, obviously having come there because of some association with the vehicle. The police officer asked the appellant if he was the owner, and he replied: 'Yes, we have bought it as a write-off'. The inspector then asked if it was being used on account of his, the appellant's, business, and the appellant replied: 'Yes, it is being taken to Kirkby', and the reference to its being taken to Kirkby was that there was a stock car racing meeting at Kirkby Stadium that afternoon and the vehicle was going to Kirkby on the appellant's behalf for the purposes of that meeting.

The justices gave the following opinion in the course of their Case. They said that they were of opinion that in view of the evidence of the police officer, there was evidence that Mr Gaule had been using the vehicle with the authority of the appellant and with his knowledge and that therefore the appellant was using the vehicle.

The only argument before us, and it has been an interesting and valuable argument, is whether it was correct to convict the appellant in these circumstances of the offence of using the defective vehicle. The regulations which were breached are regulations made under the Road Traffic Act 1960, and the section, which is s 64 (2) as substituted by s 6 (1) of the Road Traffic (Amendment) Act, 1967, provides as follows:

'Subject to the provisions of this section, a person—(a) who contravenes or fails to comply with any such regulations as aforesaid; or (b) who uses on a road a motor vehicle or trailer which does not comply with any such regulations or causes or permits the vehicle to be used; shall be liable on summary conviction to a fine not exceeding £50.'

The argument which is put before us today by counsel for the appellant is that on the facts found by the justices it may well have been open to them to convict the appellant of causing or permitting the vehicle to be used in this defective condition, but, says counsel for the appellant, it was not open to the justices to convict him of using the vehicle.

There is a great deal of authority in recent years on points similar to the one with which we are now concerned; the offence of using is an absolute offence, whereas the offence of causing or permitting requires knowledge on the part of the accused. It is often more difficult to convict, therefore, of causing and permitting than it is of using, but it is quite clear that the prosecution must lay their information under the correct constituent of the section, and if in fact this was only causing or permitting and not using, the correct answer is that the information should be dismissed.

I feel it possible to start in regard to authority on this point with *Windle v Dunning and Son Ltd* (1). This was a case in which quarry owners had entered into a contract with haulage contractors to supply vehicles and drivers for the purpose of hauling the stone from the quarry, and on an occasion three of these vehicles were found on the road with excessive loads and the quarry owners were charged with using these vehicles in contravention of the appropriate regulations. LORD PARKER CJ, having read s 64 (2), went on in these terms:

'In my judgment, as was said by the Lord Justice-General (LORD CLYDE) in giving judgment in *Macleod v. Penman, Hamilton v. Blair and Meechan, Hawthorn v. Knight* (2), "The presence in the section of the alternatives of causing or permitting the use must limit the scope of what is 'using'. Normally 'using' is applicable to the actual driver." I [i.e. LORD PARKER] entirely agree with that, and in my judgment, "using" when used in connexion with causing and permitting has a restricted meaning. It certainly covers the driver; it may also cover the driver's employer if he, the driver, is about his master's business, but beyond that I find it very difficult to conceive that any other person could be said to be using the vehicle as opposed to causing it to be used.'

Applying that judgment to the present circumstances would lead to the conclusion that the appellant had been wrongly charged because there is no suggestion that Mr Gaule, who was driving the vehicle, was his servant, and LORD PARKER's classification of those who are to be treated as using would exclude, it seems, the appellant.

The other more recent authority which I find helpful, which is again a decision of this court, is the case of *Carmichael & Sons Ltd v Cottle* (3). This was a case in which a vehicle had been let out on self-drive hire, and the vehicle was found after a period of the hiring to be defective in regard to its tyres. The question arose whether the

(1) 132 JP 284; [1968] 2 All ER 46.

(2) 1962 SC(J) 31.

(3) [1971] RTR 11.

owners of the vehicle who let it out on hire could be described as using it in that condition when in fact the driver of the vehicle was the hirer. LORD PARKER said this:

'It has long been held that, when the offence is not merely an offence of user but can be an offence of causing or permitting the user, a restricted meaning should be given to "use".'

He refers then to *Windle v Dunning and Son Ltd* (1), and repeats what he said in the earlier case by way of reference to the Lord Justice-General's judgment in *MacLeod v Penman* (2). He deals with an argument not previously raised, namely, that even if the owners of the vehicle in that case could not be regarded as its users, they could nevertheless be convicted of aiding and abetting the user. He says:

'Mr Barnes for the prosecution fully recognises that; but he says that, in this case, unlike *MacLeod v Penman* and *Windle v Dunning and Son Ltd*, there is room as it were for the application of the general principle in relation to aiders and abettors. He says here that, on the facts found by the justices, it is permissible to treat the defendants as accessories before the fact. It may be, and I find it unnecessary to decide it, that the answer to that is that, when the words used are "using or causing or permitting", there is no room for the application of the principle in regard to aiders and abettors. The statute in other words itself provides the alternatives, and, if a person is to be charged as an aider and abettor or an accessory, he should be so charged, and under these provisions should be specifically charged with causing or permitting the user.'

Then he goes on to deal with the necessity for the prosecution making it clear in the information what is the case they propose to make against the defendant.

ASHWORTH J, agreeing with the judgment, said that he would like for his part

'to express my own agreement with what has fallen from LORD PARKER CJ about the nature of the charge which should be brought when the prosecution seek to render someone liable not as himself being the user of the vehicle but as someone who is an aider and abettor and, to use a familiar phrase, has counselled and procured the misuse of the vehicle, but I agree entirely with what LORD PARKER CJ has said:

I have not found this a particularly easy case because I find it difficult to accept that if a man can use a vehicle through the hands of his servant, he cannot be said to use it at the hands of someone who at his specific request drives it on a journey at the express orders and with the full knowledge of the owner. No doubt the line must be drawn somewhere, and LORD PARKER's judgments to which I have referred show a tendency to restrict the capacity of persons using in cases where the alternatives of permitting or causing to be used are provided.

I have thought for some time that it might be right for us to say in the present case that there is yet another category of user for present purposes, not merely the actual driver or his employer, but someone who by specific and immediate direction causes a vehicle to be driven in the manner in which it was driven in this case. But in the end I have come to the conclusion that it would not be right in view of the authorities to strive to extend the meaning of 'use' for the present purposes, and that only confusion may follow in subsequent cases if we endeavour so to do.

I have therefore come to the conclusion that this is a case on the wrong side of the line as far as the prosecution are concerned, and that although the appellant would

(1) 132 JP 284; [1968] 2 All ER 46.

(2) 1962 SC(J) 31.

clearly have been guilty of a charge of permitting the use, he was not a user within the authorities and therefore his conviction of using the vehicle on charges 3 to 10 inclusive is one which ought to be set aside. It may be that different considerations would apply to the first two charges if considered in isolation because there the section creating the offence does not contain the alternative of 'causing or permitting', but this was not explored in the court below and I would not feel it right to make a distinction in this court, in view of the fact that the possibility of distinction was not canvassed by the fact-finding tribunal. I think that the only right way of disposing of this matter is to allow the appeal and quash all convictions.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Appeal allowed.*

Solicitors: *Jeffrey Gordon & Co* for Silverbeck & Co, Liverpool; *Cree, Godfrey & Wood*, for R H Nicholson, Liverpool.

Reported by T R Fitzwalter Butler, Esq, Barrister.

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### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

17th December 1971

R v SOUTHAMPTON CITY JUSTICES. Ex parte BRIGGS

*Magistrates—Summary trial—Election by defendant—Application to withdraw consent—Duty of magistrates to hear and determine.*

The applicant appeared in person before the respondent justices on three charges and elected to be tried summarily. He pleaded guilty to all three charges, convictions were entered accordingly, and he was committed to quarter sessions for sentence. The recorder decided that in respect of the third charge, one of theft, a plea of not guilty should be entered and the case remitted to the justices for disposal on that basis. When the applicant again appeared before the justices he desired to withdraw his consent to summary trial and to claim trial by jury in respect of that charge. The justices were advised by their clerk that they had no power to consent to the withdrawal of the applicant's election for summary trial and they refused to hear his application.

**HELD:** the justices had the power to allow the applicant to withdraw his consent to summary trial, and mandamus must issue directing them to hear his application for withdrawal of his consent and in the exercise of their discretion to determine his request for trial by jury.

**MOTIONS** by Jeffrey Briggs for an order of mandamus directing the respondents, the Southampton city justices, to consider and deal in accordance with the provisions of the Magistrates' Courts Act 1952 with his application to be put to his election whether or not to consent to be tried by the justices on a charge of theft remitted to them by Southampton City Quarter Sessions, and for an order of prohibition restraining the justices from trying him summarily on this charge of theft.

*JJ Smyth* for the applicant.

The respondent justices did not appear and were not represented.



**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicant, Jeffrey Briggs, seeking orders of mandamus and prohibition to issue against the justices for the county of Southampton requiring them to conduct certain proceedings before them in such a manner as to permit the applicant to elect to go for trial by jury on a charge of theft, contrary to s 1 (1) of the Theft Act 1968, or to make such election as he may be advised and, in the event of his electing to go for trial as aforesaid, to take all proper steps for the institution of committal proceedings in consequence of such election.

On 11th October 1971 the applicant appeared before Southampton justices on three charges. He purported to plead guilty to all three charges and he was convicted on his pleas. The justices then committed him to the city quarter sessions for sentence. He had elected to be tried summarily in respect of the charge of theft as a preliminary to his plea and conviction by the justices. On 11th November he appeared before the recorder at quarter sessions pursuant to the committal for sentence which the justices had ordered. For reasons which are not entirely clear from the material before us the recorder determined that a plea of not guilty should be entered in the case of the charge of theft with which we are concerned.

That he had authority to do so has recently been made clear in this court in the case of *R v Mutford and Lothingland Justices, ex parte Harger* (1). In recognising the power of the recorder to direct that the matter be sent back to the justices as on a plea of not guilty LORD PARKER CJ gave certain warnings as to the dangers which might follow if recorders and others sitting at quarter sessions exercised this power too liberally, but that the power exists is determined by that case, and it was exercised by the recorder in this instance. He ordered that a not guilty plea should be entered and the matter should be sent back to the justices for disposal.

On the matter coming back before the justices some misunderstanding arose whether the future proceedings were to be proceedings on indictment or summary. In the end it was made clear on behalf of the applicant that he desired to go for trial before a jury in regard to this offence. In other words he desired to withdraw his consent to summary trial which he had given at the very beginning of these proceedings, and desired that the justices' interest in the matter should be confined to the conduct of committal proceedings.

I say there was some misunderstanding in the matter because the solicitor appearing for the applicant had certain discussions with the clerk to the justices, and the latter took the view that there was no outstanding power of the justices to allow the applicant to alter his election in this regard. I would pay tribute to the obvious care which the clerk and his assistant took on this question, but they seemed to have been misled, in a way which I do not fully follow, by the form of the recorder's order into thinking that the recorder had ordered that this matter should be dealt with not only on a plea of not guilty but as on a consent to summary trial as well. I can see nothing in the recorder's order which dealt with the second point at all.

However, the clerk to the justices, taking the view that the issue was determined by the recorder's order, advised the justices that they had no power to allow this applicant to withdraw his consent to summary trial. We have an affidavit from the justices' clerk making it clear that he thought that it was his duty to tender this advice and advised the justices that they had no power to consent to the election being withdrawn.

They had that power. Nothing in the recorder's order that I can see provided to the contrary, and independently of any special order of that kind the power of justices to allow an accused person to withdraw his consent to summary trial was recognised

(1) 135 JP 107; [1971] 1 All ER 81; [1971] 2 QB 291.

as long ago as 1957 in *R v Craske, ex parte Comr of Police of the Metropolis* (1). That decision seems to have received comparatively little publicity until earlier this year, when in an unreported case which came before this court on 14th May, *R v Metropolitan Stipendiary Magistrate, ex parte Zardin* (2), this court referred to the decision in *R v Craske*. In my judgment appears this phrase:

'It is clear from the case of *R v Craske* . . . that in circumstances such as the present the magistrate has a discretion to allow the accused person to change his or her election if he wishes. If there was doubt, as there may have been before, about the existence of that right at all, it is resolved by *R v Craske*.'

So the true position when the matter eventually came back to the justices was that they did have power to allow the applicant to withdraw his consent to summary trial, and if he asked, as he did, to withdraw his consent, then the justices were required to exercise their discretion whether they would allow him to do so or not. The mischief in the present case is that they did not exercise a discretion at all because they believed that they had no discretion to exercise.

For my part I am satisfied they were wrong in adopting the view that they had no discretion to exercise, and I would myself order mandamus to go directing them to hear the applicant's request to withdraw his consent to summary trial, and to determine that request in their discretion. We have been pressed by counsel for the applicant to give some kind of indication or guidelines as to how such a discretion should be exercised. For my part I think it would be dangerous, and I decline to give any such direction. I think it suffices to tell the justices that, as in all their undertakings, they must endeavour to do justice, and whether or not they exercise their discretion in favour of the applicant's request will depend on how they see the broad justice of the whole situation. I would allow mandamus to go in the terms to which I have referred. In the circumstances prohibition is not necessary.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Mandamus granted.*

Solicitors: *Robbins, Olivey & Lake*, for *Robinson, Jarvis & Rolf*, Cowes.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) 121 JP 502; [1957] 2 All ER 772; [1957] 2 QB 591.

(2) (14th May, 1971) unrep.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND FORBES, JJ)

3rd February 1972

NANDHRA v SOLOMON

*Commonwealth Immigrant—Admission—Conditions—Notice of conditions—Conditions endorsed on passport which then returned to immigrant—Commonwealth Immigrants Act, 1962, sch. 1, Part I, para 2 (1).*

The appellant was a Commonwealth immigrant. He landed at Birmingham airport on 21st April, 1968, and was refused admission to the United Kingdom by an immigration officer. Two days later the refusal was revoked, and, through an interpreter, he was told he could remain in England for a period not longer than two months on two conditions (i) that he entered no employment, business, or profession for reward, and (ii) that he left the United Kingdom at the end of the two months. These conditions were endorsed on his passport, which was then returned to him. Later, his permission to remain in the United Kingdom was extended to 23rd September, 1968. He did not leave on that date, and in April, 1969, he obtained employment for reward in England and continued so employed until May, 1971, when he was charged with failing to comply with the aforesaid conditions, contrary to s. 4 (1) (b) of the Commonwealth Immigrants Act, 1962. The justices convicted him and recommended that he be deported. On appeal he contended that the conditions had not been notified to him in accordance with the provisions of para 2 (1) of Part I of Sch 1 to the 1962 Act, in that notice in writing of them had not been given to him.

**Held:** the conditions in the present case were validly imposed, and had clearly been broken by the appellant; the delivery of the passport to the appellant, endorsed as it was with the conditions of entry, was equivalent to giving him a notice in writing in accordance with the terms of para 2 (1); accordingly, the justices had come to the right conclusion and the appeal would be dismissed.

**CASE STATED** by Wolverhampton Justices.

On 3rd May 1971 the respondent, Edwin Solomon, the chief constable of West Midland Constabulary, preferred an information against the appellant, Arjan Singh Nandhra, a Commonwealth immigrant, charging him with failing to comply with a condition of admission imposed on him by the immigration authorities at Birmingham Airport on 23rd April, 1968, that he should not engage in any employment, business, or profession for reward. On 7th May the respondent preferred another information against the appellant charging him with failing to comply with a condition that he should leave the United Kingdom at a date not later than 23rd September, 1968, alleging with regard to both conditions contravention of s. 4 (1) (b) of the Commonwealth Immigrants Act 1962. The justices convicted the appellant on both informations, and he appealed.

*Hugh Bennett* for the appellant.

*P Coleridge* for the respondent.

**LORD WIDGERY CJ:** The facts, which are not controverted, are that the appellant arrived at Birmingham Airport on 21st April 1968; he was interviewed by an immigration officer, he being himself a Commonwealth immigrant; and he was initially refused admission to the United Kingdom. However, after further instructions, on 23rd April 1968, a different decision was taken. He was admitted to the United Kingdom by the immigration officer, but conditions were imposed on his admission (i) that he should not stay longer than two months, and (ii) that he should enter no employment during that period. The Case does not disclose whether the permit to enter and the conditions were imposed in writing in the sense that they were inscribed on a separate piece of paper, but it does find that those conditions

were recorded on his passport, which was then returned to him. Later he asked for an extension of time to stay in this country, and by a letter from the Home Office dated 15th August 1968, he was permitted to stay until 23rd September 1968. There is a blank in the history of the matter until the appellant is found some years later in this country and is charged with having broken both these conditions, that is to say, by working, which he undoubtedly was doing, and by extending his period of stay. On the merits there is no doubt that these conditions were broken. There is no doubt whatever that the appellant without authority remained beyond the period which had been contained in the conditions, and there is no doubt that he did take employment in contravention of those permits.

The only point raised before us is whether the conditions were proved to have been lawfully imposed in the first place. The first point taken by counsel for the appellant is that the letter of 15th August, 1968, was not properly proved in the court below, because the original, which would have been in the possession of the appellant, was not called for by notice to produce and the justices were wrong in allowing admission of a copy as secondary evidence. I do not think it is necessary to reach any conclusion on that point, because, if it be the case that the letter extending the appellant's stay was not properly proved, the result in the court below would be that one would be thrown back on the conditions initially imposed, and one, therefore, turns to see whether any criticism can be levelled at the method by which the original conditions were imposed on 23rd April 1968.

The only point taken is one under para 2 (1) of part I of sch 1 to the Commonwealth Immigrants Act 1962, where it is provided:

'The power of an immigration officer under s 2 of this Act to refuse admission into the United Kingdom or to admit into the United Kingdom subject to conditions shall be exercised by notice in writing; and subject to sub-para (2) of this paragraph, any such notice shall be given by being delivered by the immigration officer to the person to whom it relates.'

I have already said that the Case does not find whether a separate notice in writing in accordance with that paragraph was given in this case or not. I understand that the immigration officer would wish to contend, if it were open to him, that it was given, but on the form of the Case before us it is impossible to take that view. So the issue resolves itself into the final and very narrow question whether the delivery of the appellant's passport with the notice of admission and the conditions inscribed on it is equivalent to giving him a notice in writing in accordance with the terms of para 2.

I can see no reason why the notice in writing should not be contained in the passport if the passport were duly delivered to the appellant as it would appear to have been according to the findings of the justices. Whether there is any advantage to anyone by his having a separate document I know not, but I see no hardship to an immigrant if, instead of giving him a separate piece of paper which he might lose, the immigration officer chooses to record such matters as we are here concerned with in writing on the passport and then delivers the passport to the immigrant. It seems to me that no effective attack can be made on the validity of these conditions, and, if they were validly imposed, they were clearly broken. I think the justices came to a right conclusion and I would dismiss this appeal.

**MELFORD STEVENSON J:** I agree.

**FORBES J:** I agree.

*Appeal dismissed.*

Solicitors: *Sharpe Pritchard & Co*, for Cookseys, Wolverhampton; *Mandy & Steward*, Wolverhampton.  
Reported by N P Metcalfe, Esq. Barrister.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, SACHS, LJ AND ACKNER, J)

25th November 1971

R v RIMMER

*Criminal Law—Evidence—Plea of guilty at magistrates' court—Withdrawal—Committal to quarter sessions for trial—Admissibility of evidence of original plea of guilty—Matters proper to be considered—Discretion of judge.*

A plea of guilty in court which has been withdrawn is not without effect. If the court allows the plea to be withdrawn, the court is deciding that the defendant ought not to be bound by his confession in a way which otherwise would have resulted in his immediate conviction.

Whether evidence of a previous plea of guilty and its withdrawal should be admitted at a subsequent trial is a matter for the discretion of the trial judge, but, before exercising his discretion, he must consider whether the confession made by the plea has any probative value, and, if so, whether such probative value would exceed the prejudice to the defendant resulting therefrom. It is wrong for the judge to admit the plea before investigating these matters.

APPEAL by Patrick Rimmer against his conviction at West Riding Quarter Sessions of entering a ship as a trespasser and stealing a suit, contrary to s 9 (1) (b) of the Theft Act 1968.

S M Spencer for the appellant.

J M Meredith for the Crown.

**SACHS LJ** delivered this judgment of the court: This case gives rise to a point of law of general interest in somewhat unusual circumstances. On 24th February 1971 at Goole West Riding Magistrates' Court the appellant was convicted of taking a motor boat without the owner's consent, and he was sentenced to be made the subject of a probation order for three years. That conviction is not under consideration. Then on 8th March 1971 at Selby West Riding Magistrates' Court the appellant pleaded guilty to theft. The charge against him was that he had on 5th March 1971 trespassed on board a Dutch ship and stolen an overall suit belonging to a member of the crew. He then elected to be dealt with summarily and was remanded until 10th March for reports as to his suitability for Borstal training. On 10th March when he appeared on remand he asked that his plea should be changed to one of not guilty in circumstances which fall to be considered later in this judgment. On 31st March he was allowed to change his plea to that of not guilty; he then elected trial by jury and was duly committed to quarter sessions. On 27th July at West Riding Quarter Sessions he was convicted of burglary and sentenced by the deputy-chairman to nine months' imprisonment, and for the breach of the probation order of 24th February 1971 he was sentenced to three months' imprisonment to run consecutively to the sentence for the offence committed on 5th March. Thus the sentence of the court was 12 months' imprisonment in all. Now by leave of the single judge he appeals against conviction on the ground that at the trial at quarter sessions there was improperly admitted evidence of the plea of guilty which he tendered at the magistrates' court on 8th March.

The facts of the case were as follows. The charge which was originally before the justices and then before sessions related, as already indicated, to the theft from a Dutch ship lying in Goole Dock of a blue and red overall suit worth about £10, a suit which had been kept hanging outside the crew's cabin. It belonged to one Mr Hoch, a member of the crew who had on 5th March gone ashore in the evening and returned



about 10.00 p.m. At that late hour he saw the suit still hanging in the corridor. Next morning he discovered that it had gone. So much for 5th March. On 6th March at about 1.00 p.m. the appellant was seen wearing this suit which undisputedly belonged to Mr Hoch. On 7th March the appellant went at the request of the police to Goole police station where the suit was in the custody of the police force. He was interviewed by a police sergeant about 10.40 a.m. and explained his possession of the suit by saying that the mate of the Dutch ship had given it to him when he had been aboard that ship on the afternoon of 5th March. He maintained that Mr Hoch was wrong when he said he had seen that suit at 10.00 p.m. In that state of affairs the appellant was asked if he would like the mate of the ship to be brought to the police station. At his request that was done. Thereupon the mate, in the presence of the appellant, said that he had not given the latter any suit at all. At that stage the appellant made an oral confession as follows:

'Fair enough, I stole it. I went back to the ship at 10 p.m. I took it because I was cold and I had nowhere to stay.'

That oral confession was followed by a written statement, and in the course of that statement the appellant said:

'I was N.F.A. and at about 10 p.m. I went on board and took it to keep me warm because it was a cold night. I realise I was doing wrong and stealing . . .'

Then one comes to 8th March, the day on which the matter first came before the justices. On that day the mate and Mr Hoch attended court, and the suit was available there. On that occasion, so it appears, the appellant pleaded guilty in carefully chosen words. He pleaded not guilty to burglary but guilty to theft. Thereupon the justices having regard to his past record, remanded him for consideration whether he should be committed with a view to an order for borstal training. Thereafter the mate and Mr Hoch were in effect told that it was all right for them to sail away in their Dutch ship, and at the same time the suit was returned from the custody of the appellant to Mr Hoch himself. At that stage, accordingly, the evidence against the appellant quite literally sailed away. Then came 10th March 1971 when the appellant, who having regard to his record can hardly be said to be unacquainted with the procedure of courts, proceeded to change his plea. The matter was adjourned until 31st March, and on that occasion he was given permission to make that change; thereupon such evidence as was available, which did not include that of the mate, was heard, and he was committed for trial.

At the trial on 27th July 1971 the mate was again not available. A time came in the course of the evidence of Police Sergeant Redhead when the jury were asked to retire, and the deputy chairman was asked to consider whether the police officer could be asked questions in relation to 8th March with a view to establishing that there had been a change of plea in circumstances which were consistent with that change having taken place because the appellant considered that there was then a better chance of acquittal, and at the same time to some extent to explain the circumstances in which the mate of the Dutch ship was not going to be called at sessions. After a discussion to which it is not necessary to refer in any detail at this stage, the learned deputy chairman directed that the evidence as to the original plea of guilty and the subsequent change should be admitted into evidence. He appears to have taken the view that this should be done on general grounds in relation to the circumstances as a whole, and in particular in relation to explaining the fact that the mate would not be giving evidence at the sessions trial.

It is against that decision and the admission of subsequent evidence that the appellant sought and was granted leave to appeal. Before this court it has been

submitted on his behalf in the course of, if the court may be permitted to say so, a well constructed argument by counsel for appellant, that in no circumstances can reference be made at trial to the fact that the appellant at an earlier stage pleaded guilty and later changed his plea. That is a matter which is of more consequence nowadays than it has previously been, because it is only recently that justices have been held to have a discretion to allow a plea of guilty to be changed between the moment of plea and the moment of sentence. That discretion was first stated to exist in *S (an infant) v Manchester City Recorder* (1) which was decided by the House of Lords on 21st October 1969. By virtue of that decision justices have a general discretion which can be exercised on occasions which, it was assumed at the time by LORD UPJOHN, would be likely to occur only rarely, but no guidelines have been laid down as to the circumstances in which such changes shall or shall not be permitted, and it is plain that justices may at times exercise that discretion when in doubt whether facts stated to them by an accused in person are true or not. Indeed nothing that this court would state is intended to suggest that they should take anything but a liberal view of what should be done when an accused appears in person, as he did in the present case.

Today it has been submitted to this court that in law there is a distinction as regards, for instance, statements by way of voluntary confession on the way into court made by an accused, and what five minutes later, in the quieter and more solemn precincts of the court itself he may say by way of voluntary confession when in the dock. In aid of that submission, it was put to this court that the withdrawal of a plea of guilty so to speak wipes the slate entirely clean so that it can never be referred to in the course of the trial.

In the view of this court that argument overlooks the fact that a plea of guilty has two effects: first of all it is a confession of fact; secondly it is such a confession that without further evidence the court is entitled to and indeed in all proper circumstances will so act on it that it results in a conviction. This court is not prepared to accept the submission that a plea of guilty in court, if withdrawn, has simply no effect whatsoever. In truth the request for a withdrawal affects the second constituent of the plea, in other words the court may decide that the accused ought not to be bound by his confession in a way which results in an immediate conviction, and if the court allows the withdrawal, it is that second constituent that is affected. That leaves for consideration in each case the question whether the confession made by the plea has any probative value, and whether that probative value is one that exceeds the prejudice that might be imported by referring to it. Whether it has a probative value at all, and whether that probative value exceeds the prejudice which may be thus imported, must depend on the facts of the case. The circumstances in which a withdrawal of a plea is permitted may vary infinitely. One may have a case where a plea, for instance, to a charge of handling is most properly withdrawn because the appellant did not realise that it was necessary for him to have the relevant knowledge that the goods were stolen. On the other hand, the withdrawal of a plea may result from some completely false statement of fact made by the accused himself as to what has happened between the date of the plea and the date that withdrawal is requested, something which the justices cannot and would not check on the spot. Whether in any individual case the evidence as to the previous plea and its withdrawal should be admitted into evidence is plainly a matter for the discretion of the trial judge, who must most carefully examine whether indeed the probative value does exceed the prejudice which would be induced by the admission of such evidence. In the vast majority of cases in practice the result of such an examination would be that the evidence would not be admitted. Indeed, the occasions on which

(1) 134 JP 3; [1969] 3 All ER 1230; [1971] AC 481.

it is likely to be regarded as admissible will, of their nature, be rare. In each case that question must be decided, as it was in the present case, by an examination of the relevant facts on what is often referred to as 'a trial within a trial'.

That being the principle to be applied, it is now appropriate to return to the particular facts of this case. It is to be observed that when the submissions were made to the learned deputy-chairman, there was no evidence before him of any sort as to the reasons why on 31st March the change of plea was permitted. Nor does the deputy-chairman appear to have approached, or indeed been invited to approach, the question of the admission of the evidence as being a matter of discretion to be determined in the way in which has just been stated. Whether, had the correct approach been adopted then on a careful examination of the material matters in the light of the oral and written admissions made by the appellant, according to the police evidence, on 7th March, the evidence of the change of plea might have been admitted, is an issue on which this court does not feel disposed to offer observations. The fact remains that the matters were not appropriately investigated before the deputy chairman, nor was his attention directed to the relevant principles to be applied. It is, however, as well to state at once that this court would not have considered that his discretion would have been properly applied if it had related simply to the question of explaining the absence of the mate of the Dutch ship, because that absence could be and in practice was adequately explained by other means at the trial itself. In those circumstances, this court is proceeding on the basis that the evidence was not in this particular instance properly admitted, particularly as any such admission would have to be followed by a very careful direction by the trial judge as to exactly how it was to be looked at from a jury point of view. This court however, returning to the oral statement and the very clear written statement of the appellant and to the compelling nature of the surrounding facts, has come to the conclusion that even without referring to the change of plea the evidence against the appellant was overwhelming, and would in any event have resulted in a conviction by the jury. In those circumstances, applying the proviso, the court dismisses the appeal.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; A V Hammond & Co, Bradford.

Reported by T R Fitzwalter Butler Esq, Barrister.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(KARMINSKI, LJ, GEOFFREY LANE AND WATKINS, JJ)

10th December 1971

R v OYESIKU

*Criminal Law—Evidence—Corroboration—Statement by witness previously made by him—Allegation that it is a late invention.*

The evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him unless his credit, as to some material fact to which he has deposed, is impugned on the ground that his evidence is a late invention or has been lately devised or reconstructed even though not with conscious dishonesty.

APPEAL by Charles Oyesiku against his conviction at Middlesex Quarter Sessions of an assault occasioning actual bodily harm and of assaulting a police officer.

*John Hazan QC and P C R Rountree for the appellant.*

*R B Sanders for the Crown.*

**KARMINSKI LJ** delivered this judgment of the court: This is an appeal by the appellant against his conviction at Middlesex Quarter Sessions on two counts, one charging an assault occasioning actual bodily harm and the other charging the appellant with assaulting a police officer. He was sentenced to concurrent terms of nine months' imprisonment on each count.

The appellant, who lives in Barnet with his wife, failed to pay some rates, and on 11th January 1971, a police officer, Sgt Evans, who was also the warrant officer to the appropriate magistrates' court, went to serve the necessary notice or warrant on the appellant. The appellant was not there, but his wife was, and the police officer left with the wife the appropriate printed notice and the court telephone number. He also wrote down his name. A week later, Sgt Evans, not in uniform, went round again. He saw the appellant, and told him that he had left a notice the previous week about the rates. The appellant said he knew nothing about it. According to Sgt Evans this conversation took place on the door-step, and the sergeant had one foot on the top step. Sgt Evans then showed the appellant a warrant for his arrest, which, according to the police officer, caused a very strong reaction. The appellant said that it was all wrong and he knew nothing about it, and, according to the sergeant, the appellant pushed him violently in the chest and caused him to stumble. At that time the sergeant, doing his duty, tried to arrest the appellant. Both men fell to the ground with the appellant apparently on top of the police officer. Then there was what has been described as a tug of war with the sergeant trying to arrest the appellant, and other things followed. It was said that the appellant got hold of a walking stick, locked the front door, and struck the sergeant a number of blows about the arms and head and body, partially stunning him. The sergeant said that he asked the appellant's wife to help, but the appellant refused to let her do so. In the meantime some neighbours, having heard very loud noises and fighting and screaming from the appellant's house, telephoned the police, and reinforcements duly arrived. In the end the appellant was arrested by the police.

Sergeant Evans was examined by the doctor. He was not very badly injured. There were marks on his back and shoulders which, according to the doctor, were consistent with his being struck with something with a flat surface. There was some damage to the knuckles of his right hand, which might have been caused by somebody's teeth. The sergeant was off duty for some time. The appellant was charged and was committed for trial, and in due course he was convicted.

The evidence in the main was that of the appellant and his wife, on the one hand, and Sgt Evans, on the other. The other evidence does not, in our view, amount to a great deal. The real point in this case, in our view, is a comparatively short one. The appellant, having been arrested, was taken in custody to the police station where he remained for the time being. He was later bailed. About two days later the wife went to his solicitors and made a statement in writing. The effect of it can be summarised as being that the aggressor was the sergeant and that the appellant was trying to find out what it was all about and trying to break away, and did not realise that the sergeant was a police officer. The wife had not by that time seen her husband who was in custody. She saw him not very long afterwards. She was cross-examined by counsel for the prosecution, who put it to her that this statement given to the solicitors was something she had made up. Counsel objected to the jury looking at the statement. There is no doubt that he made it quite clear that he was attacking the wife's statement on the ground that she had made it up to help her husband.

The judge without hearing any argument on the law or on the facts ruled that the jury should not see the statement. He said:

'I cannot allow inadmissible evidence to go before the jury and I am ruling that this is inadmissible. I am prepared to allow you to re-examine the witness to the effect that she has made a previous statement in writing to the solicitor and when she made it, and I think I might be prepared to go so far as to allow her to look at her statement and read and say that it is consistent with what she has told the jury today, but I am not going to allow that document to go before the jury.'

It is right to say that towards the end of his summing-up he came back to this question of the statement in rather guarded and brief terms:

'And she was shown a statement made to the solicitors which she says was made one or two days after the [appellant] was taken to Brixton and said she had not visited her husband before that time and that her statement was substantially in accordance with her evidence in front of you. Of course, members of the jury, her statement is not, in fact, evidence. It is not in front of you at all and that is all that you can look at. You must make up your minds, so far as that lady is concerned, whether she is a truthful witness or whether she came here to try and support her husband by telling untruths about what really happened that evening.'

I draw attention to that short passage because the jury never saw the statement which we have had the advantage of reading.

It was argued with great force before us by counsel for the appellant that this decision to exclude the evidence was wrong in law. It so happens that our courts are curiously silent about principles to be applied in cases of this kind. It is conveniently stated in some of the well-known textbooks—Phipson on Evidence, 11th edn, 1970, at paras 156 and 157, and Professor Cross in his book on evidence, 3rd edn, 1967, p 201, where he takes the view that the credibility of a witness's evidence may be confirmed by a statement made by him to the same effect if it can be said to form part of the transaction to which his evidence relates. In *R v Coll* (1), HOLMES J said (1):

'It is, I think, clear that the evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him; nor will the fact that his testimony is impeached in cross-examination render such evidence admissible. Even if the impeachment takes the form of showing a contradiction or

(1) (1889), 25 LR Ir 522.



inconsistency between the evidence given at the trial and something said by the witness on a former occasion, it does not follow that the way is open for proof of other statements made by him for the purpose of sustaining his credit. There must be something either in the nature of the inconsistent statement, or in the use made of it by the cross-examiner, to enable such evidence to be given.'

We regard that statement of the law as correct, and applicable to the present case.

Our attention has also been drawn to a recent decision in the High Court of Australia, *The Nominal Defendant v Clements* (1). I desire to read only one passage from the judgment of SIR OWEN DIXON, CJ. He said:

'The rule of evidence under which it was let in is well recognised and of long standing. If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, inasmuch as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident however that the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid by the party, but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack. It is obvious that it may not be easy sometimes to be sure that counsel is laying a foundation for impugning the witness's account of a material incident or fact as a recently invented, devised or reconstructed story. Counsel himself may proceed with a subtlety which is the outcome of caution in pursuing what may prove a dangerous course. That is one reason why the trial judge's opinion has a peculiar importance.'

Dealing with the last paragraph of that quotation from SIR OWEN DIXON, there is no doubt that in this case counsel for the prosecution was making an attack on the witness. That judgment of the Chief Justice of Australia, although technically not binding on us, is a decision of the greatest persuasive power, and one which this court gratefully accepts as a correct statement of the law applicable to the present appeal.

That is the position in law, and, in our view, the trial judge was wrong to refuse to allow that evidence to be given. The value of it, of course was a matter for the jury to assess. We appreciate also that the judge had a duty to exercise his discretion in a matter of this kind. He dealt with the matter very shortly, saying that he could not allow inadmissible evidence to go before the jury, and he ruled that such evidence was inadmissible. We have come to the conclusion that in all the circumstances of this case he was wrong in coming to that conclusion, and, if he did exercise his discretion, he exercised it wrongly. It is only fair to the judge to say that he did not have

(1) (1961), 104 CLR 476.

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<b>CRIMINAL LAW</b> - Publicity of proceedings - Committal proceedings - Application for order permitting publication of reports of proceedings - Application made before taking of depositions begun - Criminal Justice Act, 1967, s 3 (2) <i>R v Blackpool Justices. Ex parte Beaverbrook Newspapers Ltd.</i> .. .. .	<b>QBD</b>	<b>225</b>
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<b>FORCIBLE ENTRY.</b> See <b>CRIMINAL LAW.</b>		
<b>GAME</b> - Killing without licence - Exceptions and exemptions - Deer - Killing on enclosed lands - 'Enclosed lands' - Farmland as distinct from moorland - Deer hit on land with permission running to and dying on neighbouring land - Game Licences Act, 1860, s 4, s 5. <i>Jemmison v Priddle</i> .. .. .	<b>QBD</b>	<b>230</b>
<b>GAMING</b> - Club - Licensing - Application - Notice - Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2). <i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	<b>CA</b>	<b>71</b>
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<b>GAMING</b> - Club - Registration - Refusal or cancellation - Grounds - Discretion of licensing authority - Gaming Act, 1968, sched 7, paras 8, 18. <i>Tehrani v Rostrom</i> .. .. .	<b>CA</b>	<b>40</b>
<b>GAMING</b> - Club - Registration - Right of proprietary club to be registered - Gaming Act, 1968, Part III, sched 7. <i>Tehrani v Rostrom</i> .. .. .	<b>CA</b>	<b>40</b>

the very detailed argument that we had from counsel in this court as to the general principles to be applied in matters of this kind, but we have come to the conclusion that this evidence was wrongly excluded.

We have to consider whether, as invited by the prosecution, this is a case where it would be right to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968 and to say that notwithstanding the misdirection and the wrongful exclusion of this evidence the conviction can stand. Before we can apply the proviso it is necessary for us to come to the conclusion that, if the jury had been properly directed (in our view in this case they were not), they would have been bound to return the same verdict. It may be that, if the jury had been allowed to see the wife's statement, they would nevertheless have come to the same conclusion and convicted the appellant, but we are quite unable to say on the facts before us that a jury would have been bound to come to that conclusion. For that reason we have decided that this appeal must succeed, since it is not a case for the application of the proviso. The appeal is allowed.

*Conviction quashed.*

Solicitors: Kean & Kean; Solicitor, Metropolitan Police.

Reported by N P Metcalfe, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD DENNING, MR, MEGAW AND STEPHENSON, LJ)

30th November, 1st, 14th December 1971

#### RACE RELATIONS BOARD v CHARTER AND OTHERS

*Race Relations—Provision of facilities—Discrimination—Members' club—Refusal to admit coloured man as member—Members of club 'section of public'—Impersonal quality distinguishing them from public at large—Clubs where admission by invitation—Race Relations Act, 1968, s 2 (1).*

By s 2 (1) of the Race Relations Act 1968: 'It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.'

A members' club for the membership of which persons belonging to a certain political party were eligible provided by its rules that any such person seeking to become a member must be proposed and seconded by two members and then elected by the committee of the club. One S, an Indian, was duly proposed and seconded, but his application to be allowed to join the club was rejected by the committee. The Race Relations Board took the view that this was a breach of s 2 (1) and instituted proceedings under s 19 (1) (b), (d) of the Act against the defendants, sued on their own behalf and on behalf of all other members of the club, for a declaration that the rejection of S was unlawful and for damages.

**Held:** the defendants provided facilities for entertainment, recreation, and refreshment which were 'facilities' within s 2 (1) and the members of the club to whom those facilities were provided constituted a 'section of the public'; the quality which distinguished the members as a group from the public at large was essentially impersonal, as distinguished from a group which was essentially personal, e.g. guests at a wedding

reception where they would be a private group and not a section of the public; and, therefore the defendants, in rejecting S had discriminated against him and were in breach of s 2 (1).

Per STEPHENSON, LJ: Some clubs may be so constituted that admission is by invitation only. This may constitute for them an escape route from the provisions of the subsection.

APPEAL by the plaintiffs, the Race Relations Board, against a decision of Westminster County Court that the defendants, Edward Reginald Marden Charter, Horace A Parker, and William Albert English (sued on their own behalf and on behalf of all other members of the East Ham South Conservative Club of the committee of which they were members) were not in breach of s 2 (1) of the Race Relations Act, 1968, when they refused to elect as a member of the club one Amarjit Singh Shah, an Indian.

*J P Comyn QC, Anthony Lester and M H Mendelson for the board.*

*A P Leggatt and N Thomas for the defendants.*

*Cur adv vult*

14th December, 1971. The following judgments were read.

#### LORD DENNING MR:

##### 1 *The club*

In East Ham there is a members' club called the East Ham South Conservative Club. Its premises are at 1 Vicarage Lane, East Ham. It is a political club. Its object is to maintain and advance Conservative principles. It is closely associated with similar Conservative clubs all over the country. Any man of 18 or over is eligible for membership, provided that he is a Conservative. He has to be proposed and seconded by two members able to vouch for his respectability and fitness, and then elected by the committee. The subscription is 10s a year. Any woman of 21 or over who is a Conservative is eligible for association membership. Her subscription is 5s a year. Youngsters of 16 or 17 can be admitted to junior association membership, also at 5s. Members of other Conservative clubs are admitted as temporary honorary members, provided they produce the appropriate ticket. Members can bring visitors with them to the club.

The club is directly connected with a local political association, called the East Ham Conservative Association. Most, if not all, the members of the club are members of the East Ham Conservative Association. Any member of the Conservative Association who applies for membership of the club is admitted to membership of the club, provided that he complies with the procedure for election. The club provides the usual amenities of a club. It provides facilities and services (including facilities for entertainment, recreation and refreshment) to members and visitors at the club's premises.

##### 2 *The application of Mr Shah*

Mr Amarjit Singh Shah was born in India. He came to this country about nine years ago. He is employed in the post office as a postal and telegraph officer. He is a Conservative and joined the East Ham Conservative Association five years ago, in 1966.

On 27th April 1969 Mr Shah applied to join the club. He was proposed by Mr Charles Morley and seconded by Mr Gilbert Crocker. On 5th November 1969 the committee of the club considered Mr Shah's application. Ten members were present. One of the members of the committee asked the chairman: 'Is colour relevant?' The chairman said: 'I regard it as relevant.' Mr Shah's application was put to the vote. The votes were equal—five for and five against. The chairman



gave his casting vote against the application. So, Mr Shah was rejected. The club say emphatically that this was not because of his colour.

On 7th November 1969 the chairman wrote to Mr Shah, telling him that he would not be eligible for election to membership during the next 12 months, but he would be admitted as a visitor. On 16th December 1969 Mr Shah made a complaint to the Race Relations Board. He said that he had been discriminated against by reason of his colour. The board used their best endeavours to secure a settlement. Not succeeding, they determined to bring proceedings against the club. They issued a plaint in the Westminster County Court, in which they sought: (i) damages for loss of opportunity; (ii) a declaration that the rejection of Mr Shah was unlawful.

On 24th March 1971 an order was made for the trial of a preliminary issue of law. The club said firmly that they had not discriminated against Mr Shah, but nevertheless they were desirous of having this point of law determined. Assuming that the committee rejected Mr Shah's application because of his colour, was their action unlawful? The judge sat with two assessors. He gave judgment for the club. He held that a refusal on the ground of colour was not unlawful. The Race Relations Board appeal to this court.

### 3 *The statutory provisions*

The Race Relations Act 1968 makes it unlawful to discriminate against a person. The material sections for present purposes are these. Section 1 (1) defines 'discriminate'. It says:

'a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other . . . less favourably than he treats or would treat other persons'

Section 2 (1) is the clause which prohibits discrimination in general. It says:

'It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.'

Section 2 (2) gives some examples of the facilities and services mentioned in s 2 (1). To some of these I will later refer. But, I must say at once that they include 'facilities for entertainment, recreation or refreshment', and 'facilities for education, instruction or training'.

### 4 *The interpretation of the statute*

Each side says that the statute should be interpreted on the side of freedom. But we are faced here with two conflicting freedoms. The club contend for freedom for the members to elect whom they please to their own club. Mr Shah contends for freedom to join the club without being turned down by reason of the colour of his skin. Between these two freedoms, the court has to decide. It must take as its guide, and its only guide, the words of the statute, without leaning to one side or to the other.

### 5 *Facilities*

One thing is quite clear. The committee of the club provide 'facilities'. They provide facilities for entertainment, recreation or refreshment. They provide these facilities inside the club. It was suggested before us that 'facilities' might include the opportunity of becoming a member. I do not accept this. It is too far-fetched.

### 6 Provision to the public

The next question is: Do the committee provide those facilities 'to the public'? Clearly not. An hotel, restaurant, or a theatre provide facilities 'to the public', because they provide them to anyone who comes in and is ready to pay the price. But this committee does not do so. They only provide them for a particular category of persons, namely, members of the club and visitors brought in by members. It was suggested that they also provided them for 'would-be' members, that is, for persons who wish to apply for membership. But, this again is too far-fetched. They only provide them for members and their visitors.

### 7 A section of the public

Take next 'a section of the public'. Are the members and their visitors 'a section of the public'? This is the crucial question in the case. Parliament has given us no guide, except indirectly in s 6 (2) of the Race Relations Act 1965 which shows that 'members of an association' may be a 'section of the public' and the word 'association' seems to me appropriate to include some clubs, at any rate, just as it did to LORD PARKER CJ in *R v Britton* (1).

I have looked for help from other branches of the law. The nearest I can find is from the law of charities. In order for a trust to be charitable, the purpose of it must be directed to the benefit 'of the public or a section of the public'. Such is the way the test is always formulated. It is a useful analogy, because in charities you have to distinguish between a 'section of the public' and a private group, and you have also to do so in race relations. But, as with the legislature in the Race Relations Act, so also with the courts in charity cases. Everyone has fought shy of defining a 'section of the public'. In *Re Compton* (2) LORD GREENE MR said:

'No definition of what is meant by a section of the public has, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it.'

In *Oppenheim v Tobacco Securities Trust Co Ltd* (3) LORD MACDERMOTT said that the usual way of approaching the issue was

'to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed, and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test.'

Nevertheless, over the years the courts have evolved a test for determining what is a 'section of the public' as distinct from a private group. It is set out, with illustrations, by LORD GREENE in *Re Compton* (2) and by LORD SIMONDS in *Oppenheim v Tobacco Securities Trust Co Ltd* (3). If I may put the test in my own words, it is this. Look at the group of persons concerned. Make sure that there are quite a number of them (they must not be numerically negligible). See what is the quality which they have in common—the quality which distinguishes them as a group from the public at large. Then ask whether the quality is essentially impersonal or essentially personal. If it is impersonal, the group will rank as a 'section of the public'. If it is personal, it will rank as a private group, and not as a 'section of the public'.

Let me apply this test by taking illustrations in race relations. First, the illustration given by counsel for the board of a Roman Catholic school. It takes boys who are

(1) 131 JP 235; [1967] 1 All ER 486; [1967] 2 QB 51.

(2) [1945] 1 All ER 198; [1945] Ch 123.

(3) [1951] 1 All ER 31; [1951] AC 297.

Roman Catholics and have passed the entrance examination and are accepted by the headmaster. Patrick Murphy is a Roman Catholic, and has passed the entrance examination; on paper, he is a first-rate candidate. When he comes up, the headmaster has a surprise. Patrick Murphy, despite his name, is found to have a black skin. Everyone would agree at once that it is unlawful for the headmaster to reject Patrick on the ground that he is black. The reason is because boys at the school are a 'section of the public'. The quality which they have in common—the thing which forms them into a group—is essentially impersonal. Their one common quality is that they are Roman Catholics who have passed the entrance examination. The additional quality—that they should be acceptable to the headmaster—is no doubt personal, but it does not alter the fact that all the boys have in common an impersonal quality which makes them a 'section of the public'.

On the other side there is the illustration given by STEPHENSON LJ of a wedding reception. The bride's parents issue invitations to the friends of both sides. They invite all the staff in the bridegroom's firm, but, being prejudiced, they omit one of the staff because he is black. Everyone would agree that that is not unlawful. The reason is because the wedding guests are not a 'section of the public'. The one quality which the guests have in common is essentially personal. It is their personal acceptability to the hosts. Even the staff of the firm are grouped together by a personal relationship to the employer. They are not a 'section of the public'.

On which side of the line does the present case fall? To my mind the members of the Conservative club are a 'section of the public'. They are Conservative. That is the one quality which is common to them all. It is the *sine qua non*. It is essentially an impersonal quality. It is true that, in order to become a member of the club, a person has to be proposed and seconded, and has to be elected. That is, in a sense, a personal quality attaching to each one, but it does not alter the fact that they all have in common an impersonal quality which makes them a 'section of the public'. I see no logical distinction between the members of this club and the boys at Patrick Murphy's school, or the students of a college or university, or the members of a church. In each case the applicant has to be acceptable to an admissions committee or the like. Yet beyond doubt the members are a 'section of the public'.

Counsel for the defendants urged that this Conservative club was a members' club as distinct from a proprietary club. But that is a distinction without a difference for this purpose. A proprietary club is usually under the control of a committee, and members are proposed and seconded and elected, just as in a members' club. The difference between them lies in the legal title to the club premises and the food and drink. In the one case it is in the proprietor. In the other case it is in the members. But that cannot make all the difference as to whether they are a 'section of the public' or not.

I realise that this means that the members of some famous clubs in Pall Mall are also a 'section of the public'. Some of them have in common the quality of political allegiance just as this Conservative club does. Others have in common the quality of having been to a particular university or belonging to a particular service. If an applicant with those qualifications is elected almost automatically as of course, it being an impersonal quality, I would not feel able to distinguish such a club from the present, at any rate when the members are so numerous that they cannot properly be described as a private group. They are a 'section of the public'. Such clubs cannot, as I see it, reject a man solely because of his colour or race. Nor, I trust, would they wish to do so.

It also means that clubs which require their members to be of a particular race, or to come from a particular country—and admit them virtually automatically, if they have that qualification—are also a 'section of the public'. I do not expect that

anyone not of that race, or not from that country, would wish to join them, but, if he did, they could not lawfully refuse him on the ground that he was not of that race or from that country. Such is the result of this statute.

But there are many other clubs in which an applicant is not elected automatically by any means, but is elected on his personal qualifications—his personal acceptability to the others. The members of these other clubs would not be a 'section of the public' and would, I think, be able to reject a man for any reason or for none.

#### 8 *Any person seeking to obtain or use*

Once the members of the club are seen to be a 'section of the public', it follows that the committee must not discriminate against 'any person seeking to obtain or use' the facilities of the club. Who is such a person? It is, I think, any person outside the club who applies for membership. He is seeking to obtain or use the facilities of the club for entertainment, recreation or refreshment. Just as when a student from outside applies for admission to a college. He is seeking to obtain the facilities of the college for education, instruction or training. It is impossible to suppose that the 'person seeking' must be already a member of the club or college—in other words, that he must be already one of the 'section of the public'—for that would nullify the Act altogether. It is passed so as to prevent those inside from excluding those outside on the forbidden grounds.

#### 9 *The other sections*

Apart from s 2 the 1968 Act contains ss 3, 4 and 5, which deal with other situations. These are, I think, inserted to make sure that there is no discrimination in the important fields of employment, trade unions and housing. Section 4 deals expressly with certain organisations (like trade unions and professional bodies, and so forth) who admit persons to membership. It was suggested that this section was inserted because otherwise such an organisation would not be a 'section of the public' within s 2. I cannot accept this submission. It is obvious that many organisations within s 4 are also a 'section of the public' within s 2. I think s 4 was inserted simply to make sure that those particular organisations do not discriminate, whether their members were a 'section of the public' or not. It also serves as an introduction to s 16 of and Sch 2 to the Act. It is right to say that this point was hardly mentioned by counsel for the defendants. So I do not stay longer on it.

#### 10 *Conclusion*

I cannot agree with the judge. In my opinion the answers to the preliminary issues are these: (i) an application for election to membership of the club is a situation to which s 2 of the Act applies; (ii) a refusal to elect on the ground of colour, race or ethnic or national origin would be unlawful by virtue of s 2 of the Act.

I do not expect that this ruling will give rise to difficulties. After all, every candidate will still have to be proposed and seconded, and be found generally acceptable to the committee. The only thing is that, if he is otherwise acceptable, they must not reject him simply because of his race or colour or ethnic or national origin. I would allow the appeal accordingly, but I would reiterate that the club deny that they refused to elect Mr Shah on the ground of his colour. That is a matter which must go for trial.

**MEGAW LJ:** I agree with the judgment delivered by LORD DENNING except that I fear I do not share his optimism when he says that he does not expect this ruling will give rise to difficulties.

I have, from the outset of the argument, been unable to see what distinction could validly be drawn, for the purposes of s 2 (1) of the Race Relations Act 1968, between the East Ham South Conservative Club, on the one hand, and clubs such as LORD DENNING

has referred to as 'famous clubs in Pall Mall' on the other hand. For the purposes of s 2 (1) no distinction can be drawn on the basis that one club has as its object the maintenance of political principles of one sort or another, while another club is concerned with social or sporting or cultural activities.

It is not because of any implication in respect of such clubs that I have hesitated before deciding that s 2 (1) of the Act has the meaning and effect which LORD DENNING has expressed. However, for a different reason, I have hesitated long before reaching the conclusion that Parliament intended by s 2 (1) to provide that members of a club or society or voluntary association should be treated, at least in many cases, as being 'a section of the public' for the purposes of this subsection. For once that is accepted, I can see no valid ground for saying that s 2 (1) does not apply to a club or society in England, Wales or Scotland, whether its object is to provide sporting or social or cultural or any other kind of facilities for its members, if the club or society by its constitution seeks to confine its membership to persons of one particular race or of one particular ethnic or national origin. I believe that many such clubs and societies exist in England, Wales and Scotland. I believe that many of them, at least, would be generally regarded as serving a useful and desirable purpose in the community and that their enforced disappearance would be regarded in many quarters, rightly or wrongly, as being in itself a matter of racial discrimination. Yet s 2 (1) of the Act, if the interpretation which I believe has to be given to it is correct, appears to lead inevitably to the perhaps startling, and it may be unintended, result that the committees of these clubs would be acting unlawfully if they gave effect to the club's constitution in its provision for confining membership to a particular race or nationality or 'ethnic origin'.

If that was not, indeed, the intention of Parliament, it is to be hoped that urgent consideration may be given to amending the Act so as to avoid that unintended result and so as to limit the subsection to those types of case to which it was truly intended to apply.

**STEPHENSON LJ:** The preliminary issues ordered to be tried in this case are issues of importance not only to Mr Shah, the Race Relations Board, and the East Ham South Conservative Club.

If consideration by the committee of this club under its rules of an application for election to membership of it is a situation to which ss 2, 3, 4 or 5 of the Race Relations Act 1968 applies, the Act applies to applications for membership of many other clubs. If a refusal on the ground of colour, race, or ethnic or national origins by the committee of this club to elect to membership of it an applicant eligible under r 4 of its rules would be unlawful by virtue of s 2 of the Act, so would be a refusal on those grounds to elect applicants eligible under the rules of many other clubs. Hard as counsel, particularly junior counsel for the board, tried to confine this case to a small field, it was always breaking out, and once over the boundaries of the area defined by the facts which we have to assume there was no stopping it or at least no certain stopping place short of far wider limits.

It was rightly not contended by counsel for the board that ss 3, 4 or 5 of the Act applied to the situation. It is not disputed by counsel for the club (as I will call the defendants who are the chairman, honorary secretary and honorary treasurer of the club and are sued on their own behalf and on behalf of all other members of the club between 27th April 1969 and 5th November 1969), that the applicant Mr Shah was eligible under r 4 of its rules as a male conservative not being under the age of 18 years. The questions we have to decide are therefore these: (i) Were the members of the East Ham South Conservative Club persons concerned with the provision of goods, facilities and services to the public or a section of the public? (ii) Was Mr Shah a person seeking to obtain or use those goods, facilities or services?



If the answer to the first question is 'Yes', the answer to the second must likewise be 'Yes'. Both issues would therefore receive affirmative answers because (i) s 2 would apply to the committee's consideration of Mr Shah's application, and (ii) its refusal to elect him on one of the forbidden grounds would be unlawful by virtue of s 2. If the answer to the first question is, on the contrary 'No', both issues would receive negative answers. The first question is therefore all important and the true answer to it decisive.

This club is a bona fide members' club and there can be no doubt that it in fact provides to its members and their guests the ordinary 'amenities' of a club. I take that word from r 21 of the club's rules to include such 'goods' as food and drink, which its rules and byelaws call refreshments (r 70, byelaw 2), the 'services' of what its rules call employees of the club (rr 5, 59 and 70) and its byelaws 'servants' (byelaw 5), and such 'facilities' (if I can use the term without begging any relevant question) as premises furnished with chairs and tables and supplied with books, pamphlets and newspapers (byelaws 7 and 8). Some of these things may come under more than one head, but they are all included in the trinity of 'goods, facilities and services', which, to my thinking, are comprehended in what r 21 calls 'the amenities of the club'.

I do not think it natural to regard the opportunity to be considered for membership of the club or to be elected a member of it as one of those 'facilities' which s 2 interposes between 'goods' and 'services'. Counsel for the board argued that it obviously was one of those facilities. I agree with LORD DENNING that he is wrong. I note that such an allegation found no place in the particulars of the board's claim as originally pleaded, para 5 of which alleged:

'At all material times the club provided and provides facilities and services (including facilities for entertainment, recreation or refreshment) to members and visitors at the club's premises ...'

Paragraph 6 went on to allege:

'members of the club ... and/or visitors to the club were a section of the public to whom the defendants were persons concerned with the provision of facilities or services within the meaning of s 2 of the Race Relations Act 1968.'

It was only in response to a request under para 6 for further and better particulars of those facilities and services that the board introduced 'the facility of being considered and/or accepted for membership of the club'. It was the facilities and services provided for club members and visitors, not for candidates, which Mr Shah was alleged to be seeking (para 12) and of which he claimed to have been wrongfully deprived (para 14). And when the board claimed 'damages for loss of opportunity' it was doing what the Act itself required (see ss 19 (1) (b) and 22 (1) (b)) and rightly recognising, as the Act did, a distinction between the facilities provided and the opportunity to obtain and use them. Section 2 has, in my judgment, nothing to do with facilities to obtain facilities. First thoughts were best, and I agree with the county court judge that this point fails.

It is a point which admits of little argument but it is of considerable importance, because if it were right and the club was providing a facility within the section in giving candidates for membership the opportunity of becoming members, the board's argument that the club was providing it for the public or a section of the public would be, in my view, irrefutable. Whereas the strength of the club's case is that it was concerned only with providing facilities to members of the club and their guests and not to the public or any section of it, elected members of the club privately providing facilities for each other and for no one else except visitors admitted to the club on the introduction of members under r 23. Mr Shah is undoubtedly a

member of the public. I should have thought it equally beyond doubt that adult male Conservatives eligible to membership under r 4 are a section of the public. But if the only facilities which the club is concerned with providing are not provided to anyone outside the charmed circle of members (and their visitors) but only to those within it, are the club's members, committee or officers persons concerned with providing for the public or a section of the public at all?

On this more difficult point I have come to the conclusion, in agreement with LORD DENNING and MEGAW LJ, that the club's argument, which could claim the support of common sense and accordingly prevailed with the judge and his assessors, is wrong and our judgment must be for the board in allowing this appeal.

It is true that this club is private in the sense that all members' clubs are private (see 5 Halsbury's Laws (3rd Edn) p 252, para 586). The public has no right to enter its premises and obtain or use its facilities. Only its elected members and those they introduce can do that. In this a club resembles a private householder who provides refreshment and recreation for his family and guests and differs from a shop or a hotel which caters for the public at large or at least for that section of the public which seeks to enter it. But the 1968 Act is not confined, as was the Race Relations Act 1965, to places of public resort. The question is not whether the club premises are a public place or whether the club committee is concerned with some form of public or quasi-public activity in providing facilities, but whether the members and visitors to whom they provide them are a section of the public.

To this question the agreed facts about this particular club and its membership give an affirmative answer. The persons for whom this club caters (if that word can be used without misleading) are, it is agreed, accurately set out in para 3 of the particulars of claim. LORD DENNING has set them out at the beginning of his judgment. I respectfully agree with him, using such help as can be got from the law of charities (and s 9 of the 1968 Act allowing charitable instruments to discriminate shows that Parliament did consider that law in this connection) that these persons do constitute a section of the public, although they may enjoy the club's facilities in private. I do not think it possible to draw any distinction between sections and subsections which consist of a considerable number of persons, and I would regard the members of this club as no less a section, although a smaller section, than members of the Conservative Party.

That is not to say that, on the one hand, every club, however restricted its membership or its activities, is concerned with providing for a section of the public. Nor does it mean that, on the other hand,

'in the conduct of their private affairs a genuine club is in the position of a private householder who may ban from his house any person for any reason that he likes, and the Act does not dictate how we shall conduct our private lives',

as JUDGE NICKLIN said obiter in *Race Relations Board v Bradmore Working Men's Social Club and Institute* (1), decided in the Birmingham County Court.

I agree that the Act does not dictate how we shall conduct our private lives. But the Act does dictate how we shall conduct our lives in so far as we are concerned with the provision of goods, facilities and services to the public or a section of it and make them available to members of the public. If that is our concern, we must not discriminate and cannot turn from our houses any person on any one of the forbidden grounds if he seeks to obtain or use what we are concerned with providing. But the householder who provides his guests with a meal, or the parent who invites family and friends to a reception, is not, in my judgment, dictated to by the Act, for the simple reason, additional to that given by LORD DENNING, that those whom he asks are not seeking to obtain or use what he provides. The guests bidden to supper in the

(1) (March 1970) unrep.

parable did not seek to obtain or use their host's food and drink, still less did those who on his instructions were compelled to come in from the highways and hedges. Even if those who came at his first invitation or later under that compulsion were the public or a section of the public (and it would be difficult to argue that the latter had any essentially personal quality in common) they were not seeking but sought. That is one reason why a private householder may still lawfully turn a person from his house on grounds of race or colour or national or ethnic origins. And that may be a reason for holding some clubs able to do the same, but not this club. Some clubs may be so constituted that admission is by invitation only; a would-be member cannot apply without being asked. Counsel for the club sought to extend this escape route to this club—and other clubs—whose constitution required a proposer and seconder for the election of a member by the committee with or without a ballot (rr 3 and 6). That, said counsel for the club, as I understood his argument, means that it is the proposer and seconder who offer the candidate the club's facilities and by accepting them he is not seeking to obtain those facilities.

But this is too artificial an understanding of such elective machinery. The test of the first move must not be pressed too hard. A club like this may encourage persons to apply for membership or be considered as inviting applications simply by putting its name up outside its premises, but in the ordinary way and not merely as a matter of form, the application comes first before the proposing and seconding, as the wording of r 6 shows ('an applicant for membership must be proposed and seconded'), and the whole process really starts with a person seeking to obtain or use the club's facilities by the machinery laid down in the club rules. I cannot see any escape from the Act either for this club or for 'Pall Mall clubs' by this route.

I also agree with LORD DENNING and MEGAW LJ that a club or society or association does not escape from the Act's ban on discrimination by openly limiting its membership to persons of a particular race or colour or national or ethnic origin. Discrimination, which would be unlawful if carried out secretly and without express authority conferred by the rules or constitution of a club or association, cannot be lawful if openly required by its rules or constitution. Authorised or irregular, it is equally obnoxious to the statute. It makes no difference to the application of the Act whether a particular race qualifies or disqualifies the would-be member. Whether or not Parliament intended to take integration so far as to make it illegal for a Pakistani club to refuse membership to an Indian or an Englishman, that must, in my view, be the effect of s 2. As LORD SIMONDS said, the courts are not so much concerned with what the legislature aims at as with what it fairly and squarely hits. If the plain words of s 2 require most, if not all, clubs to write into their rules a rule prohibiting discrimination as defined by s 1, we may be startled, but I agree with counsel for the board that we must not shrink from giving those words that effect.

On the other arguments addressed to us, I agree with what LORD DENNING has said about s 6 (2) of the 1965 Act and the gloss put on it by LORD PARKER CJ in *R v Britton* (1). The additional ground raised in the club's cross-notice, that s 4 of the 1968 Act would be otiose if s 2 applied to clubs, was not much relied on in argument and has not convinced me. It would have simplified our task if members' clubs had found a place in an express provision like s 4 (2), but I agree that one reason for s 4 (and s 3 too) may be found in the special provisions of s 16 of and Sch 2 and Part II of Sch 3 to the Act.

I agree for these reasons, which are with one addition substantially those given by LORD DENNING, that on the facts which we have to assume this appeal succeeds.

Solicitors: *Lawford & Co; Vizards.*

*Appeal allowed.*

Reported by G F L Bridgman, Esq, Barrister.

COURT OF APPEAL (CIVIL DIVISION)

(SALMON, EDMUND DAVIES AND STAMP, LJJ)

9th November 1971

RE B (M F) (AN INFANT)

RE D (AN INFANT)

*Adoption—Contact between adopted child and natural parents—Desirability.*

As a rule it is highly undesirable that after an adoption order is made there should be any contact between the adopted child and its natural parents, but there is no hard and fast rule that an adoption order can only be made on the terms that there should be a complete divorce of the child from its natural parents. Each case must be considered on its own particular facts.

APPEAL by the applicants for an adoption order from a decision of his Honour Judge Stansfield refusing to make adoption orders in respect of two boys aged seven years and four years who had been fostered with them by the local authority.

C Q Henriques for the applicants.

T L Dewhurst for the county council.

**SALMON LJ:** This is an appeal from an order of the county court judge refusing to make an adoption order in favour of the applicants who are prospective adopters of two boys, Martin and Steven. Martin is seven years old and Steven is four years old. These two boys were removed from their parents' home by the county council as being in need of care in March 1968. They were fostered to the applicants, who have had the two boys with them ever since, that is, for just over three years. The applicants have indisputably showered love and affection on these children and given them the most excellent care all the time they have had them. The elder boy was in a very poor way and retarded when he went to them. The younger boy was better but not very well either. The children have made great strides under the applicants' care and are undoubtedly happy and extremely well cared for in their present home.

The applicants have two little girls living at home who are adopted children, one nine and one eight years of age. The house in which they live has excellent accommodation, and no criticism could be made of the children's environment, nor of the way in which they are treated. In one of the reports submitted by the welfare officer of the county council, the fact is referred to that the home is 'untidy'. Perhaps that is unfortunate. No one, however, suggests that it is dirty. The kitchen could be better, and it is said that its hygienic arrangements are not ideal. I cannot think that this is a significant factor when one is considering whether adoption by the applicants is in the best interests of these two boys.

The natural parents (I will call them 'Mr and Mrs D') have a home which is nothing like as satisfactory as the applicants' home. They have two babies, one born in October 1968 and one in 1969, and a little girl called Pauline, who for a time was taken from their care and fostered to the applicants. She returned home. Mr and Mrs D are in constant financial difficulties. Moreover, Mr D has suffered from psychiatric difficulties and finds it impossible to keep a job for long. Both Mr and Mrs D consent to the proposed adoption. The learned judge, in the exercise of his discretion, refused to make the order. Why he did so is not at all clear to me and certainly does not appear from his judgment or from the notes that he made of the proceedings before him.

I have assumed that he founded himself on the county council's report. Apparently the view which the county council take is that it would be better for the status quo to be preserved, that is to say, for the children to remain as foster children with the applicants. It would have the advantage, so the county council think, of keeping the position fluid. There is no doubt that the position would remain fluid, but I am by no means persuaded that that fluidity could conceivably be in the interests of the children. Once an adoption order is made, then the children's position vis-à-vis the applicants is assured. The applicants would have the same legal obligation to the children as if they were their own natural children. I am not suggesting for a moment that they would not in any event continue to treat the children with the same affection and take the same interest in them and accept the same responsibility for them as they do now, and, of course, I know that the county council has no present intention of taking the children away from them. But the applicants feel—and indeed they feel rightly—that just as the children would have no legal rights against them unless an adoption order were made, so they would have no legal right to keep the children should the county council in their wisdom decide to remove the children in the future. I would have thought the insecurity which they not unnaturally feel would be just as unsatisfactory from the point of view of their relations with the children as it would be unsatisfactory for the children to have no security and no legal rights as against their adopters.

The only other point that I should deal with is the fact that the applicants take the view that Mr and Mrs D, for whom they have much sympathy, should from time to time visit the children, and particularly that these two boys should be kept in touch with their sister Pauline. It is quite true that in law Pauline will cease to be their sister after the adoption order is made, but Pauline will remain their natural sister and no order of any court can alter that fact.

As a rule, it is highly undesirable that after an adoption order is made there should be any contact between the child or children and their natural parents. This is the view which has been taken, and rightly taken, by adoption societies and local authorities as it has been by the courts in dealing with questions of adoption. There is, however, no hard and fast rule that if there is an adoption it can only be on the terms that there should be a complete divorce of the children from their natural parents. I refer to the case of *Re G (D M) (an infant)* (1), which in effect followed the dictum of VAISEY J in *Re A B (An Infant)* (2). Although the courts will pay great attention to the general principle to which I have referred, namely, that it is desirable in normal circumstances for there to be a complete break, each case has to be considered on its own particular facts.

The facts of this case are exceptional. Although it may be—I know not—that it would be a good plan if there were a complete break here between Mr and Mrs D and the two boys, the applicants (who I suspect know a good deal more about the situation than I do) consider that the occasional encounters between Mr and Mrs D and the boys and Pauline is for their good.

It is suggested that in the future the fact that the two boys know the applicants as 'Mummy' and 'Daddy' and their parents as 'Daddy D' and 'Mummy D' may lead to stresses and strains, but Mr and Mrs D are not prepared to have these children back. It is all they can do to cope with the three young ones they have at home now, and without any disrespect to Mr and Mrs D, through circumstances over which they have no control, it is obvious that it would be very much more in the interests of the two boys to stay where they have been so well cared for during the last three years.

There is only one other matter that I should mention although I am certain that

(1) 126 JP 263; [1962] 2 All ER 546.

(2) 113 JP 353; [1949] 1 All ER 709; sub nom *Re D X (an infant)* [1949] Ch. 320.



the county council does not regard it as a reason for opposing the adoption order. The fact is this, that unfortunately the applicants did not go through the usual procedure of asking for the consent of the county council before they made their application to the court. No doubt it would have been better had they done so, but of course it cannot have made any difference to the attitude which the county council adopt. Their opposition to the order is apparently based solely on the unusual circumstances that the relationship with the natural parents is not and will not be completely severed. I have no doubt myself that it is in the best interests of the children, giving full weight to that factor, that an adoption order should be made rather than refused, and I would allow the appeal accordingly.

**EDMUND DAVIES LJ:** So would I, and I have nothing to add.

**STAMP LJ:** I too agree.

*Appeal allowed.*

Solicitors: *Canter & Martin*, for *F W Ollier, Wilner & Co*, Manchester; Solicitor to the *Lancashire County Council*.

Reported by H Summerfield, Esq, Barrister.

### COURT OF APPEAL (CIVIL DIVISION)

(SALMON, EDMUND DAVIES AND STAMP, LJ)

11th, 15th, 16th November, 13th December 1971

STEVENS v LONDON BOROUGH OF BROMLEY

*Town and Country Planning—Enforcement—Notice—Service on occupier of land affected—'Occupier'—Licensee of caravan site—Right to be served with notice—Control over site—Duration of enjoyment—Town and Country Planning Act, 1962, s 45 (3).*

By s 45 (3) of the Town and Country Planning Act, 1962: 'Where the local planning authority serve an enforcement notice, the notice—(a) shall be served on the owner and occupier of the land to which it relates . . .'

To be an 'occupier' within the meaning of s 45 (3) (a) a person need not have a legal or equitable interest in the land. The dweller in a caravan held the caravan site under a licence from the owner of the land. The caravan, which was placed on a concrete standing, comprised several rooms; main water, electricity and drainage were laid on; the licensee had lived there for some seven months; he had marked out the boundary of his site with large rocks; and he was liable to pay rates in respect of it.

**HELD:** the test whether the licensee had a right under s 45 (3) (a) to have an enforcement notice served on him was the degree he had of control over the premises concerned and the duration of his enjoyment of them; he had occupied the site for a substantial period of time and had exercised an exclusive control over it indistinguishable from that of a tenant; his occupation of the caravan and the site was not transient, they were his permanent home; even if the landowner had some measure of occupation in relation to them, his occupation was clearly paramount; accordingly, he was an 'occupier' within s 43 (a), and was entitled to be served with an enforcement notice affecting the property.

**APPEAL** by the defendants, the London Borough of Bromley, from a decision of **FLOWMAN J**, reported 135 JP 380, declaring that an enforcement notice served by

them on the plaintiff, Harry John Stevens, and other persons requiring them to demolish certain roads and hard standings and to discontinue the use of certain land as a caravan site was invalid.

*Graham Eyre QC and Anthony Dinkin for the defendants.  
Michael Albery QC and Michael Essayan for the plaintiff.*

*Cur adv vult*

13th December. The following judgments were read.

**SALMON LJ:** The plaintiff's business consists of owning and operating a number of caravan sites. In 1964 he bought 7½ acres of land at Berry's Green Road, Single Street, near Biggin Hill in Kent. Three acres of this land was admittedly an authorised caravan site. This case concerns the remaining 4½ acres which I will call 'the site'. There is no planning permission in existence for its use as a caravan site. The plaintiff, however, apparently under the impression that it had existing user rights, began to develop it as a caravan site. He put down a road and hard standings, and in February 1965 the first caravan appeared. Mr Bernard Wicks took up residence in it and he still resides there. Before the end of September 1965 there were 10 or 11 caravans on the site, all being used as residences by their occupants. These were large caravans each with about 400 square feet of floor space, comprising separate bedrooms, a living room, a bathroom and w.c. Main water and electricity was laid on to each caravan and drains were connected which carried the sewage from each caravan to a cesspool serving the whole site. Most of the caravan dwellers made gardens on the small plots of land in the middle of which their caravans stood. The caravans were all bought by their occupiers from the plaintiff. No caravan was ever moved from one plot on the site to another and it would have been difficult if not impossible for the owner of any caravan to find any place to accommodate it were he to move it from the site.

It is now common ground that the caravan dwellers were not tenants but each was the licensee of the plot on which the caravan stood, that each paid the plaintiff £1.75 a week 'rent' and that his licence could not be revoked nor could he remove his caravan from the site save by one month's notice in writing. The caravans were all used as permanent homes. The plaintiff's policy was not to serve a notice to quit on a caravan dweller unless he failed to pay his rent or made a nuisance of himself. The evidence was that no such notice had been served on any caravan dweller on this site.

The question which arises for decision in this appeal is whether the caravan dwellers were occupiers of their respective plots and in particular whether Mr Bernard Wicks was the 'occupier' of the plot on which his caravan stood within the meaning of that word as used in s 45 (3) (a) of the Town and Country Planning Act 1962. If a local planning authority serves an enforcement notice under that section it must be served on all the occupiers as well as on the owner of the site to which it relates, otherwise the notice is invalid.

The defendants, as the local planning authority, issued an enforcement notice dated 24th September 1965, the material particulars of which read as follows:

'2. It appears to the [defendants] who are the local planning authority that the land has been developed by (a) the carrying out thereon of civil engineering operations, namely, the construction of a road and hard standings for caravans, and (b) the making of a material change in the use of the land to use as a caravan site by the stationing thereon of caravans for the purposes of human habitation without the planning permission required in respect thereof under Part III of

the Town & Country Planning Act 1962 3. The [defendants] consider it expedient having regard to the provisions of the development plan and to all other material considerations to serve this notice. Now therefore pursuant to s. 45 of the Town and Country Planning Act 1962 the [defendants] hereby require you within two calendar months from the date on which this notice takes effect (1) to demolish the said road and hard standings and remove from the land all materials arising from such demolition; (2) to discontinue the use of the land as a caravan site; (3) to restore the land to its condition before the development took place. This notice shall take effect, subject to the provisions of s. 46 (3) of the Town and Country Planning Act 1962, at the expiration of a period of thirty days from the service thereof upon you Dated this 24th day of September 1965 [signed by the] deputy town clerk, Town Hall, Bromley, Kent. Note: Your attention is drawn to the right of appeal against an enforcement notice contained in s 46 of the Act. A copy of this section and other relevant sections of the Act are annexed hereto.'

A copy of this notice describing the plaintiff as the owner and occupier of land at the site was served on the plaintiff on 27th September. A copy of the notice describing Mr Bernard Wicks as the occupier of land at the site was served on him on 25th September. These dates are important as will presently appear.

The plaintiff in pursuance of his rights under s 46 of the 1962 Act appealed to the Minister against the enforcement notice on a number of grounds but did not then suggest that the enforcement notice was invalid. On 5th October 1966, after a public local inquiry had been held, the Minister dismissed the plaintiff's appeal save that he varied the enforcement notice by providing that it should be complied with within six instead of two calendar months from the date on which it became effective.

The plaintiff then started the present proceedings in the Chancery Division claiming a declaration that the enforcement notice was invalid. He relied on the fact that while the copy of the enforcement notice was served on him on 27th September, copies were served on other caravan dwellers on different dates, and, in particular, the copy served on Mr Bernard Wicks was served as early as two days before 27th September, so that that enforcement notice became effective on different dates so far as the plaintiff and Mr Wicks and the other caravan dwellers were concerned. This, he argued, made the enforcement notice invalid on the authority of *Bambury v London Borough of Hounslow* (1). And so, strangely enough, it does. Indeed counsel for the defendants conceded that the enforcement notice would have been invalid had it been necessary to serve it on Mr Wicks and the other caravan dwellers. He contended, however, that since none of them was an occupier none had any right to have the notice served on him. The learned judge held that Mr Wicks and the other caravan dwellers were occupiers entitled to have the enforcement notice served on them and that, as copies of it were served on them on different dates, the notice was invalid. He accordingly made the declaration for which the plaintiff prayed. From that decision the defendants now appeal.

*Bambury's* case, being a decision of the Divisional Court, was binding on the learned judge but it is not binding on this court. The defendants have, however, accepted it in this court as correctly stating the law. During the course of the hearing of this appeal I intimated that I should like to hear argument whether *Bambury's* case ought to be followed. It is perhaps not a very compelling authority because the respondent there conceded the point that an enforcement notice in this form is invalid if copies of it are served on the owners and occupiers on different dates. LORD PARKER CJ considered, as I do, that the point was highly technical and completely

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

devoid of merit. He went no further than to express the view that 'it may, nevertheless, be a good point'. Since the point had been conceded, he proceeded on the basis that it was a good point and then disposed of the argument that the defect in the notice had been cured. Counsel for the defendants accepted the underlying assumption in *Bambury's* case as being correct in law. Counsel for the plaintiff told us that he had not come here prepared to argue the contrary, and that, if he was to do so, he would need an adjournment. Counsel for the defendants did not want an adjournment nor wish to question *Bambury's* case. He asked us to deal with this appeal on the basis that *Bambury's* case was unexceptionable. In those circumstances, we thought that we must for the purposes of this appeal, but only for those purposes, make the same assumption as did LORD PARKER in *Bambury's* case itself. Having heard no argument on the matter I express no view about that case. I am very anxious however that, should the point arise for consideration in the future, our decision in this case shall not be regarded as an authority approving the underlying assumption in *Bambury's* case. The point so far as this court is concerned is still wide open.

I will now consider the point on which this appeal turns, namely, whether Mr Wicks and the other caravan dwellers were occupiers of the plots on which their caravans stood. It would be enough to support the learned judge's finding if only Mr Wicks were an occupier.

It is necessary to set out the relevant sections of the 1962 Act. Section 45 (3) provides as follows:

'Where the local planning authority serve an enforcement notice, the notice—(a) shall be served on the owner and occupier of the land to which it relates, and (b) may, if the authority think fit, also be served on any other person having an interest in that land, being an interest which in their opinion, is materially affected by the notice.'

Section 46, so far as material, provides as follows:

'(1) A person on whom an enforcement notice is served, or any other person having an interest in the land, may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal to the Minister against the notice on any of the following grounds ...'

'(3) Where an appeal is brought under this section, the enforcement notice shall be of no effect pending the final determination or withdrawal of the appeal.'

Section 47 (1) deals with the penalties which may be imposed on an owner for non-compliance with the enforcement notice. Section 47 (5) provides for penalties which may be imposed on occupiers (amongst others) for non-compliance with an enforcement notice. It provides as follows:

'Where, by virtue of an enforcement notice, a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention of the notice, he shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding £100; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued.'

Section 177 provides as follows:

'(1) Subject to the next following subsection, the validity of an enforcement notice which has been served under Part IV of this Act on the owner and occupier of the land shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b) to (e) of s. 46 (1) of this Act.

'(2) The preceding subsection shall not apply to proceedings brought under s. 47 (5) of this Act against a person who—(a) has held an interest in the land since before the enforcement notice was served under Part IV of this Act, and (b) did not have the enforcement notice served on him thereunder, and (c) did not appeal against that notice under Part IV of this Act.

'(3) The validity of a notice which has been served under s. 52 of this Act on the owner and occupier of the building to which the notice relates shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on the grounds that the works to which the notice relates were not, or were not wholly, works in contravention of s. 33 (1) of this Act.

'(4) Subject to the next following subsection, the validity of a notice which has been served under s. 36 of this Act on the owner and occupier of the land shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (a) to (c) of s. 57 (1) of this Act.

'(5) The last preceding subsection shall not apply to proceedings brought under s. 56 of this Act against a person on whom the notice referred to in that subsection was not served, but who has held an interest in the land since before that notice was served on the owner and occupier of the land, if he did not appeal against the notice under Part IV of this Act.

'(6) The validity of a notice purporting to be an enforcement notice shall not depend on whether any non-compliance to which the notice relates was a non-compliance with conditions, or with limitations, or with both; and any reference in such a notice to non-compliance with conditions or limitations (whether both expressions are used in the notice or only one of them) shall be construed as a reference to non-compliance with conditions, or with limitations, or both with conditions and limitations, as the case may require.'

Counsel for the defendants has argued (i) that the interest referred to in s 45 (3) (b) is a legal or equitable interest in land and (ii) that it follows, by necessary inference, that the occupiers referred to in s 45 (3) (a) must also have a legal or equitable interest in the land. I agree that the interest referred to in s 45 (3) (b) is confined to a legal or equitable interest and does not include an interest in the loose or colloquial sense of someone being interested in the land. I think that this view is underlined by the language of s 177 which speaks about a person 'who has held an interest in the land'—language which in my view is appropriate only in relation to a legal or equitable interest. There can be no doubt that the kind of interest referred to in s 177 is the same as that referred to in s 45 (3) (b). I cannot, however, accept the argument that it follows from this that a person to be an occupier within the meaning of that word in s 45 (3) (a) must also have a legal or equitable interest in the land. The substance of s 45 (3) (b) was first incorporated into the town and country planning legislation by s 35 (2) of the Caravan Sites and Control of Development Act 1960 which added to s 23 (1) of the Town and Country Planning Act 1947 the words now appearing in s 45 (3) (b) of the 1962 Act. Had the legislature intended to alter the meaning of the word 'occupier' as it appeared in s 23 (1) of the 1947 Act, surely it



would have done so in far plainer language. Accordingly in my judgment the word 'occupier' in the 1962 Act means what it meant in the 1947 Act and its meaning cannot be affected by the reference to a legal or equitable interest in s 45 (3) (b).

Counsel for the plaintiff rightly concedes that there are many circumstances in which a licensee would not be an 'occupier' within the meaning of s 45 (3) (a). On the other hand he contends that the fact that a man is a licensee does not necessarily preclude him from also being an occupier entitled to be served with an enforcement notice under that section. Whether or not he is an occupier depends, not on his status vis-à-vis the landlord, but on the facts and circumstances of the particular case. I agree with that contention. On the facts of this case which I have recited at the beginning of this judgment, it would, in my view be an affront to common sense no less than to ordinary justice to hold that Mr Wicks was not occupying the plot of land on which his caravan stood. No one, except, perhaps, a lawyer could doubt that he was in occupation of that land. Nor is there anything in the town and country planning legislation which suggests that the law points to any contrary conclusion.

'The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense . . . At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time . . . Its precise meaning in any particular statute . . . must depend on the purpose for which, and the context in which, it is used.'

See *Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* per VISCOUNT CAVE (1).

The town and country planning legislation makes anyone guilty of a criminal offence who fails to comply with the requirements of an enforcement notice. Compliance with such a notice may also, in some cases (as I shall show) involve abandoning home and business. The legislation, however, clearly intended to afford a measure of protection to an occupier by ensuring that he should be given adequate warning of the enforcement notice and the opportunity of appealing against it before he could be convicted of a failure to comply with it. I can find no ground for supposing that the legislature intended to deny that protection to anyone in Mr Wicks's position by excluding him from the category of occupier. His occupation of his caravan and the plot on which it stood was far from transient; they were his permanent home. In my view his occupation was exclusive. Even if the plaintiff had some measure of occupation in relation to the unit, Mr Wicks's occupation was clearly paramount. These are all factors to be taken into account in deciding whether or not a licensee is an 'occupier' within the meaning of that word in s 45 (3) (a). In each case it is a question of fact and degree. There may well be many cases in which it is difficult to decide on which side of the line it falls. On the present facts I have no doubt but that Mr Wicks is well on the right side of the line.

There can be no doubt that the caravan and the plot on which it stood together formed one unit of which Mr Wicks was in occupation and in respect of which he was therefore liable to pay rates: *Field Place Caravan Park Ltd v Harding* (2). This last factor may not be of much importance but it would, at any rate, be odd if Mr Wicks enjoyed a sufficient degree of occupation to make him liable as a ratepayer and yet not enough to make him an occupier entitled to the protection to which I have referred. Counsel for the defendants concedes, as he must, that had there been a tenancy agreement in the same terms as the licence, Mr Wicks would have been an

(1) [1922] 1 AC 500.

(2) 130 JP 397; [1966] 3 All ER 247; [1966] 2 QB 484.

occupier within the meaning of s 45 (3) (a) (ibid). If that tenancy agreement had contained, as it might have done, an absolute prohibition against assigning or sub-letting there would have been no practical difference between Mr Wicks's position as it might then have been, and as it is now. I cannot accept that the legislature can have intended to give protection in the one case and not in the other. Nor can I see any incongruity in an occupier who has no legal or equitable interest being entitled to be served with an enforcement notice while there is no obligation to serve such a notice say on a mortgagee who does enjoy such an interest. An enforcement notice has a much more intimate connection with and impact on a person in the position of Mr Wicks than it would have on a mortgagee. I of course recognise that since Mr Wicks and the other caravan dwellers were in fact served with copies of the enforcement notice they have not been prejudiced and have no complaint. I recognise too that the plaintiff has no merit since the case rests solely on the highly technical point arising out of *Bambury's* case (1), which in turn depends on whether Mr Wicks was entitled to be served with the enforcement notice. The general importance, however, of the principle that the licensee in the position of Mr Wicks is entitled to be served, in my view, far transcends the importance of the impact which it happens to have on the merits of this particular case.

It has been pointed out that of course a caravan dweller is only a solitary example of a great multitude of different kinds of people to whom the town and country planning legislation applies. Take the case of A who carries on business in a shop and lives with his family in a flat above it. He has a licence to do so, in precisely the same terms as Mr Wicks's licence, from B, the owner of the whole premises. The agreement between A and B makes it plain that it is not a tenancy agreement and that A is being granted no legal or equitable title in the premises but only a licence to occupy them at a weekly rent, determinable by one month's notice in writing. Assuming it was possible, as it might be, to persuade the court that this was in truth a licence, then if the defendants' contentions are correct it follows that the local planning authority could serve an effective notice in respect of those premises without being under any obligation to serve notice of it on A for A, being a licensee, could not be an occupier within the meaning of that word in the 1962 Act. He could thus be forced to leave his home and business and convicted of a criminal offence without being given any opportunity of challenging the validity of the steps taken by the local authority to effect this end, and indeed without knowing anything about those steps.

Counsel for the defendants naturally relies strongly on *Munnich v Godstone Rural District Council* (2). In that case the plaintiff with a man called Mr Taras bought 1½ acres of land consisting of a field with a bungalow on it. He had unlawfully allowed four individuals to stand caravans in the field. The local planning authority issued an enforcement notice. One copy was served on the plaintiff and Mr Taras describing them as the owners of the site; one copy was served on each of the three remaining caravan owners (one of the four having departed) describing each of them as the 'occupier' of the land and these three copies were also served on the plaintiff and Mr Taras. The report does not state the degree of transience of the three so-called occupiers in the field with their caravans, but I seem to recollect, and I am fortified in this recollection by the judgment of DANCKWERTS LJ, that they were very much birds of passage. The point taken by the plaintiff was that the enforcement notice was invalid because the copy addressed to him and Mr Taras described them only as owners while the copy served on each of the three individuals was addressed to each as the occupier only of the piece of land on which his caravan was standing for the

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

(2) 130 JP 202; [1966] 1 All ER 930.

time being and therefore no notice had been served on the occupier or occupiers of the whole site. This court decided that as the plaintiff and Mr Taras were the occupiers of the whole site and the notice had been served on them, it mattered not that it described them only as the owners. It still constituted a good notice on them as owners and occupiers.

This court also found that none of the four individuals to whom I have referred was an occupier within the meaning of that word in s 23 of the 1947 Act, nor were they on the facts of that case. It is true that there is a passage in the judgment of LORD DENNING MR which, if taken literally, could be read as meaning what I believe was never argued, namely, that no caravan dweller who is a licensee can ever in any circumstances be an 'occupier' within the meaning of that word in s 23 of the 1947 Act. I do not think, however, that LORD DENNING intended to lay down anything more than that a caravan dweller with a licence of the kind granted in that particular case could never be an 'occupier', indeed that a licensee could never be an 'occupier' unless the licence which he held put him, from a practical point of view, in much the same position as he would have been under a tenancy agreement. If, which I doubt, the judgment went further than that, then in my respectful view it went further than was necessary for deciding that case. I think it is plain from the report that both the other members of the court took the view that there can be circumstances in which a licensee is an occupier. I still hold that view and consider, for the reasons I have already indicated that the present is a classic example of such a case.

It follows that I entirely agree with PLOWMAN J's judgment in the court below and would accordingly dismiss this appeal.

**EDMUND DAVIES LJ:** Expressing himself as not satisfied that the relationship of landlord and tenant was ever created between the defendants and the caravan dwellers on the site with which we are concerned in this appeal, the learned trial judge held that the latter were licensees. There was an abundance of evidence to justify this finding and it has been accepted before us. But what is in dispute is whether that finding concludes the matter in favour of the defendants. It is contended for the plaintiff that, even though the caravanners were licensees, they were also occupiers within the meaning of the Town and Country Planning Act 1962 and, as such, the provisions of s 45 (3) (a) had to be complied with. If that contention is right, it is common ground that, in the light of *Bambury v London Borough of Hounslow* (1), the enforcement notice served by the defendants was invalid. Like SALMON LJ, I prefer to leave open the correctness of that decision, but, as this case has throughout been conducted on the basis that it is unexceptionable, I am content for present purposes to regard it in a like manner.

The material facts and the legislation relevant thereto have already been set out by SALMON LJ and need now be referred to only incidentally. It is, I think, important to stress that counsel for the plaintiff accepts that not all licensee-caravanners are to be regarded as occupiers for the purposes of the 1962 Act. On the contrary, he accepts that the elements of (a) degree of control over and (b) duration of enjoyment of the premises concerned have direct relevance in this context, just as they have in relation to occupation for the purposes of rateability. For example, he does not contend that people who stay on a typical holiday caravan site for a short period would be occupiers of any part of it. On the contrary, he himself points to s 45 (7) and s 46 (1) (g) of the 1962 Act as indicating that the service of such notices is contemplated only on people who are regarded as likely to be on the site for a substantial period of time. Indeed,

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

<b>HOUSING</b> - Obtaining possession of council property from trespassers - Competency of proceedings - Proceedings instituted by authorised committee - 'Management of housing accommodation' - Cost of proceedings - 'Blanket' decision to institute. <i>London Borough of Southwark v Peters</i> .. .. .	CA	187
<b>HUSBAND AND WIFE</b> - Maintenance of wife - Provisional maintenance order - Jurisdiction - Husband resident and matrimonial offences alleged to have been committed outside United Kingdom - Wife ordinarily resident in England - Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1) - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a). <i>Collister v Collister</i> .. .. .	Fam Div	163
<b>HUSBAND AND WIFE</b> - Summary proceedings - Maintenance of child - 'Child of the family' - Acceptance - Objective test - Circumstances constituting acceptance - Time of acceptance - Withdrawal - Liability of another person - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <i>Snow v Snow</i> .. .. .	CA	54
<b>INFANT</b> - Adoption. See <b>ADOPTION</b> .		
<b>INFANT</b> - Care - Assumption by local authority of parental rights - Objection by parent - Allegation that objection out of time - Estoppel of authority - Need to appreciate ability of mother to care for child. <i>Re L (A C) (an infant)</i> .. .. .	ChD	19
<b>INSANITY</b> - See <b>CRIMINAL LAW</b> .		
<b>LICENSING</b> - Gaming licence. See <b>GAMING</b> .		
<b>LICENSING</b> - Permitted hours - Exemption order - Special occasion - Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions - Function to be held by outside local organisation - Licensing Act, 1964, s 74 (4). <i>R v Metropolitan Police Commissioner Ex parte Ruxton</i> .. .. .	QBD	175
<b>LICENSING</b> - Permitted hours - Exemption order - Special occasion - Local football match - Match occurring nearly every week - Discretion of justices - Licensing Act 1964 (c 26), s 74 (4). <i>R v Llandiloes (Lower) Justices. Ex parte Thorogood</i> .. .. .	QBD	67
<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner. <i>Dutton v Bognor Regis United Building Co Ltd</i> .. .. .	CA	201
<b>LOCAL GOVERNMENT</b> - Elections. See <b>ELECTIONS</b> .		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <i>R v Coleshill Justices. Ex parte Davies</i> .. .. .	QBD	51
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine. <i>R v Southampton Justices. Ex parte Briggs</i> .. .. .	QBD	237
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2). <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42. <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>OBSCENITY</b> . See <b>CRIMINAL LAW</b> .		
<b>PILOT</b> . See <b>SHIPPING</b> .		
<b>POLICE</b> - Obstruction. See <b>CRIMINAL LAW</b> .		
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs. <i>Riggall v Hereford County Council</i> .. .. .	QBD	172
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declaration by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (2) (10). <i>London Borough of Ealing v Race Relations Board</i> .. .. .	HL	112
<b>RACE RELATIONS</b> - Provision of facilities - Discrimination - Members' club - Refusal to admit coloured man as member - Members of club 'section of public' - Impersonal quality distinguishing them from public at large - Clubs where admission by invitation - Race Relations Act, 1968, s 2 (1). <i>Race Relations Board v Charter</i> .. .. .	CA	249

<b>RENT CONTROL</b> – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Need of tenants' consent to reference – Reference of number of contracts together – Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> ..	<b>QBD</b>	<b>11</b>
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – 'Accident' – Broken down car pushed by other car – Interlocking of bumpers – Breath test – Damage to both cars – Road Safety Act, 1967, s 2 (2). <i>R v Morris</i> ..	<b>CA</b>	<b>194</b>
<b>ROAD TRAFFIC</b> – Motorway – Hard shoulder – Part of verge – Marginal strip – Part of carriageway – Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f). <i>Wallwork v Rowland</i> ..	<b>QBD</b>	<b>137</b>
<b>ROAD TRAFFIC</b> – Regulations relating to construction, etc., of vehicles – Using vehicle on road in contravention of regulations – 'Using' – Vehicle driven by person other than owner's servant at owner's request – Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64. <i>Crawford v Houghton</i> ..	<b>QBD</b>	<b>234</b>
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Pilotage by unlicensed pilot after offer – Ship moving from one mooring to another – Pilotage district byelaws – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws Part IX, byelaw 2. <i>Crouch v McMillan</i> ..	<b>QBD</b>	<b>179</b>
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Ship moving from mooring to discharge berth – Pilotage by unlicensed pilot after offer – General offer insufficient – Need of specific offer communicated in relation to particular movement of ship – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2. <i>Montague v Babbs</i> ..	<b>QBD</b>	<b>144</b>
<b>TOWN AND COUNTRY PLANNING</b> – Advertisements – Control – Display on walls of public houses – Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height – Advertisements showing cigarette packet, man holding glass of beer, and beer glass – Objects shown all above permitted height – Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a). <i>McDonald v Howard Cook Advertising Ltd</i> ..	<b>QBD</b>	<b>79</b>
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Land in area zoned for residential building – No prospect of permission being given for that use – Land Compensation Act, 1961, s 16 (2). <i>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</i> ..	<b>CA</b>	<b>93</b>
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Service on occupier of land affected – 'Occupier' – Licensee of caravan site – Right to be served with notice – Control over site – Duration of enjoyment – Town and Country Planning Act, 1962, s 45 (3). <i>Stevens v London Borough of Bromley</i> ..	<b>CA</b>	<b>261</b>
<b>TRADE DESCRIPTIONS</b> – False description – Motor car – False mileage recorded on odometer – Sale by motor dealer – Defence of reasonable precautions and due diligence – Dealer ignorant of alteration of odometer – Condition of car consistent with mileage recorded on odometer – Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <i>Naish v Gore</i> ..	<b>QBD</b>	<b>1</b>
<b>YOUTHFUL OFFENDER</b> , See <b>CRIMINAL LAW</b> ; Magistrates.		



we know that all the notices in this case were expressed to take effect at the expiration of a period of 30 days from service, and called for the execution of works which, in the nature of things, involved a good deal more than simply clearing the site of a few caravans and would probably require a not insubstantial period of time to complete.

For my part, I am prepared to apply the two tests of (a) degree of control and (b) duration, propounded by counsel for the plaintiff and to hold that, unless he can satisfy them, a person living on a caravan site has no legal right to have an enforcement notice served on him. But at least one of those served satisfied both tests, for Mr Wicks had been on the site some seven months when an enforcement notice (describing him as 'the occupier of land situate at Berry's Green Road') reached him on 25th September 1965. By that time he had marked off his boundary with big rocks and appears to have exercised a degree of control on his site indistinguishable from that of a tenant. Even disregarding the position of other caravanners on the site, if the proper inference from the foregoing facts is that Mr Wicks was an 'occupier' within the meaning of s 45 (3) (a), it follows that the notices served both on him and on the plaintiff were bad, being expressed to take effect from different dates: see *Bambury's case* (1).

On what grounds is it said that the act of the defendants in serving Mr Wicks was a superfluity which can and ought to be disregarded? In the last analysis, the assertion rests on an obiter dictum of LORD DENNING MR in *Munnich v Godstone Rural District Council* (2). Brushing aside the fact that in the enforcement notices served on certain caravan dwellers they were described as 'occupiers', LORD DENNING said:

'That was erroneous. They were not occupiers within the meaning of the Act. They were simply caravan dwellers. Caravan dwellers are only licensees and are never to be regarded as occupiers unless they are granted a tenancy. It was unnecessary to serve them at all.'

BUT DANCKWERTS and SALMON LJ were more guarded, the latter observing,

'As DANCKWERTS, L.J., has said, there may well be cases where those dwelling in caravans are occupiers.'

In *Shell-Mex and BP Ltd v Manchester Garages Ltd* (3) LORD DENNING said that, when considering whether what had been granted amounted to a licence or a tenancy, the determining point was not the label applied to it, but the nature of the transaction itself. Similarly, in the present case the issue has to be resolved not simply by having regard to the evidence given by the plaintiff himself at the Ministerial inquiry and to the notice displayed in his site office to the effect that the caravanners were 'licensees', any more than by holding as conclusive against the defendants the fact that their own enforcement notices described each caravanner served as an 'occupier of land'. Instead, regard should be had to all the relevant circumstances. That no one can be regarded as the 'occupier' of land for any purpose unless he be either owner or tenant is an insupportable proposition: see the passages cited by the learned trial judge from the speech of VISCOUNT CAVE in *Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* (4). As to the term 'occupier', the learned lord concluded:

'Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used.'

(1) 130 JP 314; [1966] 2 All ER 532; [1966] 2 QB 204.

(2) 130 JP 202; [1966] 1 All ER 930.

(3) [1971] 1 All ER 841.

(4) [1922] 1 AC 500.

In what context, then, is the word 'occupier' used in s 45 of the Town and Country Planning Act 1962? It must be borne in mind that Part IV of that Act (entitled 'Enforcement of Planning Control') deals with planning in general and is by no means confined to the control of caravan sites. Section 47 (5), which has already been read by SALMON LJ, is important. The effect of it is that, provided an enforcement notice is validly served on someone, any person who thereafter uses the land in a manner contravening it is ipso facto rendered guilty of a criminal offence, regardless of whether or not he has himself been served and even regardless of whether he has knowledge that a notice has been served at all. Provided he is using the land in a manner which in fact constitutes a contravention of the notice, it matters not that his contravention was committed in complete ignorance of its terms or even of its existence. That this is the effect of s 47 (5) was at no time challenged by counsel for the defendants—indeed, he in terms accepted it.

On the face of it, this result is so arbitrary and unjust that one is driven to strain to find some means of avoiding it. One way of achieving this is to adopt an expansive approach in determining the category of people who must be served with enforcement notices, and who can then appeal to the Minister (pursuant to s 46 of the 1962 Act) with a view to having it quashed or varied, or, alternatively, who can take steps to comply with it and so avoid criminal or other proceedings. That, in effect, was the course adopted in this case by the learned judge, who regarded it as a fair inference

'that the intention of the legislature was . . . to ensure that anyone who might be prejudiced by an enforcement notice should be served with it and have an opportunity of appealing against it.'

Having in mind the requirement in s 45 (3) that an enforcement notice 'shall be served on the . . . occupier of the land to which it relates', and finding himself impelled to the conclusion that Mr Wicks (to take an example) was 'a licensee and not a tenant', he concluded:

'Whatever the status of such a person, vis-à-vis the owner of the land, he would, in my judgment, . . . be an occupier for the purposes of s 45.'

Munnich's case (1) notwithstanding, such an approach commends itself to me, and I am prepared to adopt it as one amply warranted by the facts of the case, including the physical layout, duration of sojourn on the site, the contractual terms existing between the plaintiff and his caravanners, and all those other features to which SALMON LJ has already referred. Just as in *Field Place Caravan Park Ltd v Harding* (2), a caravan and the pitch on which it stood were held to form one unit of occupation capable of being a single rateable hereditament, so also, in my judgment, Mr Wicks is to be regarded for the purposes of the 1962 Act as the 'occupier' of the allocated piece of land on part of which rested the caravan which was his permanent home. So regarding him, it follows that I would also be for dismissing this appeal.

**STAMP LJ:** Counsel for the plaintiff in support of his submission that the word 'occupier' in s 45 (3) of the Town and Country Planning Act 1962 ought to be given a wide meaning to embrace persons in the position of Mr Wicks who, so it was submitted, had a degree of control over the land on which his caravan was placed, called in aid s 47 (5) of the Act. That subsection provides that where by virtue of an enforcement notice a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in

(1) 130 JP 202; [1966] 1 All ER 930.

(2) 130 JP 397; [1966] 3 All ER 247; [1966] 2 QB 484.

respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used or carried out in contravention of the notice he shall be guilty of an offence and shall be liable to the fines there specified. It would, so the argument runs, be unjust and anomalous if a person was not to be served with a notice, the breach of which would render him liable to a penalty. I fully appreciate the force of the argument and indeed one would have expected the two subsections ss 45 (3) and 47 (5), so to be framed as to embrace the same persons. Thus would the injustice or anomaly to which attention is called have been avoided. The court is accordingly asked to place on the word 'occupier' in the former subsection a meaning which would remove the injustice so far as regards persons in the position of Mr Wicks. The construction which we are asked to place on the word 'occupier' will not however remove the injustice or anomaly, for it will leave a class of persons not in the position of Mr Wicks who on any construction of s 45 (3) are not 'occupiers' and so not entitled to receive the enforcement notice but nevertheless liable to penalties under s 47 (5). Neither the construction of counsel for the plaintiff, nor as I see it any possible construction, of 'occupier' in s 45 (3) will comprehend all who may be using the land or carrying out operations thereon within the meaning of s 47 (5). A caravanner, such as the caravanner in *Munnich v Godstone Rural District Council* (1), who uses the land or one whose caravan is moved from place to place on the land at the whim of the owner of the land will not be entitled to an enforcement notice but nevertheless be liable to penalties if he fails to comply with it, and so I think would the organiser of a motor-cycle rally taking place once a fortnight on the land under licence from the owner. I cannot therefore impute to the legislature the intention that those persons liable to penalties should be served with an enforcement notice and on no principle of construction can I treat s 47 (5) as controlling or affecting the meaning of the word 'occupier'.

Nor am I able to accept the submission on behalf of the defendants that the word 'occupier' in s 45 (3) (a) takes its colour from s 45 (3) (b) so as to give the word 'occupier' a meaning which would comprise only those having an interest in the land. Section 45 (3) is the successor, as amended, to s 23 (1) of the Town and Country Planning Act 1947. That section provided that the enforcement notice should be served on the owner or occupier and there was no such reference as you find now in s 45 (3) (b) to any other person having 'an interest in that land'. At that point of time therefore the meaning of the word 'occupier' had to be determined without the aid of anything to be found in s 45 (3) (b), which was added by s 35 (2) of the Caravan Sites and Control of Development Act 1960 providing for the addition at the end of s 23 (1) of the 1947 Act of the words now found in s 45 (3) (b) of the Town and Country Planning Act 1962. The addition in 1960 of the reference to a person having an interest in the land cannot in my judgment affect the proper construction of the original words which in my judgment accordingly fall to be construed without regard to the terms of s 45 (3) (b).

I conclude therefore that neither the submission founded on the penal effect of s 47 (5) of the 1962 Act nor that founded on s 45 (3) (b) assists in the answer to the question whether any of the occupiers of the caravans in this case was an 'occupier' of the land within the meaning of s 45 (3) (a).

It is not contended in this case that the caravan dwellers are other than licensees—that is to say they had a contractual right to place their caravans on the land, to have them connected to the services there provided with no doubt ancillary contractual rights, expressed or implied, of access to and from their caravans, perhaps to walk round and disport themselves over the caravan site and, in the case of Mr Wicks, a licence to mark out an area of the land which surrounded his caravan. But none

(1) 130 JP 202; [1966] 1 All ER 930.

of them, not even Mr Wicks who is in the strongest position, had any interest legal or equitable in the land itself or any part of it. It is with the occupier of the land not of a caravan resting on it that s 45 (3) is concerned.

Is there then any essential difference between the caravan dwellers in this case and those in *Munnich v Godstone Rural District Council* (1). There LORD DENNING MR decided not that the particular caravan dwellers in that case were not occupiers but that:

'Caravan dwellers are only licensees and are never to be regarded as occupiers unless they are granted a tenancy.'

DANCKWERTS LJ in the course of his judgment said this:

'In most cases, where persons are permitted to place caravans on land belonging to the owner, the owners of the caravans are not occupiers in the ordinary sense of the word, although it is possible that they may be occupiers in certain special circumstances. I remember a case in which I was concerned in which the land contained very permanent standings for the purpose of caravans being let out by the owner of the land, and, according to my recollection, the persons who hired the caravans were treated as tenants when I suppose they might become occupiers. In the present case, however, where it appears that there is a more or less shifting population with regard to the caravans which were brought on to the site and belonged to the person who came, I think that it is quite plain that in no sense of the word were the four persons mentioned in this case anything but licensees and, therefore, that they were not occupiers.'

Some criticism was directed in the course of the debate at the introductory part of the judgment of DANCKWERTS LJ, it being urged that he was erroneously directing himself to the meaning of the word 'occupier' in a different Act from that in question. But the remarks which followed were in general terms and in my view he was laying down a general rule that caravan dwellers who are mere licensees and have no interest in the land—and I use the word 'interest' in its strict legal sense—are not occupiers.

Whether or not, in view of the doubt whether the remarks in the judgment of DANCKWERTS LJ which I have quoted were part of his *ratio decidendi*, so that, there is a decision of this court that licensees are not occupiers within the meaning of the section here in question I would follow the decision in that case. There is already a difficulty in determining whether in any given set of circumstances a man is a tenant or a licensee and I would not wish to add further confusion in the law by holding that a licensee having no interest in the land may be an occupier according to the acts—or, if you will, the degree of control—which are either expressly or impliedly authorised by his licence. There is I think another reason for following the judgment of LORD DENNING in the *Munnich* case (1) in that it does in my view lead to a more sensible result, for it would, as I see it, be odd if it was compulsory, by the effect of s 45 (3) (a), to serve one who had no interest in the land but, by the effect of s 45 (3) (b), discretionary to serve it on one who had.

I only add this in relation to the meaning of the word 'occupier', that here it is used in a section designed to deal with a situation in which there has been a wrongful development of land which is to be remedied; and in my view a construction requiring the enforcement notice to be served only on those who may be supposed to have been responsible for and to be in a position to remedy what has been done, is to be

(1) 130 JP 202; [1966] 1 All ER 930.

preferred to one which would embrace one who has merely a contractual right to place his caravan there.

It follows in my judgment that it was not necessary or discretionary to serve the enforcement notice on any of the caravanners and I would allow the appeal.

*Appeal dismissed.*

Solicitors: *Herbert Smith & Co; James & Charles Dodd.*

Reported by G F L Bridgman, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

11th December 1971

R v INNER LONDON AREA (WEST CENTRAL DIVISION) BETTING LICENSING COMMITTEE. Ex parte PEARCY

*Gaming—Betting office—Licence—Application—Notice advertising application—Inclusion of matter additional to that required by statute—Effect on validity of notice—Betting, Gaming and Lotteries Act, 1963, Sch 1, para 6.*

The applicant, who was applying to the respondent betting licensing committee for the grant of a betting office licence under the Betting, Gaming and Lotteries Act, 1963, inserted in a newspaper an advertisement giving notice of the application, which was in the form prescribed in Sch 1, para 6, to the Act, but contained the following additional paragraph: 'N.B. These premises are already operating as a licensed betting office'. An advertisement in similar form had been placed on the premises. The licensing committee declined to hear the applicant's application, being of opinion that the added sentence rendered the notice defective. On an application for mandamus directing the licensing committee to hear and determine the application according to law,

Held: since the inclusion of additional matter was not prohibited by the Act of 1963, there was no reason why some unnecessary addition should invalidate the notice unless the addition prevented the notice from having its due force and effect; as no possible reduction of the effectiveness of the notice could result from the added sentence, there was no reason to regard the notice as being ineffective, and the fact that by the addition of the sentence in question the applicant might unwittingly have committed an offence under s 10 (5) of the Act was immaterial; accordingly, the licensing committee were wrong in deciding that they had no jurisdiction to consider the application and mandamus must issue.

MOTION by Thomas Ellis Percy for an order of mandamus directed to the betting licensing committee for the Inner London Area (West Central Division) requiring them to hear and determine according to law an application made by the applicant on behalf of a company, A Williams & Sons (London) Ltd, for the grant of a betting office licence in respect of premises at 88 Grafton Road, London NW 5, it being contended that the committee had wrongly declined to hear the application.

*Quentin Edwards* for the applicant.

The respondent committee did not appear.

**LORD WIDGERY CJ:** In these proceedings counsel moves for an order of mandamus directed to the Betting Licensing Committee for the Inner London Area (West Central Division) requiring the respondent committee to hear and determine according to law an application made on 17th September 1971 by the applicant,



Mr Percy, on behalf of a company for the grant of a betting office licence in respect of premises known as 88 Grafton Road, London NW5. The respondent committee declined to consider the application because it considered itself to be without jurisdiction in view of what it regarded as a defect in the statutory notices leading to such an application. It is contended before us that the respondent committee misdirected itself in law, that there is no such defect in the notice, and accordingly that the respondent committee should have adjudicated on the application in the ordinary way.

The application in question was under the Betting, Gaming and Lotteries Act 1963 in respect of a betting office licence. The procedure for making application for a betting office licence is to be found in Sch 1 to the Act. In particular, the paragraphs of the schedule beginning with para 3 are headed 'Applications for grant of permit or licence'. One finds in para 3 a provision that the authority is to fix a day in each of specific months on which they will hold a meeting to consider applications.

By para 5:

'Any such application as aforesaid may be made at any time and shall be made to the clerk to the appropriate authority in such form and manner, and shall contain such particulars . . . as may be prescribed.'

Then there is further provision in para 5 for sending a copy of the application to the appropriate officer of police and the local authority.

No question arises in the present case as regards the application itself which was made on the proper form submitted to the proper authorities and made in proper time. It is the advertisement of the application which is the subject of criticism by the respondent committee. The advertisement is dealt with in para 6 of Sch 1:

'Not later than fourteen days after the making of any such application as aforesaid to the appropriate authority, the applicant shall cause to be published by means of an advertisement in a newspaper circulating in the authority's area a notice of the making of the application which shall also state that any person who desires to object to the grant of the permit or licence should send to the clerk to the authority, before such date not earlier than fourteen days after the publication of the advertisement as may be specified in the notice, two copies of a brief statement in writing of the grounds of his objection.'

There is further provision for a similar notice being placed on the door of the premises. Everything in the present application hinges on the nature of the advertisement by the applicant in intended performance of the obligations in para 6. The notice put into the newspaper was as follows:

'Notice is hereby given that on the 17th day of September 1971, I, Thomas Ellis Percy of 175 Streatham Road, Mitcham, Surrey—duly authorised in that behalf of A. Williams & Sons (London) Limited, whose registered office is situate at 1, Alston Road, London, S.W.17—for and on behalf of the said company—made application to the betting licensing committee for the petty sessional division of West Central for the grant of a betting office licence in respect of premises at 88 Grafton Road, London, N.W.5 . . .'

It seems to me that no one can doubt that that sentence satisfies the obligation that the advertisement shall contain a notice of the making of the application. The notice goes on strictly in accordance with para 6 to say that any person who desires to object may send notice of his objection to the clerk of the licensing committee at an address and before a date both of which are mentioned. So far, therefore,

it seems to me that the notice used in this case meticulously follows the requirements of para 6. However, underneath the signature at the foot of the notice there appears the following: 'N.B. These premises are already operating as a licensed betting office'. Those words are not contemplated by para 6 and are surplus to the requirements of the paragraph. It was the presence of those words which caused the respondent committee in this case to think that the notice was defective, and indeed so defective as to deprive them of jurisdiction. We are told by counsel for the applicant that the reason why this addition was made is because this is in fact a transfer of a licence from one company to an associated company. The premises are already the subject of a licensed betting office permit, and practice and experience has shown that if in such cases a note is placed at the bottom of the notice that the premises are already used in this way, it prevents people making objections which they would not make if they realised no additional accommodation for use as a betting office was contemplated. So these words have been added with that object. The question for us is whether the inclusion of those words makes the notice invalid to the extent of depriving the respondent committee of jurisdiction. The respondent committee thought that it did, and in reaching that conclusion they were guided by several authorities in this court and in the Court of Appeal dealing with the parallel subject of the grant, renewal and cancellation of gaming licences. These licences are granted under a different Act, namely, the Gaming Act 1968, but there is some similarity in the procedure which has to be followed to obtain a gaming licence and that required to obtain a betting office permit. In particular Sch 2 to the 1968 Act sets out the form of application which has to be made for a gaming licence and deals with the advertisement of the application, but this schedule contains in para 6 (4) a provision which has no counterpart in the 1963 Act. Paragraph 6 (4) provides:

'A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

There have in consequence been cases in which a notice under the 1968 Act has been held invalid because it contained some matter additional to that required by the terms of the schedule, and the reason in my judgment why in those cases, of which *R v Leicester Gaming Licensing Committee, ex parte Shine* (1) is the principal example, the additional matter has rendered the notice invalid is simply because in the 1968 Act it is expressly so provided that such an addition is prohibited.

The present case is quite different because in the absence of any such prohibition one merely has to go back to the requirements of Sch 1 to the 1963 Act and see if they are complied with, and if they are complied with, there is on the face of it no reason why some unnecessary addition should invalidate the notice unless that addition should prevent the notice having its due force and effect. In the present case no possible reduction of the effectiveness of the notice can result from the words following 'N.B.' and in my judgment they are in no sense a reason for regarding the notice as being ineffective. Counsel, in his duty to the court, has drawn our attention to the fact that there may be other reasons for thinking that the addition of these words was unwise in the present case, because he has referred us to s 10 of the Betting, Gaming and Lotteries Act 1963 which in sub-s (5) makes it an offence for a person

'save in a licensed betting office or in such manner as may be prescribed on premises giving access to such an office [to publish an advertisement]—(a) indicating that any particular premises are a licensed betting office.'

(1) 135 JP 473; [1971] 3 All ER 1082.

He said, and I think he is right, that the words 'N.B. These premises are already operating as a licensed betting office' do amount to an advertisement that those premises are what is there described, a licensed betting office. I think probably he is right when he says his clients have perhaps unwittingly committed a criminal offence under s 10 by reason of the addition of those words. For my part I see no reason why that should militate against the effect of the notice for the purpose of Sch 1 to the 1963 Act.

I sympathise with the respondent committee and understand that they could easily have been misled into thinking that the principles applicable to the procedure under one Act must necessarily apply to the procedure under the other. In my judgment, that is not so. I think they had jurisdiction to consider this application and that the order of mandamus should go.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Order for mandamus.*

Solicitors: *F C Roope & Co.*

Reported by T R Fitzwalter Butler, Esq, Barrister.

#### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

13th December 1971

**THOMAS DAVID (PORTHCAWL) LTD AND OTHERS v PENYBONT RURAL DISTRICT COUNCIL AND OTHERS**

*Town and Country Planning—Enforcement—Notice—Mining operations—Notice specifying substantial area—Actual working only in two smaller areas within specified area—Some operations more than four years before service of notice—Town and Country Planning Act, 1962, s 45 (1) (2).*

*Town and Country Planning—Enforcement notice—Notice to be served within four years from carrying out of development—Mining operations—Initial working of area more than four years prior to notice—Subsequent working of area within four-year period—Whether new development or continuation of original development—Validity notice—Town and Country Planning Act, 1962, s 12 (1), s 45 (2).*

The respondents, as agents for the local planning authority, served on the appellants an enforcement notice under s 45 (1) of the Town and Country Planning Act, 1962 which related to an area of sand on the seashore and complained of development in the form of mining operations, consisting of the extraction of sand and gravel. Paragraph 1 of the notice referred to the land alleged to have been developed as an area encircled by a red verge line on the plan attached to the notice. Paragraph 3 alleged that the actual working of the sand and gravel did not occur all over the land confined in the red line, but in two smaller areas within it, each of which was coloured pink. In these two smaller areas initial working for sand and gravel had in some instances occurred before November, 1962, and, therefore, more than four years before the service of the enforcement notice, but in other instances the working occurred within the four years period. An appeal by the appellants against the enforcement notice was dismissed by the Secretary of State, and the appellants appealed to the Divisional Court, contending (i) that, as no actual mineral working had occurred outside the two smaller pink-washed areas, it was not

open to the planning authority to make the enforcement notice effective over the wider area comprised within the red line; (ii) that in those parts of the smaller areas where the initial working had taken place more than four years before the service of the enforcement notice s 45 (2) of the Act provided that there was no power to prevent the appellants from continuing to work those areas until they were worked out.

**HELD:** (i) when an enforcement notice was served with reference to mining operations, there was no requirement that the effect of the notice should be confined to the yardage which was the subject of an actual cut by the shovel or bulldozer, and the planning authority were entitled to consider whether the land on which the actual cut had been taken was not in fact part of a wider area being started in development by the immediate activity referred to; if it was clear that the first cut was relative to a larger area, then it was right for the tribunal of fact to determine, if it thought fit, that that larger area was the planning unit for the development under consideration; in the present case the local authority and the Secretary of State were right in thinking that the area confined in the red line was a planning unit and the land to which the enforcement notice should be directed; (ii) in the case of mining operations, each shovelful or cut by bulldozer was a separate act of development; accordingly, the fact that the initial cut had occurred more than four years prior to the enforcement notice did not prevent the notice from restraining further activity of the same character.

**APPEAL** by Thomas David (Porthcawl) Ltd and the trustees of Merthyr Mawr Estates against a decision of the Secretary of State for Wales dismissing an appeal by the appellants against an enforcement notice served on them by the Penybont Rural District Council as agents for the Glamorgan County Council, the local planning authority.

*Douglas Frank QC and J Ryman* for the appellants.

*ID L Glidewell QC and Gordon Slynn* for the Secretary of State for Wales.

The respondents, the Penybont Rural District Council and the Glamorgan County Council, did not appear.

**LORD WIDGERY CJ:** This is an appeal under s 180 of the Town and Country Planning Act 1962, against the decision of the Secretary of State for Wales conveyed in his decision letter of 24th May 1971 dismissing an appeal by the present appellants against an enforcement notice served on 7th November 1966 by the Penybont Rural District Council, as agents of the Glamorgan County Council, the local planning authority for the county of Glamorgan. The enforcement notice related to an area of sand on the seashore known as Merthyr Mawr Warren, and it complained of development in the form of engineering operations. The Secretary of State, among other minor adjustments, directed that the notice should be amended to substitute 'mining operations' for 'engineering operations', and I will treat the notice as having been in those terms from the outset.

Since development in the form of mining operations is not perhaps as common in this court as some other forms of development, it is convenient to begin by refreshing one's memory of the legislation relevant to such development. This notice being served in 1966, the relevant statute is the Town and Country Planning Act 1962. Section 12 (1) of this provides:

'In this Act, except where the context otherwise requires, "development", subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.'

An enforcement notice is dealt with in s 45 (1):

'Where it appears to the local planning authority—(a) that any development of land has been carried out without the grant of planning permission required

in that behalf in accordance with Part III of this Act ... then ... the local planning authority, if they consider it expedient to do so having regard to the provisions of the development plan and to any other material considerations, may, within the period specified in the next following subsection, serve a notice under this section (in this Act referred to as an "enforcement notice").

The period specified in the next following subsection, so far as relevant, is a period of four years from the carrying out of that development. As to what the notice may contain, sub-s (4) provides:

'An enforcement notice—(a) shall specify the development which is alleged to have been carried out without the grant of planning permission as mentioned in paragraph (a) of subsection (1) of this section or, as the case may be, the matters in respect of which it is alleged that any such conditions or limitations as are mentioned in paragraph (b) of that subsection have not been complied with, and (b) may require such steps as may be specified in the notice to be taken, within such period as may be so specified, for the purpose of restoring the land to its condition before the development took place, or of securing compliance with the conditions or limitations, as the case may be, and in particular may, for that purpose, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.'

In regard to mining development these provisions were modified by Part II of the Town and Country Planning (Minerals) Regulations 1963. The effect of these modifications is that 'use' of land in s 12 does not include the use of land by the carrying out of mining operations, but for the purpose of s 45 (4) reference to the discontinuance of a use includes discontinuance of mining operations. Thus in answer to the question 'development or no', what one has to have regard to in mining cases is the actual carrying out of work—that is the question—and no change of use is concerned in it. However, when one comes to enforcement under s 45 the effect of the amendment to which I have referred is that an enforcement notice may require the termination of mining operations in precisely the same way as it can require the termination of a use of land undertaken without planning permission.

To come back to the facts of the case. The enforcement notice which gives rise to this appeal, recited in para 3 that it appeared to the council that 'the said land' had been developed by the carrying out thereon of mining operations, namely, the extraction of sand and gravel. Going back to para 1 of the notice, one finds that 'the said land' means an area encircled by a red verge line on the plan attached to the notice and before the court. So the land on, in, or under which the development is said to have taken place is this large area encircled by the single red line. However, it is clear from para 3 of the notice that what is being alleged is that the actual working of the sand and gravel did not occur all over the land confined in the red verge line, but has taken place in two much smaller areas within the large area and each itself coloured pink. So the complaint is—and no one could have made it clearer than the draftsman of this notice—that the land comprised in the red verge line has been developed by reason of the taking of sand and gravel from two smaller pink-washed areas.

The present appellants appealed against that notice on a number of grounds and the usual inquiry was held. Since counsel for the appellants has been very economical in his argument in defining the points which he takes in his submission that the Secretary of State was wrong, I do not find it necessary to go into the history of this matter in any great detail. I think it suffices to illustrate the point in issue to say this. Workings for sand have taken place in this area for very many years indeed,



certainly back to before the second world war, and when the inspector came to consider the history of the land encircled by the red line he found that no working had taken place in that area other than in the two areas washed pink. Further in the two areas washed pink initial working for sand and gravel had in some instances occurred before November 1962, and therefore more than four years before the service of the enforcement notice, whereas in other cases within the pink-washed land the initial development had taken place after November 1962 and therefore within the four year period [see Town and Country Planning Act, 1962, now replaced by s 15 (3) of Town and Country Planning Act, 1968].

Counsel's criticism of the Secretary of State's decision really crystallised itself into two submissions. His first submission is that, it being found as a fact that no actual mineral working has occurred outside the two pink-washed areas then, as a matter of law it was not open to the planning authority to make the enforcement notice effective over the wider area comprised in the red line. The second submission is that in those parts of the pink-washed area where the initial mineral working occurred more than four years before the service of the enforcement notice there is no power to prevent the appellants from continuing to work those areas until they are worked out. Putting it another way, he submits that in areas where the initial working was more than four years before the date of the notice there is no control under the Act sufficient to enable an enforcement notice to be served which will prevent continued working of those areas until they are worked out. I will endeavour to deal with those two points separately.

As to the first one, the control which can be exercised by the town and country planning legislation in respect of mineral working is in respect of any such workings which occur in, on, over, or under land. Counsel for the appellants' argument is that there can be no development within those words in s 12 of the Act except on land where the top spit, the top surface, has actually been removed by way of working. He says that the area in question here outside the two pink-washed areas is an area in which no mineral workings have occurred, and therefore it is an area which could not competently be included in the enforcement notice. In answer to that counsel for the Secretary of State reminded us of the fact that in many planning cases, although more particularly in cases concerning change of use, it is necessary to consider initially what is the planning unit to which the enforcement notice can properly be applied. One gets, for example, a field of ten acres with one caravan situated in the corner. If you look at the small area covered by the caravan and ask whether there has been a material change of use, the answer will almost certainly be Yes. If you look at the ten acre field and ask the same question in relation to it, the answer may well be No. Accordingly, in such a case, before you can consider the effect of planning legislation you have to ask yourself what is the planning unit to which an enforcement notice can properly be addressed. That matter was dealt with authoritatively by the Court of Appeal in *G Percy Trentham Ltd v Gloucestershire County Council* (1) so far as change of use cases are concerned and I refer to a passage from the judgment of LORD DENNING MR. This was a case concerning farm buildings some of which had been used for storage of building materials, and LORD DENNING said:

"Even if the appellants were able to say that these nine buildings were a "repository", I do not think that they could sever them from the rest of the farmhouse and farm buildings. In applying the Town and Country Planning (Use Classes) Order 1963, one must consider the whole of the unit which is being used. I think that DIPLOCK, L.J., indicated the right test towards the end of the argument. One should look at the whole area on which a particular

(1) 130 JP 179; [1966] 1 All ER 701.

activity is carried on, including uses which are ordinarily incidental to or included in the activity.'

DIPLOCK LJ makes the same point when he said:

'As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

Accordingly, one finds in change of use cases that the extent of the planning unit has to be determined by looking at the whole area over which a particular activity is carried on.

Counsel for the Secretary of State contends, and for my part I agree with him, that a similar approach must necessarily be used in connection with operational development such as development by mining. I do not think that it can possibly have been the intention of Parliament that, when an enforcement notice is served in regard to mining operations such as the present, the effect of the enforcement notice should be meticulously restricted to the very square yardage which is being the subject of an actual cut by the shovel or the bulldozer as the case may be. I think it is permissible, and indeed right, in mining operations cases to ask whether the land on which the actual cut is taken is not in truth and in fact part of a wider area which is being started in development by the particular immediate activity referred to. If as a matter of fact and common sense it is clear that the first cut is a cut relative to a larger area, then it is right for the tribunal of fact to determine if it thinks fit that that larger area is a planning unit for present purposes. In this case I think therefore that the rural district council and the Secretary of State were right in thinking that the area confined in the red line was a planning unit and was the land to which the enforcement notice should be directed. I do not take time to dwell on the many inconsistencies and peculiar consequences which might follow, in my judgment, if the land to which the notice related had necessarily been confined to land on which an actual cut had been made.

As to the second point, counsel for the appellants, as I have said, contends that where in any particular spot the taking of minerals began before November 1962 the appellants retain the right to work downwards within the horizontal confines of that area to any extent. He justifies this by saying that the proper interpretation of such a situation is that the development occurred when the surface was cut, and since the development occurred when the surface was cut and since that was more than four years before the date of the notice, it follows that the notice cannot restrain further activity within the confines of that cut. For my part I think that that argument is unsound because I think that in these operational development cases, and I am particularly referring now to mining cases, that each shovelful or each cut by the bulldozer is a separate act of development and it seems to me to be of no comfort to the developer that he should have made a first cut at a particular point more than four years ago. When he continues the work he will be carrying out a further development, not merely continuing the development of four years ago. Accordingly, he would be doing something which is a breach of planning control, and I see no reason why an enforcement notice should not be appropriate.

I ought to say for completeness that the Secretary of State deleted from the notice a requirement for the making good of works which had taken place before the notice was served. Had that requirement remained, other matters might have required investigation in regard to whether that requirement applied to development occurring more than four years before the date of the notice. In the circumstances I find it

unnecessary to go into this matter and content myself by saying that I think the Secretary of State was right in law. I would dismiss the appeal.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I agree also.

*Appeal dismissed.*

Solicitors: Collyer-Bristow & Co, for Cox & Cameron, Port Talbot; Solicitor, Department of the Environment.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

13th December 1971

#### STOKER AND ANOTHER v STANSFIELD

*Landlord and Tenant—Small tenement—Recovery—Application to justices for warrant—Notice of application—Service—Substituted service—Need to prove due diligence by landlord in seeking tenant—Small Tenements Recovery Act, 1838, s 2.*

By s 2 of the Small Tenements Recovery Act 1838: '... notice of application [to justices for a warrant for possession] intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person so holding over . . . , and the person serving the same shall read over the same to the person served or with whom the same shall be left as aforesaid, and explain the purpose and intent thereof . . . provided that if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person.'

Under this section the landlord was bound to effect service of the notice either personally or by leaving it with some person who was apparently residing on the premises, and he could avoid that obligation and avail himself of the alternative method of substituted service under the proviso only if he could prove that he had exercised due diligence in his efforts to find the missing tenant and had been unsuccessful.

*Housing—House owned by local authority—Possession—Proceedings under Small Tenements Recovery Act, 1836—Need to comply strictly with requirements of s 2—Inapplicability of Housing Act, 1957, s 169 (1).*

Per GRIFFITHS, J (LORD WIDGERY, CJ, concurring). Although it is only by virtue of s 158 (2) of the Housing Act, 1957, that a local authority are able to take proceedings under the Small Tenements Recovery Act, 1838, they are none the less bound to abide strictly by the requirements of s 2 of the Act of 1838 with regard to service of the notices, and they are not entitled to rely on the less stringent requirements of s 169 of the Act of 1957.

CASE STATED by justices for South Shields.

On 8th July 1971 a complaint was made by the respondent, Alan Stansfield, as agent of South Shields Corporation, that the corporation had let to the appellants, Edward Stoker and Mary Stoker, a tenement situated at 303 Dean Road, in the

borough at the rent of £2.97 per week, that the tenancy was determined by notice to quit on 10th May 1971, that on 23rd June 1971 a notice in writing of intention to apply to recover possession of the tenement was served on the appellants, and that the appellants refused to deliver up possession of the tenement and still detained the same. Accordingly the respondent applied to the justices for an order of possession under the Small Tenements Recovery Act 1838. The justices were satisfied that the respondents had complied with the provisions of s 2 of the Small Tenements Recovery Act 1838 inasmuch as after three calls at the premises by the respondent the persons holding over could not be found and admission could not be obtained, the notice was posted on a conspicuous part of the premises, and they granted an order for possession in not less than 21 nor more than 30 clear days. The appellants appealed.

*J R Reid* for the appellants.

*G O A Sebestyen* for the respondent.

**ASHWORTH J:** This is an appeal by way of Case Stated by justices for the county borough of South Shields who on 8th July 1971 heard proceedings initiated by the respondent under the Small Tenements Recovery Act 1838 to recover possession of a tenement occupied by the two appellants and let to them. The tenancy in question had been duly determined by notice to quit on 10th May 1971, and on 23rd June 1971 a notice in accordance with the 1838 Act was prepared on behalf of the respondent. The main issue in this case is the question whether sufficient proof was before the justices to show that that notice of intention to proceed was duly served as provided by that Act.

The facts are in a very short compass and were not in dispute in the court below. The notice of intention was served on 23rd June at 4.15 p.m. by the respondent by affixing a copy of the notice to the door of the premises and putting a copy of the notice through the letterbox. Two attempts to serve the notice personally had been made previously, at 10.15 a.m. and at 2.30 p.m. on the same day, when after the respondent had knocked on the door no reply was received. On the latter occasion a neighbour said that the appellants were likely to be back 'fourish'. When the respondent returned at 4.15 p.m. the same lady told him that the appellants had been in, but had gone out again, and she did not know when they would be back. It was contended on behalf of the appellants that the notice was not served in accordance with the 1838 Act. On the other hand, the respondent said that this was just such a case as was caught by the proviso to s 2.

The Small Tenements Recovery Act 1838, as its title shows, was an Act to facilitate the recovery of possession of tenements. It is a cheap and expeditious way of recovering possession, but it has conditions in it which certainly, in my view, have to be strictly fulfilled, and which are for the most part for the protection of the tenant. I need not read s 1 which is lengthy and in language associated with 1838 as a period. Section 2 is important:

'Such notice of application intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid; and the person serving the same shall read over the same to the person served or with whom the same shall be left as aforesaid, and explain the purport and intent thereof'...

Pausing there, it is quite plain that more is required than the mere handing of the notice to the occupying tenant of the house. It is essential that the person serving the same shall read it over to the person served. Moreover, having read it over, the

serving authority must explain the purport and intent thereof. However, the section does contain a proviso that

'if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person.'

One point taken by counsel for the respondent was that this was in its own terms a section conferring an option on the landlord or local authority to serve either in one of two ways. I am quite satisfied that that argument is wrong, that in fact the word 'may' does mean 'must' be served in one of those two ways. That is reinforced by the requirement that the notice must be read over and explained to the person receiving it.

There is no authority that counsel have found in the courts of this country dealing with this matter, but reference was made to an Irish case, *Blue v Fullerton* (1), where PALLES CB emphasised that in a corresponding provision the implication was that due diligence should be used before the alternative remedy of substituted service could be invoked. I for my part would apply precisely the same reasoning to s 2 of the 1838 Act. Before a local authority or other landlord can seek to invoke the summary remedy given by the 1838 Act on the footing that he has served a notice of intent by posting it on the door because the tenant cannot be found, he must be in a position not only to state but to prove that he has exercised due diligence in his effort to find the missing tenant. In this case it is of significance that all the efforts deposed to on behalf of the local authority were concentrated on one day and one only. It is true that on that particular day three visits were paid, but it also emerges from the facts accepted by the justices that the present appellants were not away on holiday, they had not left the premises for good, and indeed the neighbour said that they were expected back around four o'clock. That must have made it quite evident to the respondent, who had been trying to serve the notice, that the appellants were available within the area of South Shields, and, if he called at some other time, or possibly next day, there was every chance of his finding them. It is, in my view, impossible to lay down strict rules as to the number of occasions on which visits must be paid. Still less is it possible to say on how many days such visits should be paid. But I feel constrained to say in this case that on this evidence there was not due diligence proved in order to serve this summons.

What I think may have misled the justices is their consideration of the three words 'cannot be found' because their attention was not called to the Irish case of *Blue v Fullerton* in which the implication of due diligence being necessary was explained, and they may have thought, and indeed in giving their reasons the justices rather suggested, that it was enough for the present respondent to prove that physically he could not on the date in question find either of the appellants, whereas what he ought to have done was to prove further that he had taken due diligence to find them. For these reasons I do not feel that the justices applied their minds to an important question which does raise some concern, because this is a summary remedy affecting small tenements at low rents and people who may not understand their landlords' remedies. I would be in favour of allowing this appeal with the result that the warrant issued by the justices should be set aside.

**GRIFFITHS J:** I agree with the reasons which have been given by ASHWORTH J for allowing this appeal. I would wish to deal only with a further argument that was

(1) (1876), IR 10 CL 233.



put before this court on behalf of the respondent, based on the provisions of the Housing Act 1957. It was argued on behalf of the respondent that it was only by virtue of the provisions of the Housing Act 1957 that the corporation were able to rely on the procedure under the Small Tenements Recovery Act 1838 in order to recover possession of these premises. That is because the annual rental of the premises was over £20 a year. Counsel for the respondent has drawn the attention of the court to the following provisions of the Housing Act 1957. By s 158 (2) of the Act it is provided:

'Where a local authority, for the purpose of exercising their powers under any enactment relating to housing, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined.'

This is the section which empowers the local authority to proceed under the Housing Act 1957. Counsel for the respondent then drew attention to s 169. This relates to the service of a notice under the Housing Act 1957 and provides:

'(1) Subject to the provisions of this and the last foregoing section, any notice, order or other document required or authorised to be served under this Act may be served either—(a) by delivering it to the person on whom it is to be served, or (b) by leaving it at the usual or last known place of abode of that person . . .'

In this case notice was put through the letterbox and so, says counsel for the respondent, the requirements of s 169 were satisfied. He thereafter drew attention to s 188 which provides that the powers of the Act are cumulative, and reads:

'All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not passed . . .'

So, argues counsel for the respondent, the corporation had the option either to effect service as provided by the Small Tenements Recovery Act 1838, or alternatively to use one of the methods provided for by s 169 of the Housing Act 1957. I for my part cannot read s 169 in that light. In my view, if it is desired to proceed by virtue of the Housing Act 1957 under the Small Tenements Recovery Act 1838, it is still incumbent on the local authority to abide strictly by the provision of the Small Tenements Recovery Act 1838. This they have not done in the present case. I also would allow this appeal.

**LORD WIDGERY CJ:** I agree with both judgments.

*Warrant set aside.*

Solicitors: *Gamlens*, for *T D Marshall, Hall & Levy*, South Shields; *Lewis, Gregory, Mead & Sons*, for *R S Young*, South Shields.

Reported by *T R Fitzwalter Butler*, Esq, Barrister.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

15th December 1971

## PORTER v ABERYSTWYTH JUSTICES

*Licensing—Club—Special hours certificate—Premises adapted for providing substantial refreshment for members—Licensing Act, 1964, s 78 (b).*

The appellant applied to the respondent justices for a 'special hours certificate' for a club, in respect of which a certificate under s 79 of the Licensing Act 1964 of suitability of the premises in respect of music and dancing was in force. He showed the justices a menu card which mentioned soups and various foods such as scampi and chips and a variety of other combinations of eggs, chips, bacon and beans. Alternatively sandwiches were available and pork pies, sausage rolls, fruit salad with ice cream and a number of beverages, such as coffee, tea, etc. The justices inspected the premises, finding a modern kitchen with cooking equipment, a club room with 21 tables, each seating four persons, adequate toilet facilities and a small circular dance floor. However, they refused to grant a special hours certificate on the ground that the club was not adapted to provide 'substantial refreshment' to which the supply of intoxicating liquor was an ancillary within s 78 of the 1964 Act. On appeal it was argued that the club in question had satisfied the requirements of s 78 (b) of the Act, and that the justices had applied too high a standard in their definition of 'substantial refreshment'.

**Held:** the appeal would be allowed because the test was not whether an individual was provided with a substantial meal, but whether the premises were adapted and used for the provision of substantial refreshment; in any case it was clear that a club which provided the meals set out in the menu produced before the justices was providing substantial refreshment within s 78 (b) of the Act of 1964; accordingly, the conclusion reached by the justices was wrong, their refusal to grant a certificate would be set aside, and, as the requirements of s 78 had been met, the court would grant the appellant a special hours certificate.

**CASE STATED by Aberystwyth justices.**

On 17th March 1971 the appellant, David George Porter, applied to Cardigan justices sitting at Aberystwyth for a special hours certificate under s 78 of the Licensing Act, 1964, in respect of premises known as the Asteroid club, Aberystwyth. The justices refused the application on the ground that the club was not adapted to provide 'substantial refreshment' to which the supply of intoxicating liquor was an ancillary within s 78 of the Licensing Act, 1964. The appellant appealed to the Divisional Court against this refusal on the ground that the Asteroid club had satisfied the requirements of s 78 (b) of the 1964 Act.

*Norman Wise* for the appellant.

The respondent justices did not appear.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the county of Cardigan acting in and for the petty sessional division of Aberystwyth in respect of an adjudication by them by which they refused the appellant, David George Porter, a special hours certificate under s 78 of the Licensing Act, 1964, in respect of premises known as the Asteroid Club at Aberystwyth.

Section 78 requires conditions to be satisfied before a special hours certificate can be granted. It provides:

'If, on an application made to the magistrates' court with respect to premises in respect of which a club is or is to be registered and which are in any area which

is subject to statutory regulations for music and dancing, the court is satisfied—  
 (a) that a certificate granted under s 79 of this Act is in force for the premises,  
 and (b) that the whole or any part of the premises is structurally adapted, and  
 bona fide used, or intended to be used, for the purpose of providing for the  
 members of the club music and dancing and substantial refreshment to which the  
 supply of intoxicating liquor is ancillary, the court shall grant a special hours  
 certificate for the premises . . .'

with the consequence that the premises can be kept open and drink can be consumed  
 up to 2 am.

The justices set out the evidence which was given before them by the appellant in a  
 way which leaves me in no doubt that they are broadly accepting what he said.  
 According to his evidence, a certificate under s 79 of the suitability of the premises for  
 music and dancing was in force. That, it will be remembered, is one of the conditions  
 laid down in s 78, and the premises are premises in respect of which a club is regis-  
 tered. So all that remained for the justices to consider before deciding whether to  
 grant the special hours certificate was to see whether para (b) of s 78 was complied  
 with, namely, whether the premises were structurally adapted and bona fide used or  
 intended to be used for the purpose of providing music and dancing and for substan-  
 tial refreshment to which the supply of intoxicating liquor was ancillary.

So far as the premises being structurally adapted for providing these matters, the  
 justices find on inspection that there was a modern kitchen which contained, for  
 example, a gas cooker with two ovens, an eye-level grill, three frying units, a refriger-  
 ator, deep freeze and various other equipment of a minor character all laid out in a  
 modern kitchen on the premises. They also find that the club room is a large room  
 with 21 tables, that each table can seat four people, that there are adequate toilet  
 facilities, and that there is a small circular dance floor in the middle. Looking at the  
 description of what the justices saw when they inspected these premises I find it  
 impossible to say that it was open to them to find that the premises were not structur-  
 ally adapted for the purpose of providing music and dancing and substantial refresh-  
 ments. The dance floor was there, the cooking equipment was there, the lay-out of  
 the tables and chairs for those who wished to eat was there.

The justices, however, find in their opinion that the premises were not adapted  
 for the provision of meals other than snacks. I feel that it is impossible to form that  
 conclusion on the basis of what the justices state they found when they went to  
 inspect the premises. Furthermore, the appellant gave evidence that the club provid-  
 ed meals and refreshments, and he exhibited a menu card which is attached to and  
 forms part of the Case. The menu card shows that there was available for members  
 of the club such dishes as scampi and chips at 42p, chicken and chips at 32p, sausage,  
 egg and chips, and a variety of other combinations of egg, chips, bacon and beans.  
 Alternatively, sandwiches were available at 11p, and also pork pies, sausage rolls, fruit  
 salad with ice cream, and a number of beverages such as coffee with or without milk,  
 tea, Horlicks milk and so on. It may not be a gourmet's meal, but I find it impossible  
 to say that, if a member of the club elects to eat chicken and chips followed by one  
 of the sweets and beverages offered, that could be regarded as anything other than a  
 substantial meal. Indeed the test is not whether an individual eats a substantial meal,  
 but whether the premises are adapted and used for the provision of substantial refresh-  
 ment. It seems to me that if one asks the question as a matter of common sense  
 whether a club providing meals according to the menu that I have referred to was  
 providing substantial refreshment, the answer would inevitably be 'Yes it was'.

I have reluctantly come to the conclusion that the justices reached a decision which  
 on their own statements was one which no reasonable Bench could reach. I would  
 accordingly set aside their decision, and since the grant of a special hours certificate is

mandatory as soon as the requirements of s 78 are met, I would order that the certificate be granted accordingly.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Appeal allowed.*

Solicitors: Ward, Bowie & Co for Humphreys & Parsons, Machynlleth.

Reported by N P Metcalfe, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND STEPHENSON, LJ AND THOMPSON, J)

4th, 10th November 1971

R v PRAGER

*Criminal Law—Evidence—Admissibility—Judges' Rules—Confession—Alleged breach of rules—Failure to administer caution—Discretion of judge to admit—'Oppression'—Judges' Rules, 1964, introduction, note (c), r 2.*

By note (c) to the Judges' Rules, 1964, a statement by the defendant, before being admitted in evidence, must be proved to have been 'voluntary in the sense that it has not been obtained . . . by fear or prejudice or hope of advantage, . . . or by oppression'.

The Judges Rules are merely a guide to police officers conducting investigations and are not rules of law. Although failure to comply with the rules may render answers and statements liable in some circumstances to be excluded from evidence in subsequent criminal proceedings, a judge may admit in evidence a confession alleged to have been obtained by a course of questioning, which was not introduced by a caution in accordance with r 2 of the Judges' Rules, on the ground that the confession was made voluntarily. The judge is not obliged first to rule on the issue whether the confession was obtained in breach of the Judges' Rules.

To establish that a confession was not voluntary on the ground that it was obtained by 'oppression', it must be shown that it was obtained under conditions which tended to sap, and did sap, the free will of the defendant. 'Oppressive questioning' may be described as questioning which by its nature, direction, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent. Regard should be had to the characteristics of the person who makes the statement.

APPLICATION by Nicholas Anthony Prager for leave to appeal against his convictions at Leeds Assizes of making a sketch calculated or intended to be useful to an enemy and of communicating documents calculated or intended to be useful to an enemy, contrary to s 1 (1) (b) and s 1 (1) (c) of the Official Secrets Act, 1911, respectively. He also applied for leave to appeal against the sentences imposed on him of concurrent terms of 12 years' imprisonment in respect of each of the two convictions.

J P Comyn QC and E Lyons for the applicant.

The Attorney-General (Sir Peter Rawlinson QC) and D Herrod for the Crown.

*Cur adv vult*

10th November. **EDMUND DAVIES LJ** read the following judgment of the court: On 23rd June 1971 Nicholas Anthony Prager, the applicant, was convicted at Leeds Assizes of making between 1st June and 29th July 1961 a sketch, contrary to s 1 (1) (b) of the Official Secrets Act 1911 (that was count 1), and of communicating documents between 29th July and 2nd September 1961, contrary to s 1 (1) (c) of that Act. The convictions were by an 11:1 majority. The applicant was acquitted of the third count, which charged him with doing, on 16th January 1971, an act preparatory to the commission of an offence contrary to s 7 of the Official Secrets Act 1920. He was sentenced to concurrent terms of 12 years in respect of each of the two convictions. He applied to this court for leave to appeal against conviction and sentence. On 4th November we heard the application, the submission of counsel for the applicant being made almost entirely in camera (at the request of counsel for the Crown and with the complete concurrence of counsel for the applicant). We did not deem it necessary to hear counsel for the Crown before announcing our refusal of the application in respect of both conviction and sentence, but indicated that we would at a convenient later date give our reasons for arriving at that conclusion. That we now proceed to do.

The applicant was born in 1928 of Czech parents and lived in Czechoslovakia until he came to this country with them in 1948 or 1949 and became a naturalised British subject. In 1949 he married a Czech woman and in May of that year joined the Royal Air Force. By 1959 he had been promoted to sergeant and, being a clever engineer, was one of a very small team engaged on highly secret and important work. In 1958 the applicant's wife acquired an interest in a house in Prague on the death of her aunt. The applicant and his wife wanted to sell it and get the money transferred to England. But, as there were exchange control difficulties, in 1959 the applicant proposed visiting Czechoslovakia. For this purpose he needed a visa and went to the Czech Embassy in London. There he met a Mr Malek, an officer of the Czech intelligence who occupied the post of consul, and what seems to have been initially a wholly innocent contact was to prove a turning-point in the applicant's life. In 1960 the highly secret unit in which he was serving moved to Fillingley, near Doncaster. For some reasons, which merit and have doubtless already received attention, the security system obtaining there was imperfect, for it was possible to abstract classified matter at night, photograph it, and return it undetected the following day. Among the projects being carried out was one called 'Blue Diver', and count 1 relates to the alleged photographing of material relating thereto for the purpose of supplying it to the Czechs.

In 1961 four important events occurred. Taken individually, they may well have been capable of an innocent explanation, but, when regarded collectively, were said by the Crown to provide a powerful indication that the applicant was preparing for espionage. First, in February 1961, the applicant and his wife—or at least the wife—were on terms of social intimacy with Mr Malek. Secondly, in March 1961, the applicant sought a three months' extension of his 12 years Royal Air Force engagement which was due to expire the following May. He explained that he sought the extension so as to complete a course of study he was then undoubtedly pursuing, whereas the Crown alleged that the extra months covered June and July, thus enabling him to have access to secret material for the time necessary to enable him to further the course of espionage on which he was set. Thirdly, during 1961 the applicant bought a polaroid camera and a 'close-up' kit at a total cost in excess of £120. It could undoubtedly be used for photographing documents and would enable its user to know instantly whether he had procured a satisfactory result. Fourthly, the applicant and his wife required a visa for the Czechoslovakian holiday they took in 1961, and for this purpose were in contact with Mr Malek. The Crown alleged that it was during



a visit by the applicant to the Czech Embassy that he handed over to Mr Malek his photographs of secret material. In August 1961 the applicant left the Royal Air Force and became engaged on computer work with English Electric. This involved his visiting Czechoslovakia from time to time during the next ten years.

When it was that the intelligence staff of this country first interested themselves in the applicant is not clear. All we know is that it was only after 'prolonged enquiries' that Detective Chief Superintendent Craig and Detective Superintendent Sills and other police officers arrived at his home near Rotherham at 8.00 a.m. on Sunday, 31st January 1971. At the outset he was shown a search warrant issued under the Official Secrets Act 1911. He was then told that the police wanted to question him regarding a serious matter and was asked whether he preferred to go to the police station for the purpose. He said he did, and in the 25-minutes journey to Doncaster police headquarters remarked: 'This whole thing is a fantasy, but I will help you all I can'. They arrived there at 9.15 a.m. and his wife followed soon after. It has not been suggested to this court that the applicant then or at any time before he was charged thought, or had any grounds for thinking, that he was not free to leave the police station had he wanted to.

On arrival, the applicant was given refreshment and Detective Chief Superintendent Craig forthwith began questioning him and, conforming to a decision previously arrived at, they gave him no caution before doing so. In essence, this application turns on whether they were right in so refraining. The submission of counsel for the applicant is that it was a completely wrong decision and should have led to the exclusion from the jury's consideration of everything said or acknowledged by the applicant thereafter.

In his submissions before us, counsel for the applicant conveniently divided the events of the day into session 1, lasting from 9.15 a.m. to 12.30 p.m., session 2 from 5.45 p.m. to about 7.40 p.m., and session 3 from 7.40 p.m. to about 11.30 p.m. During session 1 the applicant made no admissions, and in particular denied taking illicit photographs or meeting Czechs whom he knew to be intelligence agents working for their country. Questioning broke off at 12.30 p.m., when (accompanied by a detective officer) the applicant took a walk in the precincts of the police headquarters, had lunch and then rested and slept in a room made available to him. When he awoke, he was given tea and freshened himself up. At 5.45 p.m. his interrogation was resumed, thus beginning what his counsel described as session 2. At about 7.40 p.m. something significant occurred, for on being asked whether he had been regarded as an agent by the Czech intelligence, he replied: 'It did not happen like that. Anything I have done was done unwittingly, but you must know my family are out of this'. At this point Detective Chief Superintendent Craig cautioned the applicant in accordance with r 2 of the Judges' Rules 1964, and it is to be observed that when LORD WIDGERY CJ, the trial judge, came to sum up, he told the jury:

'It is not perhaps without importance to remember that that caution was, according to the prosecution—the police officers—and really not challenged by the defence given to [the applicant] *before* he made any kind of admission in this matter at all.'

Session 3 began with the caution at 7.40 p.m. Between then and 9.00 p.m. the applicant orally admitted buying a polaroid camera and a 'close-up' kit in Sheffield, and photographing 'stuff' in his kitchen. Asked what 'stuff' he was referring to, he replied, 'Just pictures of general calculations'. Asked to which device these calculations related, he said 'Blue Diver'. He went on to say that he had handed these over to Mr Malek at the Czech Embassy in London, and spoke of later passing notes on

'Blue Diver' to two Czech intelligence officers at Jevaney when on holiday in Czechoslovakia and of being paid by them £200 or £300, which he regarded as 'an advance against the sale of my house'. At 9.35 pm he was asked whether he was prepared to furnish a signed statement and he assented, but asked whether he might take another walk before doing so. He then took a short walk, again accompanied by a detective officer. At 9.50 pm he was cautioned in the terms laid down by r 3 of the Judges' Rules 1964 and between then and 11.30 pm he dictated a long statement. On its completion, he read and initialled each page and signed the completed statement. It is not contested that the statement, if true, constituted a complete admission of the two offences on which he was later convicted by the jury. In relation to one of counsel for the applicant's submissions, it is convenient to observe at this point that Lord Widgery CJ in due course told the jury that, if they were satisfied that such portion of the statement as dealt with the alleged espionage arrangements in 1971 which formed the basis of the third count in the indictment was true and voluntary, 'then of course you will have no alternative but to convict him', despite which, as we have already said, the jury acquitted on that count.

On 1st March the same two officers saw the applicant and his solicitor at the prison. Reading from a script, the applicant then made a second statement, the opening words being:

'I wish to make a statement in which I will tell you the truth. The previous statement which I was required to make on the 31st January is not true in most of its contents because I was induced to make that statement and I was in a state of fear.'

It constituted a complete denial of any participation in espionage activities. At the trial, when Detective Superintendent Sills was about to tell the court what happened after the applicant reached the police headquarters on 31st January, counsel for the applicant intimated that he desired to develop an objection in the absence of the jury. They accordingly retired, and there ensued a trial within the main trial, regarding the admissibility of the proposed prosecution evidence relating to events occurring after 9.15 a.m. His submissions may thus be summarised. In laying information for the purpose of obtaining a search warrant pursuant to s 9 of the Official Secrets Act 1911 (which requires that a magistrate must be 'satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed'), Detective Chief Superintendent Craig had sworn that his grounds for suspicion were that the applicant had 'made a sketch of a certain secret document which was calculated to be useful to an enemy'. Furthermore, the whole tenor of the questioning thereafter disclosed that the police already had detailed knowledge of the applicant's activities and that an informant or informants had disclosed matters of considerable gravity concerning him. As a result, before any questioning began, the police had, in the words of r 2 'evidence which would afford reasonable grounds for suspecting' that the applicant had committed breaches of s 1 of the Act and should, therefore, have administered the caution prescribed by that rule. As they had failed to do so, the court ought, in the proper exercise of its discretion, to have excluded all evidence relating to what transpired after 9.15 a.m., for the omission was fatal to admissibility and could not be cured by the cautions later given.

This was a somewhat unusual trial within a trial. For example, at no stage of it was the police evidence challenged. Again, neither the applicant nor any other witness was called to testify to circumstances which might provide a factual ground for excluding the confession. On the contrary, counsel for the applicant made it clear that his objection to admissibility had 'nothing to do with fears, inducements, or threats', although the applicant 'had certain fears in his own mind', which turned

out to be a fear that his wife might have been guilty of the offences into which the police were enquiring. It may here be conveniently noted that this disclaimer was in line with those made at a later stage in the trial when, his submission on admissibility having been overruled, counsel for the applicant cross-examined the police in the jury's presence. For example, he assured Detective Superintendent Sills that no impropriety was suggested, nor was it suggested that the applicant 'was induced by you in any improper sense', nor that, despite his second statement, the applicant had been 'made' to say anything.

Having regard to this attitude, one might be forgiven for concluding that counsel for the applicant was taking his stand simply and solely on the alleged breach of r 2. But it turned out that this was not so, for it later emerged that, despite his assurances, he was further (or alternatively) basing his objection on a wider and more fundamental ground. Turning to note (e) to the Judges' Rules 1964, with its insistence that, before being admitted in evidence, an alleged confession must be proved to have been 'voluntary, in the sense that it has not been obtained . . . by fear of prejudice or hope of advantage . . . or by oppression', counsel for the applicant submitted that the form, prolongation, and quick-firing of the questioning of the accused was designed to 'crack' him and accordingly amounted to 'oppression'. In the result, it somewhat tortuously emerged during the sub-trial that two questions were being raised—(a) was r 2 breached? and (b) had the prosecution proved that the applicant's oral admissions and signed statement were made voluntarily?

Question (a) was, in effect, treated by counsel for the applicant as conclusive of this appeal. But as the 1964 rules make clear, they were

'put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.'

Nevertheless, counsel for the applicant insisted that the admissibility of an alleged confession must in the first place (and, he seemed to be saying, in the last place also) depend on whether the rules have been complied with. He submitted that it was incumbent on LORD WIDGERY CJ to decide whether, when the interrogation of the applicant began, the police already had 'evidence' which would afford reasonable grounds for suspecting that he had committed offences against the Official Secrets Act 1911.

LORD WIDGERY declined to rule whether or not such 'evidence' had existed. Some of the material presented when, in the course of the sub-trial the court proceeded to sit in camera, rendered this, as he understandably said, 'a very difficult question'. But LORD WIDGERY added that, in the light of his conclusion regarding the overriding issue of voluntariness, he found it unnecessary to decide it. Counsel for the applicant has strongly criticised this approach. He submitted before us that LORD WIDGERY should have decided first whether r 2 had or had not been breached for, if it had been, the confession should not have been admitted unless there emerged 'some compelling reason why the breach should have been overlooked'. He cited no authority for that proposition which, he claimed, involved a point of law of very great importance. This 'complete lack of authority' (to use counsel's phrase) is not surprising, for, in our judgment, the proposition advanced involves no point of law and is manifestly unsound. Its acceptance would exalt the Judges' Rules into rules of law. That they do not purport to be, and there is abundant authority for saying that they are nothing of the kind. Their non-observance may, and at times does, lead to the exclusion of an alleged confession, but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily. In the present case, LORD WIDGERY was, without deciding the point, prepared

to assume in the applicant's favour that there *had* been a breach of r 2, and then proceeded to consider whether the voluntary nature of the confession had nevertheless been established. In our judgment, no valid criticism of that approach can be made. On the contrary, it appears to us entirely sound and, it should be pointed out, strictly in line with the observation of counsel for the applicant: 'I cannot complain if your Lordship says: "I prefer to answer the overall question" ...'

We, therefore, turn to question (b), namely: Was the voluntary nature of the alleged oral and written confessions established? In *Comrs of Customs and Excise v Harz* (1) LORD REID, in a speech with which all the other law lords agreed, treated the test laid down in principle (c) in the introduction to the Judges' Rules as a correct statement of the law. As we have already indicated, the criticism directed in the present case against the police is that their interrogation constituted 'oppression'. This word appeared for the first time in the Judges' Rules 1964, and it closely followed the observation of LORD PARKER CJ in *Callis v Gunn* (2) condemning confessions 'obtained in an oppressive manner'.

The only reported judicial consideration of 'oppression' in the Judges' Rules of which we are aware is that of SACHS J in *R v Priestley* (3) where he said:

'to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'

In an address to the Bentham Club in 1968, LORD MACDERMOTT described 'oppressive questioning' as—

'questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent.'

We adopt these definitions or descriptions and apply them to the present case. In doing so, we must bear in mind that in the lower court counsel for the applicant, while in one breath complaining of the nature of the police interrogation, in the next breath told LORD WIDGERY:

'This is not a case, and I stress it, of continual third degree grilling or questioning from 9.15 right through the whole time.'

We must also have regard to the fact that, while counsel expressly disclaimed the assertion made in the course of the applicant's second statement of 1st March that the police had 'made' and 'induced' him to say things which were untrue, before us he asserted that, although 'two very skilful police officers did their duty in the highest tradition of their force', they erred in that, 'by persistent pressure and cross-examination they set out to break this suspect'. By the time the sub-trial began, one

(1) 131 JP 146; [1967] 1 All ER 177; [1967] 1 AC 760.

(2) 128 JP 41; [1963] 3 All ER 677; [1964] 1 QB 495.

(3) (1965), 51 Cr App Rep 1

of these two officers, Detective Superintendent Sills, had embarked on his evidence and was thus seen and heard by LORD WIDGERY (although not under cross-examination), but at no stage before a ruling on admissibility was called for was any evidence given by the applicant. The ruling had accordingly to be based on what had emerged regarding the events of 31st January, including sessions 1 and 2, the giving of the first caution at 7.40 p.m., the giving of the second caution at 9.50 p.m., and the manner in which the written statement was taken, read, initialled and signed by the applicant. In the light of that material, LORD WIDGERY posed to himself the question whether the propriety of admitting evidence of the oral and written admissions had been established by the Crown. He expressed himself as satisfied that this was so even on the assumption that r 2 had been breached.

In the judgment of this court, nothing has emerged during the hearing of this application to indicate any reason for holding that LORD WIDGERY erred in exercising his undoubted discretion as he did in admitting the accused's oral and written statements. After the jury had returned to the court, the detective officers were strongly cross-examined on this issue of voluntariness. The applicant, the sole defence witness, said that his admissions were untrue, that he had wanted to leave the police station, that he had asked in vain to see a lawyer and his wife (who he knew was also at the police headquarters), that by 7.30 p.m. he was feeling terrible and his mind was a blank, and that from that time onwards he tried to tell the police what they were obviously expecting him to say, being able to 'make up' his confession from the form of the questions they had put to him. As against that the jury had the evidence of Detective Superintendent Sills that, when his colleague said he was seeking the applicant's co-operation regarding the truth or falsity of certain matters, the applicant replied:

'I came with you because I wanted to find out what it was all about and I want to help you if I can because I admire the British way, you know, but it really sounds a lot of rubbish to me, but go ahead, ask me what you like.'

In the course of the summing-up, repeated warnings were given to the jury of the necessity of their being sure that the confessions were both true and voluntary. Nevertheless, the criticism was advanced before us that the long, detailed questioning of the applicant called for a stronger warning than those given. We find this criticism baseless. Other criticisms were advanced and we do not propose to deal with them here, save to say that we have considered them carefully and they have induced no doubt in our minds regarding the soundness of the convictions returned. We make special mention only of the submission that there was such an inconsistency between the convictions on counts 1 and 2 and (despite the previously quoted observation of LORD WIDGERY) the acquittal on count 3 that the former should be regarded as unsafe. We do not agree. The charges were entirely different in character, further evidence which related only to the first two charges was presented, the third charge related to alleged incidents occurring ten years later than those giving rise to the first two counts, and it may well be that, having come to a firm conclusion in regard to the 1961 counts, they regarded as vague and unsatisfactory the further charge of doing 'an act preparatory to communicating to another person', etc. But speculation on the point is a sleeveless errand. The real test is whether, despite the undoubted inconsistency, there are any grounds for suspecting that the convictions on the first and second counts were unsafe and unsatisfactory. In our judgment, no such grounds have been shown to exist.

For the foregoing reasons, we came to the conclusion that the application for leave to appeal against conviction must be refused.

As to the 12-years concurrent sentences imposed, the applicant is a man of 42, and his counsel stressed that his convictions related to events of ten years ago and that



it had not been suggested that actual harm to this country had resulted therefrom. On the other hand, with typical candour he conceded that the applicant had revealed a very important anti-radar device to the agents of a potential enemy. Nevertheless, he submitted that concurrent sentences of seven to eight years would meet the justice of the case. In our judgment, it was one of great gravity and the sentences imposed might well have been higher had the offences not been, as LORD WIDGERY put it:

'substantially mitigated by the fact that . . . ten years have passed since [the offences were] committed and no disaster, fortunately, has befallen this country as a consequence of what you did.'

We see no reason to take a different view and accordingly the application in relation to sentence is likewise refused.

*Applications refused.*

Solicitors: *J Levi & Co, Leeds; Director of Public Prosecutions.*

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

7th December 1971

#### DERRICK v COMMISSIONERS OF CUSTOMS AND EXCISE

*Customs and Excise—Importation of prohibited goods—Indecent or obscene photographs—35 mm cinematograph films—Indecency not apparent on mere visual inspection—Customs Consolidation Act, 1876, s 42.*

In the goods enumerated and described in the table of prohibitions from and restrictions upon importation in s. 42 of the Customs Consolidation Act, 1876, are 'indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles'. Sixteen reels of 35 mm cinematograph films which had been imported by the appellant were seized by the Commissioners of Customs and Excise as being liable to forfeiture under s. 42, the films being indecent and obscene. They were in transparency form and before their character could be judged they had to be enlarged and by the use of apparatus displayed on a screen. Justices ordered them to be forfeited. On appeal,

Held: (i) the films were capable of being indecent or obscene although they had not been translated into a form in which they could give offence; (ii) the ejusdem generis rule did not apply to the concluding words of the prohibition since there was no single genus therein, and, accordingly, the prohibition applied to any articles, including cinematograph films, which were indecent or obscene; (iii) alternatively, the films were 'photographs' within the meaning of the prohibition despite their small size.

PER CURIAM: The fact that cinematograph films are subject to other controls has no bearing on the construction of s. 42. The section is a very important means of preventing indecent films from reaching the United Kingdom, and other statutory provisions which prevent their use once they are in the country are merely complementary.

EDITOR'S NOTE: The provision for the forfeiture of goods improperly imported is now to be found in s 44 of the Customs and Excise Act, 1952, the appropriate words of s 46 of the Act of 1876 having been repealed by Sch. 12 to the Act of 1952.

**CASE STATED** by justices for East Sussex.

By a complaint preferred by the respondents, the Commissioners of Customs and Excise, against the appellant, William Sydney Derrick, it was alleged that on 17th August 1970 at Newhaven Car Hall, Sussex, he imported 16 reels of 35 mm cinematograph film which were liable to forfeiture on the grounds that they were indecent or obscene articles imported contrary to the prohibition contained in s 42 of the Customs Consolidation Act, 1876. The justices found that the films were indecent and obscene articles, were of the opinion that at the time of seizure they were liable to forfeiture, and accordingly condemned them as forfeited. The appellant appealed.

*B T Wigoder QC and W S E Getz for the appellant.*

*Gordon Slynn for the commissioners.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated from justices for the county of East Sussex sitting at Lewes who, on 17th February 1971, made a forfeiture order, as I can conveniently describe it, in respect of 16 reels of 35 mm cinematograph film which had been imported at Newhaven and were alleged by the Commissioners of Customs and Excise to be indecent or obscene articles.

The authority for seizure of such an article is the Customs Consolidation Act, 1876, which in s 42 provides that:

'The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.'

In the ensuing table inserted somewhat surprisingly, as counsel pointed out, between coffee and snuff one finds the following:

'Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles.'

There was no issue before the justices as to the obscene or indecent character of the articles in question, and the only issue before us is whether 35 mm cinematograph film in reels comes within the prohibition which I have just read and within the terms of the charge in this case which alleged that they were indecent or obscene articles within the prohibition.

Counsel who has argued the matter for the appellant invites us to apply the ejusdem generis doctrine to the construction of the prohibition. He says that there is to be found in these words of description a single genus and he points out in his submission that all the items specifically described are items of which on visual inspection it is possible to form an immediate judgment as to their indecent quality. He says that cinematograph films are not within that genus because before their character in regard to decency or indecency can be judged, they have to be displayed with apparatus in some way and a picture thrown on a screen. Accordingly, when one comes to the concluding words of the prohibition, and I quote them again 'or any other indecent or obscene articles', he asks us to apply the ejusdem generis doctrine and to exclude from those final words films of the description here in question.

His second argument, which is alternative to the first, is that a reel of 35 mm film is not capable of being indecent or obscene, and in support of that he relies on a

decision in this court in *Straker v Director of Public Prosecutions* (1). That was a rather special case under the Obscene Publications Act 1959. The articles which had been seized from the defendant comprised a very large number of photographic negatives which were described by the court in the course of judgment as the 'stock-in-trade' of the accused. The real question in *Straker's* case was whether these negatives had been published within the meaning of the charge, but there is an observation of LORD PARKER CJ which is rather closer to the circumstances of the present case. There, having read s 1 (2) of the Obscene Publications Act 1959, which is in these terms:

'any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures',

LORD PARKER went on to say:

'Pausing there, for my part it seems to me that it is possible, without deciding the matter finally, for a negative such as we are dealing with here to come within the words "any film or other record of a picture".'

The matter did not require further investigation in that case and for my part I would have had little doubt in construing the 1959 Act that a negative was a film or other record of a picture within the meaning of the phrase. I see no reason to distinguish between the positive and the negative for the purposes of that Act, and accordingly, as it seems to me, the argument that this film is not capable of being indecent or obscene because it is not translated into a form in which it can give offence is not an argument which I find attractive in this case.

Counsel for the commissioners seeks to meet the first argument in two ways. He submits in the first place that there is no single genus in the prohibition in the 1876 Act. He points out that the genus alleged by counsel for the appellant is not appropriate at any rate to books. He submits that it may well be impossible in the case of a novel to decide whether it is decent or indecent from a short and brief survey of its pages. Accordingly he says that even if the other matters in the prohibition may disclose a common genus, there is an exception at all events in the case of books and thus, he says, the argument that *eiusdem generis* can be applied is self-rebutted. His contention, which he says is consistent with the understanding of this Act for many years, is that *eiusdem generis* should not be applied and that the prohibition therefore applies to any articles which are indecent or obscene. If that is the right view, of course, it justifies the forfeiture order made in the present case.

Alternatively, although I think a little less enthusiastically, counsel for the commissioners would contend that cinematograph film is a 'photograph' within the precise words of the prohibition—a photograph not the less because it consisted of a series of photographs, not the less because the photographs were in transparency form, not the less because the photographs were small and required some kind of mechanical enlargement in order that they might be enjoyed.

For my part I am prepared to accept that either of those arguments is sufficient for present purposes. I agree that the *eiusdem generis* rule cannot apply. It follows that any article which is indecent may be forfeited under this procedure, and had it been necessary, I would certainly have been prepared to hold that these films are photographs despite the limitations on their use to which I have already referred.

The fact that cinematograph films are subject to other controls, as indeed they are, seems to me to be beside the point. The present section is a very important means of

preventing indecent films from ever reaching the country at all, and the other statutory restrictions which prevent their use once they are in the country are, I think, merely complementary. Nor am I impressed by the fact that in a somewhat parallel provision in the Post Office Act 1953, Parliament has thought it desirable with the production of the cinematograph film for the first time to refer to it in terms in prohibitions of this kind under the post office legislation.

These points are of some persuasive power, but, in my judgment, they do not meet counsel for the commissioners' argument and I would dismiss this appeal.

**ASHWORTH J:** I agree. I would only add that I entirely agree with LORD WIDGERY that this is not a case in which *ejusdem generis* rule of construction can be applied. As counsel for the commissioners put it, the object of this particular paragraph in the table of prohibitions is manifestly to prevent the importation of indecent things. Whatever their shape or form, the object is to prevent indecency being distributed in this country. He illustrated that by suggesting that it would be absurd if, while this list of named articles was effective so far as it went, none the less an importer so minded could introduce without fear of trouble toys or statues which could quite obviously be indecent.

Moreover, it seems to me a complete answer to counsel for the appellant's contentions for one has only got to study the facts in regard to books to realise that this is not limited to indecent objects which can be recognised as being indecent on mere inspection, otherwise one can imagine the country being flooded with 'paperbacks' perfectly innocent on their outside but containing all manner of indecency within. This would mean, I think, putting a very limited and far too strict construction on the prohibition which was intended as already mentioned to prohibit the distribution of indecency within this country. I agree that the appeal should be dismissed.

**GRIFFITHS J:** I agree.

*Appeal dismissed.*

Solicitors: *Courts & Co; Solicitor, Customs and Excise.*

Reported by T R Fitzwalter Butler, Esq, Barrister

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QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

15th December 1971

PHELAN v BACK

*Criminal law—Evidence—Recall of witness by judge—Recall of prosecution witness after closing speech for defence—Desire of judge to refresh memory.*

The presiding judge of a court (now the Crown Court) hearing an appeal from a magistrates' court, sitting alone or with magistrates and without a jury, has a discretion to allow evidence to be called, after the normal point at which such evidence would be excluded, if the interests of justice require it and if in the exercise of his discretion he thinks fit so to do. The situation is different from that which arises on a trial by jury.

On an appeal against conviction at a magistrates' court the recorder of a borough quarter sessions, after the conclusion of the evidence and the speech of counsel for the defence, recalled a witness for the prosecution and put further questions to him in order to refresh his memory of the witness's testimony on a particular point. No shorthand note was available and the recorder himself had no adequate note of the witness's evidence on that point. The recorder invited counsel for the defence to put further questions to the witness and to address the court further, but both these invitations were declined. The recorder found the case proved and dismissed the appeal, but stated that, if the witness had not been recalled, he would not have found the case proved.

**HELD:** the recorder was entitled to refresh his memory in the manner in which he did, and it could not be said that he had wrongly exercised his discretion in doing so.

**CASE STATED** by the recorder of Plymouth.

On 7th January 1971 the recorder dismissed the appeal of the appellant, Stephen Paul Phelan, against his conviction by Plymouth justices of using threatening words and behaviour in a public place, contrary to the Public Order Act 1936, s 5.

*Robin Miller* for the appellant.

*John Beveridge* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated from the learned recorder of Plymouth in respect of his adjudication at Plymouth Quarter Sessions on 7th January 1971. The history of the matter was that a charge had been preferred by the respondent, PC Back, against the appellant alleging that he had used threatening words and behaviour on an occasion in August 1970. The matter came before the Plymouth justices in the first instance sitting as a magistrates' court. They convicted the appellant and sentenced him to be detained in a detention centre for three months. He appealed to quarter sessions. What has given rise to the appeal to this court is set out in the Case in this way. The recorder says:

I heard the appeal on the 7th day of January, 1971. The prosecution arose out of confused disturbances outside a youth club involving a large crowd. There was a conflict of evidence between police officer witnesses for the respondent and the appellant and his witnesses. At the conclusion of counsel's speech for the appellant I found myself unable from my note or my recollection to recall what the respondent's principal witness had said on certain material points of detail stressed by appellant's counsel. This witness had impressed me as a fair and reliable witness. I therefore recalled him and questioned him myself. I invited appellant's counsel to cross-examine and to address me further: both invitations were declined. Having thus ascertained what this witness's evidence was on the material details, I found the respondent to have discharged the burden of proof beyond reasonable doubt and I dismissed the appeal against conviction.



If the witness had not been recalled, I could not and would not have found the case proved.'

It is contended by counsel for the appellant that the learned recorder was wrong in recalling a prosecution witness in that way, and he says with force that, if that point is once established, it is clear from the Case that the recorder, without the assistance of that evidence, would have allowed the appeal. Accordingly he says that the appeal should be allowed in this court.

There are, of course, rules of procedure governing every court. Those rules derive from law or from convention, and there is no doubt that as a general principle such rules must be observed. That means that if the rules are not observed, or if any departure from them is to take place, that departure must be justified according to the circumstances of the particular case. We must not allow the rules to be our masters, they must remain our servants, and the authorities show a wide range of circumstances in which prosecution witnesses can be called or recalled after the close of the prosecution case. The normal rule must be that they will be called before the close of the prosecution case, but there are exceptions.

The case principally relied on by counsel for the appellant is *R v Sullivan* (1). That was a trial for murder, and on two occasions the trial judge allowed certain witnesses for the prosecution to be recalled. In the first instance they were recalled to rebut evidence given by the prisoner; later, in the course of his final speech, counsel for the accused invited the jury to find that another person altogether had committed the murder, whereupon the judge asked that the person so accused be called in order to deny his part in it even though the time at which he was to be recalled was after counsel for the defence had made his speech. We were referred to this case principally for what was said by AVORY J. He dealt with an argument which had taken place in the Court of Criminal Appeal whether these witnesses were being recalled to add something to what had been said before or whether they were merely being recalled to repeat what they had said before. With regard to the law AVORY J said:

[Counsel for the appellant] contended that the two police constables were recalled for the mere purpose of stating over again the evidence which they had already given as witnesses for the prosecution. If the court had come to the conclusion that that objection was well founded, and that these two police constables had merely been recalled for the purpose of restating that which they had already sworn to in their examination in chief, the court would have been bound to hold that the recalling of the two police constables for that purpose was an irregularity, and the court would then have had to consider whether any substantial miscarriage of justice had been occasioned thereby.'

Counsel for the appellant contends that that which the recorder did in this case on the authority of *R v Sullivan* (1) was an irregularity.

For my part I think there may be a very distinct difference in the application of these rules to a trial on indictment before a jury and a trial before magistrates or before a recorder. Quite clearly it is most undesirable, and indeed highly irregular, in a trial before a jury to recall a witness who has already given evidence merely for the purpose of giving the evidence again. One would wonder what the point of such an exercise would be, and in any event with a trial on indictment there is a shorthand note of the evidence and if some serious question arises as to what a witness said when in the box, the proper way to check it is to turn up the shorthand note. I have no doubt, with respect to AVORY J, that what he said in *R v Sullivan*

(1) 86 JP 167; [1923] 1 KB 47; [1922] All ER Rep 431.

in describing as an irregularity the recall of a witness merely to repeat what he said before is entirely correct.

In *Webb v Leadbetter* (1) this court was concerned with a magistrates' case in which, when the parties assembled to begin the proceedings, one of two prosecution witnesses had not appeared, and rather than have an adjournment the prosecution elected to go on, relying only on the one witness who had appeared. The matter went right through, both cases were closed, the justices retired to consider their opinion, and the missing witness then appeared with a genuine story of the breakdown of a car which had prevented his appearing before. The justices were invited to come back to court to hear him, not as part of the prosecution case, not even before the defence had been closed, but after the justices had retired. LORD PARKER CJ, giving the leading judgment, pointed out that such an exercise of discretion was one which was not open to any properly instructed Bench of magistrates. He said, dealing with the principle of the matter:

'It is, of course, quite clear, under our law that he who affirms must prove; therefore, strictly, once the prosecution have closed their case, there would be no opportunity for them to call further evidence, subject of course, to evidence in rebuttal, with which we are not concerned. Nevertheless, it does seem to me that there must always be some residuary discretion in the court to allow, in particular circumstances, evidence to be called, but the manner in which that discretion is exercised must depend on the stage of the case. If one turns to indictable offences, it is perfectly clear that it has become now an established rule of law that no evidence can be called after the summing-up, and a judge who in his discretion sought to exercise his discretion by allowing evidence to be called at that stage would be acting entirely wrongly and the conviction would be quashed. The same considerations do not wholly apply in magistrates' courts, but, nevertheless, as a general rule and in the absence of some special circumstances, it would certainly be wholly wrong for the justices to purport to exercise a discretion to allow evidence to be called once they had retired, and indeed, probably, after the defence had closed their case. At an earlier stage it may well be proper to exercise the discretion in favour of allowing a witness to be called, and indeed that was suggested in a decision of this court in *Saunders v. Johns* (2).'

I would adopt that reasoning, not merely in regard to magistrates' courts, but also in regard to quarter sessions, and I have no doubt that there is an element of discretion in the recorder or chairman of quarter sessions when sitting alone or with magistrates when hearing an appeal and when not sitting with a jury to allow evidence to be called, after the normal point at which such evidence would be excluded, if the interests of justice require it and if in the exercise of his discretion he thinks it is proper so to do. We have been referred to other cases in which on a trial by jury attempts have been made to introduce fresh evidence after the close of the prosecution case, but I do not propose to refer to those cases because I think they deal with a significantly different situation from that which prevails here.

The short point here, once it is established that the recorder had an element of discretion, is whether he exercised his discretion in a way which this court ought to reject and set aside. In my judgment, he was perfectly entitled to refresh his memory on those parts of the evidence of which he had no note. He could not refer to a shorthand note because none existed, and although it might perhaps have been wiser if he had asked counsel in the first instance to see whether they agreed as to the evidence

(1) 130 JP 277; [1966] 2 All ER 114.

(2) [1965] Crim LR 49.

in question, I find it quite impossible to say that he exercised his discretion wrongly in doing what he did in the circumstances.

I am not unimpressed by the fact that when the prosecution witnesses had been recalled and counsel for the appellant was given an opportunity to cross-examine and address the recorder further, that opportunity was not accepted. I feel that if in fact some significant difference in the evidence given at the end of the trial to that given by the witness when first called had appeared, it would have reflected itself in cross-examination and address from counsel for the appellant. In my judgment, the contention that there is here an error of law is not made out and I would dismiss the appeal.

**ASHWORTH J:** I agree.

**GRIFFITHS J:** I also agree.

*Appeal dismissed.*

Solicitors: Bower, Cotton & Bower, for Bond, Pearce & Co, Plymouth; Gregory, Rowcliffe & Co, for J A Pearde & Major, Plymouth.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, PHILLIMORE, LJ AND LAWSON, J)

14th January 1972

R v THORPE

*Road Traffic—Causing death by dangerous driving—Evidence—Previous drinking—Admissibility—Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit—Evidence of substantial excess rightly admitted on major charge—Road Traffic Act, 1960, s 1.*

On a charge of causing death by dangerous driving evidence of drinking prior to the accident which caused death is admissible if it goes far enough to show that the quantity of alcohol consumed might have adversely affected a person driving. If it is proved that the alcohol content in the blood of a driver exceeds 80 milligrammes per 100 millilitres, the point has been reached when the consumption of alcohol is such that it can affect the driver.

Where, therefore, the defendant had pleaded guilty to driving with a blood-alcohol concentration exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act, 1967, and the alleged proportion of alcohol in his blood substantially exceeded the prescribed limit,

**HELD:** the evidence of excess was admissible on a charge of causing death by dangerous driving, contrary to s 1 of the Road Traffic Act, 1960, as it went to show that the quantity of alcohol consumed might have adversely affected a person driving.

**APPEAL** by Neal Thorpe against his conviction at Newcastle Assizes of causing death by dangerous driving contrary to s 1 of the Road Traffic Act 1960. He having pleaded guilty to a further charge of driving with a blood-alcohol proportion above the prescribed limit contrary to s 1 (1) of the Road Safety Act 1967, he was sentenced to a fine of £75 on each charge and was disqualified for seven years.

W H R Crawford for the appellant.

R A Percy for the Crown.

**LORD WIDGERY CJ** delivered this judgment of the court: The appellant pleaded guilty at Newcastle Assizes to driving a motor vehicle with a blood-alcohol concentration above the limit prescribed by the Road Safety Act 1967, the amount of alcohol in his blood being 130 milligrammes per 100 millilitres of blood. He was also at the same time charged with causing death by dangerous driving. To that he pleaded not guilty and he was tried and convicted. The fact of his plea of guilty and the amount of the alcohol concentration in the blood was known to the jury which tried him on the charge of causing death by dangerous driving. It was known to them because they were in court when the plea was taken and it was quite openly discussed in the course of the trial and referred to in the summing-up. In this court the appellant appeals against his conviction of causing death. He does so on a certificate of the trial judge who certified that the matter was fit for appeal, there being an issue whether the facts of the appellant's plea of guilty to the blood-alcohol concentration count and the degree of blood-alcohol concentration therein alleged should have been disclosed to the jury.

I do not find it necessary to go into the facts of this case to any degree. It really suffices to say that on an afternoon in September at about 3.30 p.m. in a built-up area a four year old girl was knocked down and killed by a Ford Zephyr car driven by the appellant. There was evidence before the jury from which they could have inferred that the car was being driven at an excessive speed immediately prior to the accident. Such evidence consisted of the testimony of witnesses who had seen, I think, in one instance black smoke coming from the rear wheels of the car as it braked before the occurrence, and also evidence as to marks on the road indicative again of a speed of not less than 45 miles an hour. I say no more about the facts because we are here concerned simply with the question of law whether it was proper for the jury to be informed of the fact that the appellant's blood contained alcohol to a degree above the limit prescribed by the Road Safety Act 1967.

The same question arose in 1961 before laboratory specimens were a common factor in cases of this kind and before there was any standard laid down as to the quantity of alcohol in a person's blood which should or should not in itself amount to an offence. The question raised in *R v McBride* (1) was very similar to the one raised in the present case. It was again a case where a man had been charged with causing death by dangerous driving, and the question for the five judges who constituted the court on that occasion was whether it was admissible on such a charge to prove that the accused had been drinking shortly prior to the event. The principle enunciated by a strong court is given in the judgment of the court read by ASHWORTH J, where he said:

'In the opinion of this court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected.'

The principle which is enshrined in that paragraph is quite clearly this. It would be prejudicial and not probative for the prosecution to seek to show merely that the accused had been in a public house on the evening in question or had been seen with a glass of beer in his hand. If evidence of that kind were allowed to be admitted,

(1) 125 JP 544; [1961] 3 All ER 6; [1962] 2 QB 167.

it might prejudice the mind of the jury and it would have no probative value at all. What this court was saying in *R v McBride* was that such evidence is not admissible unless it goes far enough to show that the quantity of alcohol taken is such that it may have some effect on the way in which the person drives. In those days without the sophisticated devices of breathalysers and laboratory tests the way to express that principle was that used in the judgment of the court. Now we can bring that principle up to date, because we now have a well-known method of testing the quantity of alcohol in the person's blood and thus of testing indirectly the quantity which he has consumed, and in applying the principle of *R v McBride* we must take advantage of those modern developments.

The question really resolves itself into this: If a person driving is shown to have more than 80 milligrammes of alcohol per 100 millilitres of blood, does that show a sufficient consumption of alcohol to tend to show that the amount of drink taken was such as would adversely affect a driver? I take those last few words, as will be observed, from the judgment of ASHWORTH J. If it is proved that the alcohol content of the blood of a person driving exceeds 80 milligrammes per 100 millilitres, is that evidence which tends to show that the amount of drink taken was such as would adversely affect a person driving?

Counsel for the appellant, who has assisted the court greatly in his argument, says 'No' to that question. He argues that it is well known that the effect of a given quantity of alcohol may differ between one person and another. I observe that it is not laid down in *R v McBride* that it must be shown that the quantity of alcohol would necessarily affect any driver. What is required is to consider whether it is of such a volume as would affect drivers generally, or, as the trial judge puts it, affect 'a driver'.

I have no doubt myself that, if it is proved that the alcohol content in the blood of a person driving exceeds 80 milligrammes per 100 millilitres, the point has been reached when the consumption of alcohol is such that it can affect a person driving and I say that in full consciousness of counsel for the appellant's argument that, if one took a particular person driving, that quantity of alcohol might or might not have affected him. The point as we see it is that the proof of excess over 80 milligrammes is enough to bring the evidence within that which this court sanctioned in *R v McBride*.

A further point is taken as to the way in which the trial judge, having admitted the evidence, used it, but I find no substance in that, and I do not propose to encumber this judgment by dealing further with the facts of the case. In the judgment of the court the trial judge's ruling on this point was entirely correct, the evidence was properly admitted and the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals: A J Olson, Durham.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*



COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, PHILLIMORE, LJ AND LAWSON, J)

20th January 1972

R v HUCHISON

*Criminal Law—Sentence—Isolated act charged—Plea of guilty to that charge—Statement by prosecutrix—Allegation of other similar acts—Evidence of defendant and of prosecutrix heard by judge—Acceptance by judge of evidence of other similar acts—Sentence passed on that basis.*

A count in an indictment charged the defendant with a single act of incest with his daughter on a named date. He pleaded guilty and it was contended on his behalf that his guilt was limited to that one occasion. In a statement the daughter said that there had been regular intercourse between her and the defendant over a long period. The judge, being of opinion that he could not properly pass sentence until he had decided which account was correct, himself heard evidence from both the defendant and his daughter, decided that there had been regular intercourse, and on that basis sentenced the defendant to four years' imprisonment. On appeal,

**HELD:** the course followed by the judge was not a proper one in that it, in effect, deprived the defendant of his right to trial by jury in respect of the other alleged offences; if the judge felt that he could not do justice by accepting the defendant's admission of one incident only, he should either have allowed the prosecution to prefer a voluntary bill in respect of the other alleged offences as stated by the defendant's daughter, or have allowed the indictment to be amended, and then dealt with the whole matter at a later date; in the circumstances the sentence would be reduced to one of two years' imprisonment.

**APPEAL** by Edward Roy Huchison against a sentence of four years' imprisonment imposed on him at Lewes Assizes on his plea of guilty to a charge of incest.

*R E Hammerton* for the appellant.

**PHILLIMORE LJ** delivered this judgment of the court: The appellant pleaded guilty on 22nd July 1971 at Lewes Assizes to a single count charging him with incest with his daughter, a girl under 16 at the time. He was sentenced at an adjourned hearing on 26th July to four years' imprisonment.

The position was that he had admitted to one act, but the girl had made a statement in which she had referred to the appellant, her father, making sexual approaches to her from the age of six onwards, to an attempt at intercourse with her when she was about 13, and to another act thereafter in which he succeeded. According to her statement he had then taken her out regularly following intercourse, taking her to a night club and to various public houses and giving her presents. When his wife left the home, she had moved into his bed and they had had intercourse almost every night until about February 1970, when he brought another woman into the house, after which intercourse between herself and the appellant ceased and she left the house.

The trial judge felt—and one sympathises with him—that he must make up his mind as to what was the truth, whether the appellant had had intercourse only on the one occasion regarding which he was charged and which he admitted, or whether the truth of the matter was as described by the daughter. So on 26th July he proceeded to hear evidence. He heard the appellant give evidence-in-chief, he cross-examined and re-examined, then he heard the evidence of the daughter. At the conclusion of it all he said:

'My conclusion is that this story about that one occasion is not true. I am not saying I am prepared to take [the daughter's] statement as it stands, but it is perfectly obvious to me that the [appellant] had made a habit of having intercourse with his daughter.'

He proceeded to pass this sentence of four years, pointing out that this was a disgraceful case.

What is said by counsel for the appellant is that the course adopted by the trial judge was wrong. The appellant was in effect deprived of trial by a jury in regard to these additional offences suggested by the daughter. The judge did not address his mind, it appears, to the question whether there was corroboration of these other incidents, and indeed, if there was any corroboration, it was extremely slight. Altogether this is quite unsatisfactory. Of course there are cases where the prosecution puts forward a count as a sample count, and in those cases it is well understood that, if that course is taken and the defence are notified, a judge is entitled to deal with the whole matter on the basis that the offence in fact was repeated more than once or that there were other similar incidents. But that is not this case. This was put forward as a single offence, and counsel says that in those circumstances the trial judge ought, if he thought he could not do justice by adopting the appellant's admission of one incident and one incident only, either to have allowed the prosecution to prefer a voluntary bill charging the other instances as stated by the daughter or to have allowed the indictment to be amended, and then deal with the whole matter at a later date. The court thinks that this contention is right. The course followed by the trial judge was wrong and in effect it deprived the appellant of his right to trial by jury in respect of these other alleged offences.

So far as the actual sentence is concerned, counsel suggests that since the appellant has now been in prison for some six months, the proper course might be to put him on probation at this stage, and possibly to arrange that he should have medical treatment under s 4 of the Mental Health Act 1959. The court does not think that that is the right course. This was an act of intercourse by a father with his daughter under 16, indeed probably under 14, and the court thinks it was a grave offence and one which on any view must be treated severely. In all the circumstances the court is prepared to reduce this sentence from four years to two years, and to allow the appeal to that extent.

*Sentence reduced.*

*Solicitor: Registrar of Criminal Appeals.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, PHILLIMORE, LJ, AND LAWSON, J.)

13th, 21st January 1972

R v BANKS

*Road Traffic—Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit—Specimen of blood for laboratory test—Analyst's certificate of proportion of alcohol—Admissibility in evidence—Failure to serve copy on defendant—Waiver—No objection to evidence before close of case for prosecution—Road Traffic Act 1962, s. 2 (2).*

Section 2 (2) of the Road Traffic Act, 1962, as applied to the Road Safety Act, 1967, by s. 32 (1) of and Sch. 1, para 21, to the last-named Act, requires that on a charge of driving or attempting to drive with a blood-alcohol concentration exceeding the prescribed limit an analyst's certificate of the proportion of alcohol in a specimen of blood provided by the defendant for a laboratory test must be served on the defendant not less than seven days before the hearing or trial. The requirement of s. 2 (2) may, however, be waived by the defendant, and will in fact be waived if the defendant prior to the close of the case for the prosecution makes no objection to the evidence to which that certificate relates. If the defendant desires to complain at the hearing that he is ignorant of the contents of the certificate, or that he has had insufficient opportunity to challenge the contents, he is under an obligation to challenge the contents of the certificate before it is put in evidence.

APPEAL by Jack Banks against his conviction at Lancashire Quarter Sessions of being in charge of a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit at the time he provided the specimen, contrary to the Road Safety Act 1967, s. 1, he being then fined £25 and disqualified from driving for 12 months.

A R D Stuttard for the appellant.

M J Haigh for the Crown.

*Cur adv vult*

21st January. **LAWSON J** read the following judgment of the court: Jack Banks, the appellant, a man aged 38, appeals by leave of the single judge against his conviction at Lancashire County Quarter Sessions on 2nd July 1971 on his trial on indictment for the offence of being in charge of a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provided a specimen under s 3 of the Road Safety Act 1967, exceeded the prescribed limit (i.e. 80 milligrammes of alcohol in 100 millilitres of blood) at the time he provided the specimen. For this offence the appellant was fined £25, his licence was endorsed and he was disqualified for 12 months by the deputy chairman, his Honour Judge Lawton.

The grounds of the appellant's appeal are that the learned judge was wrong in rejecting the defence submission that there was no evidence of service of the analyst's certificate on the appellant as required by s 2 (2) of the Road Traffic Act 1962 and s 32 (1) of and Sch 1, para 21, to the Road Safety Act 1967.

Section 2 (2) of the Road Traffic Act 1962 provides:

'For the purposes of any such proceedings, a certificate purporting to be signed by an authorised analyst, and certifying the proportion of alcohol or any drug found in a specimen identified by the certificate and, in the case of a specimen not being a specimen of blood, the proportion of alcohol or of that drug in the

blood which corresponds to the proportion found in the specimen, shall be evidence of the matters so certified and of the qualification of the analyst: Provided that the foregoing provision shall not apply to a certificate tendered on behalf of the prosecution unless a copy has been served on the accused not less than seven days before the hearing or trial, nor if the accused, not less than three days before the hearing or trial, or within such further time as the court may in special circumstances allow, has served notice on the prosecutor requiring the attendance at the hearing or trial of the person by whom the certificate was signed.'

When enacted this subsection related to proceedings for offences under s 6 of the Road Traffic Act 1960, namely, driving or attempting to drive or being in charge of a motor vehicle on a road or other public place when unfit to drive through drink or drugs. When the new offences of driving, attempting to drive, or being in charge of a motor vehicle having consumed in excess of the prescribed limit were enacted by s 1 of the Road Safety Act 1967, s 2 (2) of the 1962 Act was applied to them by s 32 (1) of and Sch 1, para 21, to the 1967 Act. Section 32 (1) provides:

'The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments therein specified, being minor amendments and amendments consequential on the foregoing provisions of this Act.'

Schedule 1, para 21, provides:

'A copy of a certificate required by the proviso to section 2 (2) to be served on the accused or of a notice required by that proviso to be served on the prosecutor may either be personally served on the accused or the prosecutor (as the case may be) or sent to him by registered post or the recorded delivery service.'

It is necessary briefly to set out the history of this case. The appellant was committed for trial on written statements with exhibits which were tendered to the magistrates' court under s 1 of the Criminal Justice Act 1967. These included the statement of Pc Robinson referring to and exhibiting a copy of the analyst's certificate which showed that the analysis of the sample of blood provided by the appellant under s 3 of the 1967 Act contained 229 milligrammes of alcohol in 100 millilitres of blood—thus 149 milligrammes in excess of the prescribed limit.

The written statements and exhibits on which the appellant was committed for trial were supplied to him or his advisers prior to his trial in accordance with r 3 of the Magistrates' Courts Rules 1968 which provides as follows:

'This rule applies to committal proceedings where the accused is represented by counsel or a solicitor and where the court has been informed that all the evidence for the prosecution is in the form of written statements copies of which have been given to the accused.'

On his arraignment the appellant pleaded not guilty to the charge on which he was indicted. The evidence led for the Crown at the trial included that of Pc Robinson who put the analyst's certificate in evidence. No objection was taken at that point, or until after the close of the Crown's evidence, that the requirements of the proviso to s 2 (2) of the 1962 Act as to prior service of a copy of the certificate had not been complied with. At the close of the Crown's case it was submitted on behalf of the appellant that there was no case for him to answer since the requisite service of a copy of the analyst's certificate had not been proved.

After hearing argument, in the course of which no authority was cited, the deputy chairman ruled that the fact that the analyst's certificate was annexed as an exhibit to the statements tendered under s 1 of the Criminal Justice Act 1967 constituted

service for the purposes of the proviso in question. Before so holding the deputy chairman referred to the fact that the certificate had in fact been put in without objection.

The defence submission having been overruled, the defence did not seek to challenge the findings set out in the analyst's certificate, but proceeded in an endeavour to defeat the prosecution on two grounds (i) that it had not been proved to the requisite degree that the appellant was in charge of the motor vehicle on the occasion in question, and (ii) that there was no likelihood of the appellant driving the vehicle on that occasion because it was undriveable owing to a mechanical fault. The deputy chairman summed-up the case to the jury dealing with these points and no objection is taken to his summing-up. The jury convicted the appellant.

It is clear that the Crown did not lead any evidence at the trial to show that the requirements of the proviso to s 2 (2) of the 1962 Act, as applied to the appellant's offence under s 1 (2) of the Road Safety Act 1967 by s 32 (1) of and Sch 1, para 21, to that Act, relating to prior service of a copy of the analyst's certificate had been complied with. It is equally clear that counsel for the appellant at no time before the close of the Crown's case had indicated or made any objection to the production of that certificate in evidence. The question which the court had to decide is whether, in these circumstances, the deputy chairman's ruling was correct.

The Crown sought to support this ruling by reference to the case of *R v Mitten* (1) where the defendant, who had been charged with driving under the influence of drink under s 6 of the Road Traffic Act 1960, contended on appeal that an analyst's certificate as to the alcohol content of his urine had been wrongly admitted by the trial judge on the ground that no offer had been made to him that he should be supplied with a part of the specimen taken of his urine until after he had provided that specimen. The relevant provision of the Road Traffic Act 1962 in this respect (namely, s 2 (5)) requires, as the Court of Criminal Appeal held, that the offer to supply a part of the specimen must be made at or very shortly before the request for the specimen is made. The Court of Criminal Appeal held that failure in the respect mentioned did not make the evidence of the analyst inadmissible as a matter of law, but required the trial judge to exclude that evidence in the exercise of his discretion unless he were satisfied that no prejudice was likely to result to the defendant by such failure. In the course of the court's judgment it was said that the practice with regard to disputes under s 2 (5) of the 1962 Act should be modelled on that which applies when the voluntary character of a confession is challenged. Counsel for the defence should inform counsel for the prosecution of his objection so that the disputed evidence is not mentioned in the opening and the judge will hear evidence on disputed facts and give his ruling in the absence of the jury, taking into account the discretion to which the court referred.

In our judgment the decision in *Mitten's* case that the trial judge has a discretion to admit an analyst's certificate, or his evidence, notwithstanding a failure to comply with the requirements of s 2 (5) as to the offer of a sample of the specimen requested, cannot be applied to a failure to comply with the requirements of s 1 (2) as to prior service of a copy of the analyst's certificate. That subsection is designed to allow evidence to be admitted which would otherwise, on the grounds of hearsay, be excluded, provided that the conditions of the proviso are satisfied. If those conditions are not adhered to, then *prima facie*, the analyst's certificate, as distinct from his oral evidence, is not evidence of the truth of its contents.

Furthermore, this court takes the view that there is no room in a case such as the present to apply the principle of presumed regularity. There are, of course, many cases where this presumption has been successfully relied on in cases under the road

(1) 129 JP 371; [1965] 2 All ER 59; [1966] 1 QB 10.



traffic legislation where the defendant has sought to raise, in the course of his defence, a question as to the validity of a breath test administered to him under s 3 of the Road Safety Act 1967 (see *Sayer v Johnson* (1), *Gill v Forster* (2), and *Cooper v Rowlands* (3)). But this line of cases is distinguishable from the present one, as the court is here concerned with a statutory condition for the admission of hearsay evidence.

In the course of the argument on the appellant's submission the deputy chairman referred to cases in which the prosecution had failed to prove service of notice of intended prosecution. But this, in our view, is unhelpful having regard to s 241 (3) of the Road Traffic Act 1960 which provides that such notice is to be presumed unless the contrary is proved by the defence.

In the course of the argument in the present appeal, the court drew counsel's attention to *Grimble & Co v Preston* (4), a decision of the Divisional Court on a Case Stated where magistrates had convicted the appellants of an offence under the Sale of Food and Drugs Act 1899 (now replaced by the 1955 Act). The relevant ground of appeal was that the summons served on them was not accompanied by a copy of the analyst's certificate obtained on behalf of the prosecution. This requirement was imposed by s 19 (2) of the 1899 Act and is reproduced in s 108 (3) of the 1955 Act— which Act, unlike that of 1899, also contains a provision in s 110 to the effect that the production in proceedings of an analyst's certificate in the prescribed form (that is the form prescribed by s 92 (5) of the 1955 Act) shall be sufficient evidence of its contents unless the other party to the proceedings requires the analyst to be called. In that case no objection was taken by the defendants that the summons served had not been accompanied by the analyst's certificate, until after the close of the prosecution's case. The analyst had in fact given oral evidence as to his findings, as the law then required. The magistrates overruled the objection and proceeded to convict on the evidence offered, including that of the analyst. The Divisional Court dismissed the appeal. In the course of their judgments the judges of the court dealt with the service point. DARLING J said:

'As to the second point I do not think that the objection that a copy of the analyst's certificate was not served with the summons goes to the jurisdiction of the justices. The service of the certificate is a matter of procedure, and if the objection that it had not been served was insisted upon, the court could not cure the defect, but the defect is one which the party entitled to have the certificate served upon him could waive either by words or conduct. In this case it is plain that the solicitor for the appellants waived the objection by his conduct.'

ROWLATT J said:

'As to the second point, I think that the provision that a copy of the analyst's certificate must be served with the summons cannot be got over if the person entitled to have the certificate served upon him takes the objection in the proper way. The defect cannot be cured by amendment or adjournment because however often the case may be adjourned the certificate can no longer be served with the summons. All that could be done would be to withdraw the summons and if possible commence fresh proceedings. The provision merely prescribes a formality which is to accompany the service of the summons instituting the proceedings. If the defendant chooses to appear and by words or conduct declares that though he has not had the certificate served on him with the summons he prefers to go on with his defence, I think that he may do so and the

(1) [1970] RTR 286.

(2) [1970] RTR 372.

(3) [1971] RTR 293.

(4) 78 JP 72; [1914] 1 KB 270.

jurisdiction of the justices is not affected by the omission of the formality, which is prescribed for the protection of the defendant and which he has power to waive. The question remains whether what the appellants did amounted to a waiver. They appeared by an advocate, who did not take the objection at the commencement of the hearing but cross-examined the witnesses for the prosecution and did not take the objection until he was called upon to open his own case. In the case of *Batt v Mattinson* (1), it was pointed out, and I agree, though I should be bound by it even if I did not agree, that the provision of the statute is imperative. In that case the objection was taken when the defendant appeared before the court and before the case was gone into, and no question of waiver such as we are considering arose, and the decision merely was that if the defendant takes the objection it cannot be got over. That case did not lay down a rule that the objection could not be waived.'

ATKIN J said:

'On the second point I also agree. The objection that the analyst's certificate was not served with the summons did not go to the jurisdiction of the justices. It was founded upon an informality which could not be cured by amendment (see *Batt v Mattinson* (1)), and which was a breach of a condition precedent to the appellants being brought before the justices who had cognizance of the offence. In those circumstances a person, who knows of the existence of the defect and does not take the objection at the commencement of the hearing but prefers to cross-examine the witnesses for the prosecution and defers the objection until the case for the prosecution has been completed can waive the objection just as any other condition precedent can be waived. It has been suggested to us that even after a formal refusal to take the objection and after evidence has been called for the defence and the magistrates have decided to convict, the objection can still be taken. But I do not agree with that contention.'

*Grimble's* case (2) thus supports the view that a requirement that an analyst's certificate on which the prosecution proposes to rely should be served on the defendant not less than seven days before the hearing or trial may be the subject of waiver and will in fact be waived if the defendant prior to the close of the prosecution's case makes no objection to the evidence to which that certificate relates. We think it important to observe that the object of the proviso to s 2 (2) of the 1962 Act is twofold, first, to let the defendant know precisely what is alleged as to the alcohol content of his specimen, and, secondly, to provide a sufficient opportunity to enable him, by requiring the analyst to be called, to challenge the relevant allegation. It is clear that if the defendant's complaint at the hearing is that he is ignorant of that aspect of the prosecution's case, or that he has had an insufficient opportunity to challenge the contents of the certificate, he is under an obligation to object to the admission of the contents of the certificate before it is put in evidence. If he does not do so, there is no indication that he has been prejudiced by the prosecutor's failure to satisfy the requirements of the proviso to s 2 (2); and the absence of such prejudice is revealed in the present case.

It should be borne in mind that it was not disputed that the alcohol content of the appellant's specimen was some 200 per cent in excess of the prescribed level, and counsel for the applicant frankly concedes that his point is devoid of factual merits. It would seem ludicrous in such a case that an accused should be permitted to wait until after the analyst's certificate had been put in evidence and the case for the

(1) (1900), 64 JP 615.

(2) 78 JP 72; [1914] 1 KB 270.

prosecution closed and then allowed to take a wholly unmeritorious point, hitherto kept up his sleeve, in order to secure an acquittal. Thus, equally frankly, this court is glad to have reached the decision that, for the reasons given, the appellant's appeal should be dismissed. The saving of time, expense and confusion which will result in future cases in no way endangers the rights of an accused charged with an offence under s 6 of the 1960 Act, or one under the Road Safety Act 1967, who wishes to challenge the contents of the analyst's certificate, or prejudices the fair trial of such offences where, for practical reasons, including the volume of these offences and the limited number of qualified analysts, the prosecution desires to rely on the contents of analysts' certificates, which are in fact rarely challenged. In the exceptional case of such a challenge, the accused person remains, in our view, amply protected by the law.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; Whiteside & Lord, Rawtenstall.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY CJ, MELFORD STEVENSON AND CANTLEY, JJ)

2nd February 1972

R. v CRIMINAL INJURIES COMPENSATION BOARD. Ex parte STATEN

*Criminal Injuries Compensation—Claim for compensation—No right to compensation if offender and victim 'living together . . . as members of same family'—meaning of 'living together'—Natural meaning and not meaning conforming with matrimonial law—Husband and wife living in same house—No sexual relationship—No cleaning or cooking by wife for husband—Compensation for Victims of Crimes of Violence Scheme 1964 (1969 revision), para 5 (a), para 7.*

By para 7 of the Compensation for Victims of Crimes of Violence Scheme, 1964 (1969 revision): 'Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable . . .'

The phrase 'living together . . . as members of the same family' should be given its ordinary, natural meaning and should not be given a meaning to make it conform with matrimonial law. Very often the question whether the parties were living together as members of the same family will be a pure question of fact.

The applicant, her husband, and their children lived in two council flats which had been knocked into one. Relations between the applicant and her husband had not been good for a long time. Proceedings for persistent cruelty had been taken by the wife, and the husband had been sent to prison. After his release he returned to the matrimonial home. The wife was reluctant to see him, and, being terrified for her own safety, slept in a bedroom with one of the daughters, while the husband slept on a sofa in the adjoining living room. There were no sexual relations between the husband and wife, and the wife did not clean or cook for him. After he had been in the house for some days the husband attacked and injured the wife, who claimed compensation under the Criminal Injuries Compensation Scheme. The Criminal Injuries Compensation Board refused her claim on the ground that para 7 of the scheme precluded her from being entitled to compensation. On application by the wife for certiorari to quash the decision of the board,

**HELD:** the question whether the husband and wife were 'living together... as members of the same family' was in the present case one of fact, and, there being no justification for the allegation that the board had erred in law, the application for certiorari must be refused.

**MOTIONS** by Mrs Rita Marjorie Staten for an order of certiorari to bring up and quash a decision of the Criminal Injuries Compensation Board whereby they refused her claim for compensation in respect of injuries inflicted on her by her husband. She also applied for an order of mandamus directing the board to award her compensation for her injuries.

*Lionel Scott* for the applicant.

*Gordon Slynn* for the respondent board.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of the applicant, Mrs Rita Marjorie Staten, for an order of certiorari to remove into this court and quash a decision of the Criminal Injuries Compensation Board made on 9th March 1971, whereby compensation to the applicant in respect of injuries received by her on 23rd May 1970 was refused under para 7 of the Criminal Injuries Compensation Scheme, in that it was said that the applicant and her husband who inflicted the injuries were living together at the time as members of the same family.

The findings of the respondent board in this case, so far as the facts of this matter are concerned, were these. The applicant was the wife of the person who inflicted the relevant injuries on her. They had a number of children. Their domestic base, as it were, consisted of two council flats which had been knocked into one. They thus had two bedrooms, two kitchens, two bathrooms and a living room. Relations between the applicant and her husband had not been good for a long time. Proceedings for persistent cruelty were taken, and after a time the applicant's husband went to prison. He came back from prison on 12th May 1970 and, as the respondent board find, returned to live in the matrimonial home. He stayed there for 11 days which took him up to the occasion when this injury was inflicted on his wife, giving rise to the present proceedings.

The applicant was reluctant to see her husband come home on 12th May 1970. She said she was terrified for her own safety, and the evidence before the respondent board was to the effect that following 12th May the applicant slept in a bedroom with one of her two daughters whilst her husband slept on a sofa in the adjoining living room. There were no sexual relations between the husband and the applicant and she did not clean or cook for him. The respondent board saw no sufficient reason to disbelieve that evidence and accepted it.

So we have here a situation where as a matter of fact the husband and wife and the children were living in one home, but with the degree of discord between the husband and wife which is reflected in the paragraph which I have just read. They slept in different rooms and the wife did not cook or clean for the husband. But that in many other respects this was a family living as a family is apparent from the next paragraph in the respondent board's decision, because the respondent board deal in some detail with the incident giving rise to the injury suffered by the applicant on 23rd May 1970. They find that the husband had gone out and had been drinking heavily; he came back, there was an argument in the matrimonial home relative to one of the children, the argument continued in the living room for some time until the wife eventually withdrew herself to her bedroom; and the husband followed her to the bedroom and attacked her, giving rise to the present claim.

That is the factual background on which the case is to be determined, and the short issue which we have to decide is whether in those circumstances the applicant, who undoubtedly suffered injuries in consequence of a criminal attack on her by

her husband, is deprived of any claim for compensation under the terms of para 7 of the scheme which reads as follows:

'Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable...'

The question therefore ultimately for the respondent board to determine is whether the applicant was deprived of her right to compensation because it was the husband who inflicted the damage and they were living together at the time as members of the same family.

Counsel for the applicant has approached this case by first of all examining the phrase 'living together'. He says that here one should ignore the children and other factors of that kind and examine the relationship between husband and wife. He says that if one examines that relationship it is such that in the divorce law it might well be held, or I think he would say it would be held, that they were living apart or that one has deserted the other. He says that if the conclusion by applying the principles of divorce law is that they are not living together in that sense, then one need look no further and questions of the 'same family' do not in those circumstances arise. He invites us really to treat this case as though there were no children involved, as though the husband and the wife were the only persons living in the flat, and to approach it on the lines which the divorce law approaches what is, to my mind, a wholly different question, namely, whether one party in a marriage has deserted another.

Counsel on behalf of the respondent board maintains the correctness of the board's decision refusing compensation, and says that here when one looks at the decision as a whole—and I have read most of it—it is abundantly clear that there was one family occupying this accommodation. He says that at the very least it is clear that there was evidence which the respondent board could adopt to reach that conclusion, but I think he would choose to go even further and to say that the conclusion that there was one family here, living together, is really inescapable. The applicant cannot succeed unless she shows an error of law on the face of the order or that there was no evidence to support it, and counsel for the applicant has in my judgment found it quite impossible to define the law on this subject in such a way as to show that what is involved here is an error of law. In my judgment, this is a new code intended to be set out in simple language and a phrase such as 'living together as members of the same family' ought to be given its ordinary straightforward normal meaning. I deprecate the complication which would result if the whole of the mass of learning in the divorce laws were introduced into this phrase so as to make it conform with the matrimonial law itself. I think the court should look at these words and give them their ordinary sensible meaning, and very often the question whether the parties are living together as members of the same family will be a pure question of fact. Indeed I think this is a pure question of fact in this case. I am quite satisfied there is no possible justification for saying that the respondent board erred in law. Indeed, so far as it is of any value to add it, I think they were entirely right and I would accordingly refuse the application.

**MELFORD STEVENSON J:** I agree.

**CANTLEY J:** I agree.

*Motions dismissed.*

Solicitors: *Sidney Torrance & Co, for J Levi & Co, Leeds; Treasury Solicitor.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*



QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND FORBES, JJ)

7th February 1972

HIGGINS v BERNARD

*Road Traffic—Motorway—Prohibition against stopping on verge—Stopping permitted 'by reason of any accident, illness or other emergency'—'Emergency'—Need for element of suddenness—Danger alleged to constitute emergency not apparent before driver got on motorway—Drowsiness—Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9.*

By reg. 9 of the Motorways Traffic Regulations, 1959: 'No vehicle shall be driven or moved or stop or remain at rest on any verge except in accordance with paras. (2) and (3) of reg. 7'. By reg. 7 (2): 'Where it is necessary for a vehicle which is being driven on a carriageway to be stopped while it is on a motorway . . . (b) by reason of any accident, illness or other emergency . . . the vehicle shall, as soon and in so far as is reasonably practicable, be driven or moved off the carriageway on to, and may stop and remain at rest on, the verge which lies on the left-hand side or near side of that vehicle . . .'

An element of suddenness is not essential for the existence of an emergency within the meaning of reg. 7 (2), but it must be shown that the danger alleged to constitute an emergency was not apparent to the driver before he got on the motorway and that something (not necessarily some exigency at the moment) supervened which rendered it unsafe for him to proceed to the next turn-off point.

The defendant was found by a police officer sitting in a stationary motor car on the hard shoulder of the slip road of a motorway about a quarter of a mile from the junction of the entrance to the slip road and the trunk road on which he had previously been travelling. His explanation was that he was tired, and that, before he got on the motorway a feeling of drowsiness had come over him, but he had not been able to find a place where he could stop and rest on the trunk road. After entering the slip road he decided that he was not fit to drive the ten miles to the next turn-off from the motorway, and, accordingly, pulled on to the hard shoulder of the slip road for a rest. Justices dismissed an information charging an offence against reg. 9, on the ground that the defendant had stopped by reason of an emergency within reg. 7 (2). On appeal by the prosecutor,

HELD: as the drowsiness and the potential danger of continuing to drive had been clearly apparent to the defendant before he got to the motorway, the justices were wrong in holding that he had stopped on the verge by reason of an emergency, so the case must be remitted to them with a direction to convict.

CASE STATED by Calder, West Riding, justices.

On 20th May 1971 an information was preferred by the appellant, John Paton Higgins, against the respondent, Arthur Bernard, charging that he on 27th April 1971 at Windy Hill in the West Riding of the county of York did cause a certain motor vehicle to stop on the verge of the M62 motorway otherwise than in accordance with paras (2) and (3) of reg 7 of the Motorways Traffic Regulations 1959, contrary to reg 9 of the regulations and s 13 (4) of the Road Traffic (Regulation) Act 1967.

On 11th August 1971, the justices heard and adjudicated on the information. The respondent gave evidence on oath and stated that for the two days prior to 27th April 1971 he had covered a lot of mileage and had driven 110 miles the previous day. He said that he had been to visit his mother and went to bed at 12.30 a m or 12.40 a m on 27th April and arose at 6.30 a m. He said that he had travelled this section of the motorway on the outward journey and was returning from Cheshire. He said that for the last mile of the journey he was beginning to feel extremely drowsy and was concerned for his safety and was looking for a place to stop. He said that the A672 was covered for the

most part by single white lines and he could not find room to park. He stated that he was unaware that he was so close to the motorway and, having reached the motorway, he decided that it was foolish to stop on the approach road because of traffic and decided to stop on the slip road near the motorway. He stated that he was drowsy, that it was dangerous to continue driving and that he could have fallen asleep at the wheel. He stated that he believed that the only possible intersection was ten miles further on at the end of the motorway. Having stopped, he wound his window down, opened his door and got as much air as he could without getting out of the car. He then wound his window halfway up and closed his eyes, having in mind to stop for five or ten minutes when the police constable arrived.

The justices were of opinion that, as the respondent was beginning to feel drowsy and was concerned for his safety, there was a likelihood that he would fall asleep at the wheel and he was correct to attempt to avert this danger by stopping on the verge of the motorway, and that, therefore, the circumstances constituted an emergency within the meaning of reg. 7 (1) (b) of the 1959 regulations. The prosecutor appealed.

*R A R Stroyan* for the appellant.

*N E Beddard* for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the West Riding of Yorkshire in respect of their adjudication as a magistrates' court sitting at Halifax on 11th August 1971. On that date they dismissed an information laid by the appellant against the respondent alleging that the respondent on 27th April 1971 at a specified place did cause a certain motor vehicle, namely, a motor car, to stop on the verge of a motorway, namely, the M62 motorway, otherwise than in accordance with paras (2) and (3) of reg 7 of the Motorways Traffic Regulations 1951.

The facts of the case were briefly these. On the day in question at about 5.45 p m, a police officer on duty in a police patrol car saw the respondent sitting in a Ford Escort motor car which was stationary on what is described in the Case as the verge of the slip road of the M62 motorway about 50 yards from the main motorway carriage-way and about a quarter of a mile from the junction of the entrance to the slip road and the A672 Oldham Road. That, we are told, can be expressed in another way by saying that he had entered the slip road leading from the A672 road on to the motorway, he had proceeded about a quarter of a mile down the slip road, and when still 50 yards short of the main motorway he had pulled off on to what is commonly called the hard shoulder or the verge and stopped his car there.

When the police officer approached, the respondent was awake, sitting in the driving seat. He was asked why he had stopped. He replied: 'For a rest'. The officer pointed out that if he wanted to stop for a rest, he could have stopped a quarter of a mile earlier without impinging on the motorway or its regulations at all, to which the respondent replied: 'I didn't feel too bad then'. The officer pointed out that stopping on the motorway was only permitted in an emergency, and the respondent said: 'I appreciate it's not an emergency, but I felt I had to have a rest'.

When he gave his own account of the circumstances in evidence he said that he had driven on the previous day, he had been on a visit to his mother, and went to bed at about 12.30 a m, but got up again at 6.30 a m the same day. We do not know much about his movements after his rising that morning, but in regard to the last part of his journey he said in evidence that for the last mile of the journey he was beginning to feel extremely drowsy and was concerned for his safety and was looking for a place to stop. It is clear to my mind that that shows the consciousness that he was drowsy and the consciousness that it was necessary for him to stop was something which came to him before he left the ordinary A class road and turned on to the motorway slip road. He said there were difficulties about parking on the

A672, and having got into the slip road he realised he was drowsy and that he was not fit to drive for the ten miles which lay between him and the next turn-off from the motorway. Accordingly, he pulled aside and had a rest with the door of the car open.

The justices clearly treated him as a witness of truth. They accepted his account, and they decided as a matter of law that what he had done was within the exempting words of the motorway regulations as being in an emergency. The question for us is whether that was a correct view in law of the terms of those regulations.

Regulation 9 of the Motorways Traffic Regulations 1959 provides:

'No vehicle shall be driven or moved or stop or remain at rest on any verge except in accordance with paragraphs (2) and (3) of reg 7.'

Regulation 7 (2), reads thus:

'Where it is necessary for a vehicle which is being driven on a carriageway to be stopped while it is on a motorway . . . (b) by reason of any accident, illness or other emergency; or (c) to permit any person carried in or on the vehicle to recover or move any object which has fallen on a motorway; or (d) to permit any person carried in or on the vehicle to give help which is required by any other person in any of the circumstances specified in the foregoing provisions of this paragraph, the vehicle shall, as soon and in so far as is reasonably practicable, be driven or moved off the carriageway on to, and may stop and remain at rest on, the verge which lies on the left-hand or near side of that vehicle . . .'

So that the exemption permitting the respondent to do what he did if there had been an emergency requires as its essentials that the vehicle shall have been driven on a carriageway of a motorway and that it shall thereafter become necessary for the vehicle to stop by reason of an emergency.

The justices, and I have every sympathy with them, thought that those requirements had been satisfied here. There is no previous authority, we are told, on the meaning of the word 'emergency' in this context. One comes to the dictionary and the first meaning given in the Shorter Oxford Dictionary is: 'The sudden or unexpected occurrence of a state of things'. The alternative is 'a sudden occurrence'.

Too much stress, however, in my judgment, must not be attached to the word 'sudden' because in a somewhat different context, although a context which I find valuable, the meaning of an emergency has been considered by the House of Lords. The case is *The Larchbank*, and I take this extract from the speech of LORD ATKIN.

'"Emergency" can be used to describe a state of things which is not the result of a sudden occurrence. A condition of things causing a reasonable apprehension of the near approach of danger would, I think, constitute an emergency. The gradual approach of a hostile invader might well at some time or other constitute an emergency. So might the position arising from the presence of a large hostile force encamped near the frontier and only awaiting favourable conditions for an advance.'

I am indebted to LORD ATKIN for that guidance, and perhaps for preventing me from falling into the error of thinking that an element of suddenness is essential for the existence of an emergency in the present legislation. I think that it is not, but, in my judgment, in this context an essential which has to be shown is that the driver in question was on the carriageway of the motorway and got himself on to the carriageway in circumstances in which the danger alleged to constitute an emergency was not apparent to him at all. In other words, that he got on to the carriageway at a time when, as far as he could see, it was safe and lawful for him to proceed along

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the motorway, at all events to the next turn-off point which might appear. It having been shown that he got himself on the carriageway in that state of affairs, the next thing to show is that something supervened, not necessarily some sudden exigency at the moment, but something which rendered it unsafe for him to proceed to the next turn-off point. Given those facts, it seems to me that a man should be able to plead emergency as a ground for stopping on the verge.

The only remaining question is whether the respondent qualified on the test so described, and, in my judgment, he clearly did not, because, if one thing is clear in this case, it is that the drowsiness and the potential danger if he continued to drive was clearly apparent to him before he embarked on the motorway. Accordingly, it cannot be said that he got on the carriageway of the motorway in circumstances in which the danger was not apparent and that the danger thereafter supervened. The danger was clear to him before he elected to go on the motorway, and he cannot plead its recognition as an emergency for present purposes. I would allow the appeal and send the case back with a direction to convict.

**MELFORD STEVENSON J:** I agree.

**FORBES J:** I agree.

*Case remitted.*

Solicitors: Hewitt, Woollacott & Chown; J B Izod.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### HOUSE OF LORDS

(LORD PEARSON, LORD HODSON, LORD GARDINER, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA)

29th, 30th November, 2nd, 3rd, 6th, 7th December 1971, 23rd February 1972

#### RUGBY JOINT WATER BOARD v SHAW-FOX AND OTHERS.

*Agriculture—Compulsory purchase of holding—Compensation for landlord—Assessment—Land required for use by person other than landlord—Agricultural Holdings Act, 1948, s 24 (2) (b).*

By s 23 (1) of the Agricultural Holdings Act, 1948, twelve months' notice must be given to quit an agricultural holding. By s 24 (2) (b) of the Act no statutory consent to a notice to quit (as required by s 24 (1)) is necessary where the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning.

A water board obtained planning permission to construct a reservoir on two farms both of which were let to tenants. In relation to both farms, s 23 (1) of the Act of 1948 applied; the lease of the second farm contained a clause giving the landlords power to resume possession on six weeks' notice.

**HELD:** (i) the application of s 24 (2) (b) was not limited to a case where the land was required for use by the landlord, but extended to where it was required for use by some person other than the landlord; (ii) in the present case the landlords' interests to be valued were the reversions as they existed on the dates of the notices to treat, when they were reversions to unprotected tenancies.

*Pointe Gourde Quarrying and Transport Co. Ltd v Sub-Intendent of Crown Lands, [1947] AC 565, distinguished.*

APPEALS by the Rugby Joint Water Board against decisions of the Court of Appeal, reported 135 JP 127, dismissing appeals by the appellants from decisions of the Lands Tribunal and allowing a cross-appeal by the respondents to the first and second appeals, Edward Hall Foottit and Zoe Ruth Foottit.

*George Newson QC and Guy Seward* for the appellant water board.

*W J Glover QC and J A R Grove* for the respondents.

Their Lordships took time for consideration.

23rd February. The following opinions were delivered.

**LORD PEARSON:** The appellants acquired certain lands under statutory powers for the purpose of making a reservoir. These lands included parts of farms of which the respondents were landlords, having fee simple reversions subject to agricultural tenancies from year to year. The present appeals are concerned with preliminary questions of law affecting the assessment of the compensation payable by the appellants to the respondents. It will be convenient to deal first with the Shaw-Fox appeal, which raises only the two main questions which are common to both appeals. The Foottit case raises, in addition to those two main questions, a further question which is of less importance.

In the Shaw-Fox case the tenancy was, according to the tenancy agreement, terminable by a 12 months' notice to quit expiring on 25th March in any year. But prima facie the tenancy, being a tenancy of an agricultural holding, would be protected under s 24 (1) of the Agricultural Holdings Act 1948 whereby the notice to quit, if the tenant served a counter-notice, would not have effect unless the Agricultural Land Tribunal consented to its operation. The tenancy would, however, not enjoy this protection—the notice to quit could have effect without the consent of the tribunal—if the respondents as landlords could give their notice to quit on the ground referred to in s 24 (2) (b) of the Act. The first main question is whether the respondents were entitled to act under s 24 (2) (b) at the material time in the circumstances of this case. The respondents did not in fact serve any notice to quit. The question is whether they had a right to serve one under s 24 (2) (b). The practical point affecting the compensation is that a reversion to an unprotected tenancy is in this case worth considerably more than a reversion to a protected tenancy. Section 24 (2) (b), so far as it is material, for the present purpose, provides:

'The foregoing subsection shall not apply where . . . the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning . . . and that fact is stated in the notice.'

The relevant facts can be shortly stated on the basis of the Lands Tribunal's findings. In response to an application by the appellants, the Minister of Housing and Local Government, on 6th April 1966, gave to the appellants planning permission to construct a water supply reservoir on lands which included the greater part of the Shaw-Fox farm. On 22nd August 1966 the Minister made the Rugby and South Warwickshire Water Order 1966 which, inter alia, authorised the compulsory acquisition by the appellants of the lands forming the site of the proposed reservoir. This order came into force on 7th March 1967. On 14th March 1967 the appellants served on the respondents a notice to treat in respect of such of the lands to be acquired as formed parts of the Shaw-Fox farm.

Those facts show that before and at and after the time of service of the notice to treat the relevant land was, according to the natural and ordinary meaning of the words

'required for a use, other than for agriculture, for which permission [had] been granted on an application made under the enactments relating to town and country planning';

and, if the respondents had given a 12 months' notice to quit on that ground stating that fact, the notice would, notwithstanding any counter-notice given by the tenant, have had effect without the consent of the Agricultural Land Tribunal to its operation. It follows that the tenancy was not a protected tenancy, and the answer to the first main question is in favour of the respondents.

The argument for the appellants on this question was that the words 'required for a use, other than for agriculture' referred exclusively to a requirement of the landlord in the sense that the land was needed by him either for his own use or for use by some person to whom he would make a voluntary sale of his interest. But the wording affords no ground for importing such a limitation of the word 'required', and in the context the requirement of any person obtaining planning permission would naturally be included, whether such person was the landlord himself, or a person intending to negotiate for the purchase of the landlord's interest, or a person, as in the present case, intending to make a compulsory purchase of the landlord's interest. The underlying principle seems to be that a tenancy of agricultural land loses its statutory protection when the land loses its agricultural character by becoming destined for some non-agricultural use. Several other provisions of the Act—especially ss 23 (1) (b), 25 (1) (e) and (5), 31 (1) and (2) (g) and (h), 33 and 60—were referred to as throwing light on the construction of s 24 (2) (b), but I do not think they show that any limitation of the natural meaning of s 24 (2) (b) is to be implied.

The second main question is this. Be it assumed that by reason of the appellants having obtained planning permission and requiring the land for the purpose of making the reservoir the respondents acquired the right to serve an effective notice to quit under s 24 (2) (b). Should that fact be disregarded in assessing the compensation? The appellants argue that it should, on the ground that the 'Pointe Gourde principle' applies to this case, because the landlord's right to serve an effective notice to quit was created by the appellants' scheme for acquiring the land and making the reservoir. The principle was stated in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1). That was a case where, in connection with the establishment of a United States naval base in Trinidad, the Crown compulsorily acquired quarry land owned by the company, and the value of the quarry land was increased by the construction of the naval base, which was in the vicinity of the quarry land and required a large quantity of stone. It was held by the Judicial Committee of the Privy Council that the compensation for the compulsory acquisition of the quarry land should not take into account this increase in value. LORD MACDERMOTT said:

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

The principle has been applied and formulated in many cases: *Stebbing v Metropolitan Board of Works* (2), *Re Countess Ossalinsky and Manchester Corp'n* (3); *Re Gough and Aspatiria, Silloth and District Joint Water Board* (4), in which LORD ALVERSTONE CJ said:

(1) [1947] AC 565.

(2) 35 JP 437; LR 6 QB 37.

(3) (1883), *Browne and Allan's Law of Compensations* (2nd edn, 1903) p 659.

(4) 68 JP 229; [1904] 1 KB 417; [1904-7] All ER Rep 726.

'It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the particular scheme or Act of Parliament, or, in other words, there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters.'

*Re Lucas and Chesterfield Gas and Water Board* (1) in which FLETCHER MOULTON LJ said:

'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.'

*Cedar Rapids Manufacturing and Power Co v Lacoste* (2) per LORD DUNEDIN; *South Eastern Ry Co v London County Council* (3) in which EVE J said:

'increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded.'

*Fraser v Fraserville City* (4) in which LORD BUCKMASTER said:

'the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.'

*Siri Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* (5); *Davey v Leeds Corpn* (6), per VISCOUNT DILHORNE; *Viscount Camrose v Basingstoke Corpn* (7) in which LORD DENNING MR said:

'The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition. That was settled by *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands* (8)'

*Wilson v Liverpool City Council* (9).

Those are the main authorities illustrating the application of the *Pointe Gourde* principle, and they show that it is a principle regulating the valuation of a defined parcel of land or a defined interest in a parcel of land. It was at one stage of the

(1) 72 JP 437; [1909] 1 KB 16; [1908-10] All ER Rep 251.

(2) [1914] AC 569; [1914-15] All ER Rep 571.

(3) 79 JP 545; [1915] 2 Ch 252.

(4) [1917] AC 187.

(5) [1939] 2 All ER 317; [1939] AC 302.

(6) 129 JP 308; [1965] 1 All ER 753.

(7) 130 JP 368; [1966] 3 All ER 161.

(8) [1947] AC 565.

(9) [1971] 1 All ER 628.

argument described as a 'common law principle', but I do not think it can be that because compulsory acquisition and compensation for it are entirely creations of statute. The *Pointe Gourde* principle in my opinion involves an interpretation of the word 'value' in those statutory provisions which require the compensation for compulsory acquisition to include the value of the lands taken. Examples of such provisions are s 63 of the Lands Clauses Consolidation Act 1845, s 5 (2) of the Land Compensation Act 1961 and s 7 of the Compulsory Purchase Act 1965.

The question to be decided is, I think, whether the *Pointe Gourde* principle can be extended so as to apply not only to the ascertainment of the value of a defined parcel of land or a defined interest in land, but also to the ascertainment of the nature and extent of the interest to be valued in a case where the genesis or execution of the scheme has brought about an alteration of the interest itself. In the present case the interest of the respondents as landlords, before it was affected by the scheme, was a reversion to a protected tenancy. The scheme converted it into a reversion to an unprotected tenancy and thereby enhanced its value. Can it be said, in accordance with the appellants' proposition, that the change which the scheme has brought about in the nature of the reversion is to be disregarded in assessing the compensation?

If this proposition could be accepted, it would produce a fair result, which makes it attractive. There is an authority which gives it some general support but is distinguishable from the present case. In *Penny v Penny* (1) the testator had a lease of the house in which the family business was carried on. Under his will two of his sons were entitled to occupy the house, during the subsistence of the lease so long as they continued to carry on the business there, but if they ceased to carry on the business there the executor would be entitled to sell the leasehold interest. The Metropolitan Water Board served notices to treat on the executor and on the two sons of the testator. These notices to treat followed by the board's entry would terminate the sons' carrying on of the business in the house and so give the executor a right to sell the leasehold interest for the residue of the term. It was held that this right, created by the board's scheme, should not be taken into account in assessing the compensation. PAGE WOOD V-C said:

'I think the valuation ought to be made as at the time when the house was about to be taken, and should be made of the exact interest which the plaintiff would at that moment have had, assuming that the house had not been taken . . . As to the value of the interest, it appears to me clear that the plaintiff's interest is not to be treated as having been increased through an act of the Board of Works . . . The scheme of the Act I take to be this: that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by a public body is not to be thrown into the compensation fund.'

That case is distinguishable from the present case, because in that case the alteration of the interest was made only by the service of the notice to treat whereas in the present case the alteration was made (whether by the grant of the planning permission or by the making or the coming into force of the Minister's order) at some time before the service of the notice to treat.

Another authority on this point, in which a different view was taken, is *Re Morgan and the London and North Western Ry Co* (2). The claimants had granted an underlease of the land to the Swansea corporation at a low rent for the making of a public park. There was a proviso for re-entry if the land should be required or taken by a railway

(1) (1868), LR 5 Eq 227.

(2) [1896] 2 QB 469.



or other public company under the power or authority of an Act of Parliament. The railway company served the notice to treat and that brought the proviso into operation, so that the claimants were entitled to re-enter. It was held that this alteration of their interest should be taken into account in assessing the compensation. DAY J said:

"The railway company did give notice to treat. No doubt the notice to treat at once puts an end to the right of the parties to interfere with the land or to add anything to its value. They must sell the land as of the value it was at the time the notice to treat was given, and the only question we have to determine is what was the value of the land at that time. When the notice to treat was given the effect of it was that the underlease ceased so far as the land which was comprised in the notice to treat was concerned... What are they entitled to sell? Are they entitled to sell the land... "as in hand and free from the underlease"? That is the very object of the provision in the underlease. To my mind, the condition is fulfilled. The land has become in hand and free from the underlease, and the claimants are the only persons who can make a title to the land and can sell the land to the railway company."

It is not necessary to resolve what seems to be a conflict between *Penny v Penny* (1) and the *Morgan* case (2). One can take what is common ground, namely, the principle that the nature of the claimant's interest is to be ascertained at the time of (or immediately before or immediately after) the service of the notice to treat. As LORD DONOVAN said in *Birmingham City Corp'n v West Midland Baptist (Trust) Association (Inc)* (3):

"In the words of the textbook writers the notice to treat fixes the interest which is to be acquired."

This is borne out by s 5 (2) of the Compulsory Purchase Act 1965 which provides:

"Every notice to treat—(a) shall give particulars of the land to which the notice relates, (b) shall demand particulars of the recipient's estate and interest in the land, and of the claim made by him in respect of the land, and (c) shall state that the acquiring authority are willing to treat for the purchase of the land..."

It seems to me, therefore, that the respondents are entitled to compensation for the interest which they held in the land at the date of the notice to treat, even though the nature of this interest had been altered in their favour by the inception of the appellants' scheme. There is the possible argument that the respondents' reversionary interest remained the same although its value was increased by the appellants' scheme enabling the respondents to give an effective notice to quit. But I do not think that argument is right; I think the reversion to an unprotected tenancy is a different interest from a reversion to a protected tenancy. The respondents' interest to be valued is the reversion as it existed on the date of the notice to treat, when it was a reversion to an unprotected tenancy. That is what the respondents had to sell and what the appellants must pay for. I agree with the majority decision in *Minister of Transport v Pettitt* (4).

That is the conclusion to which I have come on this difficult question, which is the second main question in both appeals. So far as the main questions are concerned the two cases are indistinguishable. It follows that the appeal in the Shaw-Fox case

(1) (1868), LR 5 Eq 227.

(2) [1896] 2 QB 469.

(3) 133 JP 524; [1969] 3 All ER 172; [1970] AC 874.

(4) (1968), 67 LGR 449.

fails entirely and the appeal in the Footitt case fails so far as the main questions are concerned.

There remains the minor question in the Footitt case. On that I will say simply that I agree with the opinions of my noble and learned friends LORD HODSON and LORD CROSS OF CHELSEA, and with their reasons for allowing the appeal in the Footitt case to that extent.

Accordingly I would affirm the orders appealed from in so far as they uphold the decision of the Lands Tribunal on the main questions, and would to that extent dismiss the appeals. But I would reverse the orders appealed from in so far as they set aside the decision of the Lands Tribunal on the minor question, and would to that extent allow the appeals and restore the said decision.

Notwithstanding the appellants' success on the minor question, as they have failed on the main questions I think that in the circumstances of these cases it would be right that they should pay the respondents' costs in this House.

**LORD HODSON:** Three points, two substantial and one subsidiary, arise on these appeals which result from compulsory powers obtained by the Rugby Joint Water Board to take farmland in order to construct a reservoir. The question is as to the measure of compensation to be paid by the board to the owners of parts of two farms both of which are let to agricultural tenants. In each lease there was a power to determine the tenancy on 12 months' notice expiring on Lady Day. In one of the leases there was a clause giving the landlord power to resume possession on 42 days' notice when the land was required for special purposes. This raises the subsidiary point.

On 6th April 1966 the board obtained planning permission to construct a reservoir on the farms. On 7th March 1967 the order of the Minister authorising compulsory acquisition of the lands came into force. The board then served notices to treat on the owners and occupiers of the farms. It is settled that service of notice to treat fixes the date at which the extent or quality of an interest to be compensated is fixed. As my noble and learned friend LORD DONOVAN said in *Birmingham City Corp'n v West Midland Baptist (Trust) Association (Inc)* (1):

'In the words of the textbook writers the notice to treat fixes the interest which is to be acquired.'

The owners accordingly claim compensation on the basis that each of them could turn his tenant out by a notice given on 25th March 1967 to expire on 25th March 1968. The owners would be entitled to possession in one year in each case. Section 24 (1) of the Agricultural Holdings Act 1948 imposes restrictions on the operation of notices to quit, but s 24 (2) (b) provides that the subsection previously mentioned shall not apply where

'the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning ...'

On the construction of this subsection the first point depends.

On behalf of the board it was submitted that the restrictions were not removed by the language of the subsection which I have just quoted since the whole structure of the Act compelled the requirement to be understood as meaning requirement by the landlord as opposed to requirement by a third party such as the board not claiming through or under the landlord but acting independently as a compulsory purchaser. I agree with the Court of Appeal that there is nothing in the language of the Act to

(1) 133 JP 524; [1969] 3 All ER 172; [1970] AC 874.

restrict the requirement to that of the landlord. This would involve writing in the word 'landlord' or implying its presence where it does not appear. Moreover there does not appear to be any sensible reason why a different result should follow when land is required for a non-agricultural use whether the requirement is that of the landlord or a third party such as the board. Looking at the Act as a whole there are many sections where the landlord is identified by being described as such. In s 24 (2) (b) the requirement for use is not confined to use by the landlord and the object of the exception appears to be to exclude land which is required for a non-agricultural purpose from the statutory restrictions on the operation of notices to quit agricultural holdings, whether or not the requirement is that of the landlord or someone claiming through him. I see no reason accordingly to regard the absence of the words 'by the landlord' after the word 'use' in the subsection as being *casus omissus* by the draftsman.

The second main contention of the board, which I will call the *Pointe Gourde* (1) point, was concluded against them in the Court of Appeal by an earlier decision of the court in *Minister of Transport v Pettitt* (2), but was pressed before your Lordships as the main ground of appeal. The argument was that to give compensation to the owners on the basis that each of them could turn his tenant out on a year's notice would be to enable the acquisition of land to be made at a price inflated by the scheme giving rise to the acquisition for which the grant of planning permission was a necessary and integral part.

It is well established that the value to the owner and not the value to the purchaser is relevant in the case of the exercise of compulsory powers. Were it otherwise the use of compulsory powers would be largely frustrated. The cases on this topic are, I think, all consistent with one another. The earliest example to which your Lordships' attention was directed is reported in Notes of Cases on the Law of Compensation compiled by Balfour Browne and C E Allan in 1903. The case—*Re Ossalinsky and Manchester Corporation* (3)—arose from an arbitration between the Countess Mary Ossalinsky and the corporation of Manchester in 1883 in which the question whether the 'adaptability' of the land value for the purposes for which it is to be used is to be taken into consideration, as an element of value in compensating the owner, is discussed. Powers had been conferred on the corporation by the Manchester Corporation Waterworks Act 1879 for the purposes of carrying out the objects of the Act. GROVE J in his judgment said:

'it has been the invariable practice sanctioned by the courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under Parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under Parliamentary powers or undertakings for any special purpose'

This principle has been followed invariably and has been enunciated by the Privy Council in a judgment prepared by LORD MACDERMOTT in the case of *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1). He said:

(1) [1947] AC 565.

(2) (1968), 67 LGR 449.

(3) (1883), Browne and Allan's Law of Compensation (2nd edn, 1903) p 659.

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

A recent application of the principle is to be found in a judgment of WIDGERY LJ in *Wilson v Liverpool City Council* (1). He used these words:

'the purpose of the so-called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition.'

In the instant case the increase in the value of the interests of the owners in the land must of course be disregarded but this has no application to the ascertainment of those interests. The *Pointe Gourde* principle is satisfied as the owners contend on the basis that the land is agricultural land ignoring any increased value attributable to the scheme for its use as a reservoir. As RUSSELL LJ put it in the *Pettitt* case (2) the principle relates

'not to the ascertainment of what is the interest to be valued, but the value of the interest when ascertained.'

The majority decision in the *Pettitt* case was in my opinion correct.

The right to determine the tenancies was given to the owners by Act of Parliament, the land being required for a use other than agriculture and for this loss they must be compensated. Otherwise they will recover less than their loss which would be wrong: see *Horn v Sunderland Corp* (3), where SCOTT LJ said that the first leading feature of what is given to the owner compelled to sell is compensation—the right to be put, so far as money can do, in the same position as if his land had not been taken from him. The fetter on the determination of the tenancies remains so long as the land is used for agriculture and no longer. The ability to give an effective notice to quit is an element in the value of land and cannot be disregarded. When the precise nature of the interest has been ascertained then the land can be valued.

The second main contention of the board therefore fails and I would dismiss the appeals, other than the cross-appeal.

This last applies only to the *Footitt* case where the farm was the subject of a lease dated 12th August 1949 for seven years from 25th March 1949. The tenant held over after the expiration of the lease. Clause 1 (3) contains the reservation:

'The right pursuant to s 23 (1) of the Agricultural Holdings Act 1948—(a) from time to time to resume possession of any part of the said lands and buildings which the landlords may from time to time require for... any... purpose (not being the use of the land for agriculture) upon giving to the tenant not less than forty-two days' previous notice in writing of such requirement...'

On this point the doubts expressed by CAIRNS LJ in the Court of Appeal were in my opinion well founded. There is no question of importing the word 'landlord' into the lease. The relevant requirement is the requirement of the landlord and this is clearly stated and does not cover the requirement by the board. The reservation in the lease has no application. I would therefore allow the appeal of the board on this point alone.

I agree with the opinion which I understand the majority of your Lordships hold that the appellant board should pay the costs of the respondents on each of the appeals, including the appeal on the short point last mentioned.

(1) [1971] 1 All ER 628.

(2) (1968), 67 LGR 449.

(3) 105 JP 223; [1941] 1 All ER 480; [1941] 2 KB 26.

**LORD GARDINER:** I have had the advantage of reading the speeches of my noble and learned friends and I would concur with the majority.

**LORD SIMON OF GLAISDALE:** The appellants ('the water board') required to construct a reservoir. To do this they had, amongst other steps to be taken, to obtain planning permission and power of compulsory purchase of land. The land in question involved two farms. One was owned by Mr and Mrs Footitt, the respondents in the first two of these consolidated appeals; the other was owned by the trustees of the will of the late Mr Shaw-Fox, who are the respondents in the third of the consolidated appeals.

The water board are bound to pay compensation for the land they require. It is common ground that a person whose property is compulsorily acquired should be paid compensation for the loss he has sustained—no more, no less. On the face of it these appeals are concerned with what compensation should be paid to the respondents in each case. But there is really more to the matter than that: the appeals are brought as test cases. The respondents in each case (or their predecessor in title) had let their respective farms to tenants. So the tenants too were liable to lose property in consequence of the water board's requirements. What the tenants were losing were their leasehold interests; and what the respondents were losing were interests in fee simple in reversion on the determination of their respective tenants' leasehold interests. It follows that the larger the tenants' interests, the more remote and less valuable were the respondents' interests as their landlords; and the shorter the tenants' interests, the nearer and more valuable were the interests of the landlords; so that the respective compensation to landlords and tenants must accordingly vary in inverse ratio (even though, owing to technicalities of valuation, the variation is not mathematically exact: the two interests do not add up, as a layman might be excused for supposing, to the value of the fee simple in possession).

Until the water board came on the scene, the tenants were in each case protected under the Agricultural Holdings Act 1948, which supervened on earlier Acts going back to 1923. That meant that they had security of tenure in the ordinary course of events: and provided they farmed efficiently (and there is no evidence that these tenants did not), there was no definite date when their leasehold interests would fall into their landlords' possession. The tenants' interests being thus enlarged by the 1948 Act, the landlords' interests were inversely diminished.

When the land was taken as a result of the water board's requirements, what the tenants in reality lost was the prospect of leasing the land indefinitely; and what the landlords in reality lost was the prospect of regaining the land at the end of the indefinite period of their tenants' holdings. Justice, one would have supposed, would require that compensation should have been assessed accordingly. But in *Minister of Transport v Pettitt* (1) a majority of the Court of Appeal (LORD DENNING MR dissenting) held that a tenant enjoying security of tenure under a previous but similar statute to the 1948 Act was to be treated, not as if he had the prospect of holding his tenancy indefinitely, but as if he had been turned out under a provision for a 12 months' notice to quit in his lease as unmodified by the statute; in consequence he would only get small compensation for his loss. In the cases under instant appeal the Court of Appeal considered themselves bound by that decision. They were bound accordingly to hold that the respondents did not, owing to the requirements of the water board, lose the prospect of resuming possession of their land at the end of an indefinite period, but rather lost the far more valuable prospect of resuming possession of their land at the end of 12 months. The respondents were accordingly entitled to large compensation for their loss—compensation which would, of course, in the end have to be paid by the people who were liable for the water rate.

(1) (1968), 67 LGR 449.



Your Lordships, however, are not bound by *Pettitt's* case. It is open to your Lordships to say that *Pettitt's* case was wrongly decided; that the law need not proceed on a basis of unreality and consequent injustice, treating a tenant who has in truth lost the prospect of holding his leasehold interest indefinitely as if he had lost merely the prospect of holding it for 12 months, so as to be entitled accordingly only to small compensation; that the law need not proceed on a basis of unreality and consequent injustice, treating a landlord who has in truth lost the prospect of resuming possession of his land at the end of an indefinite period as if he had lost the prospect of resuming possession of it at the end of 12 months, so that those liable for the water rate have in the end accordingly to foot the bill for large compensation to him. This is the point of the first and third appeals.

The Court of Appeal had to decide another point—the subject-matter of the second appeal—in relation to the Foottits only. There was a clause in their lease giving them as landlords the right to resume possession of the demised land on 42 days' notice in certain circumstances. If this clause meant what the Foottits asserted, what they had lost (and therefore what they were entitled to be compensated for) was the right to resume possession of their land, not after an indefinite period, not even after 12 months, but after 42 days (a far more valuable right still), and it would necessarily follow (although this does not fall for direct decision in this appeal) that all that their tenant would have been entitled to by way of compensation was what would reimburse him for the loss of his leasehold interest for 42 days.

My Lords, it is the task of the courts to apply the law as established to the facts as proved, and justice will ordinarily best be done thereby. But since the laws are established by fallible human beings who cannot be expected to foresee every contingency, and since laws deal with general situations to which there may be unfortunate exceptions, it is inevitable that less than perfect justice may sometimes be done. Mercifully, such cases are infrequent; and the instruments of law reform have been improved of recent years. Nevertheless it must always be a matter of misgiving if the law seems to proceed on a path which diverges from reality or leads to a conclusion which does not accord with justice.

In invoking the name of justice I am not, my Lords, indulging in forensic rhetoric: the concept lies at the very heart of the legal problem with which your Lordships are concerned—namely, how compensation should be assessed in the event of compulsory purchase. Under our system of government, when private property is required for some communal purpose the owner of the property is not expected to bear the entire burden for the benefit of his fellow citizens. The burden is shared equitably by the community, through compensation being paid to the owner to reimburse him, as far as money can do so, for what he has lost, no more, no less. However, if *Pettitt's* case (1) stands, the tenants get less than full reimbursement for what they have really lost; if the consequent decision of the Court of Appeal in the instant case stands, the landlords get more than full compensation for what they have really lost.

But justice is not merely at the very heart of the legal rule principally concerned in these appeals. It is also available indirectly as a touchstone to assay how far the legal rule has been correctly refined. The lands with which your Lordships are concerned will be adjacent to other lands which the water board did not require. Those adjacent lands too may well have been let on tenancies modified by the Agricultural Holdings Act 1948. If the legal rule is correctly refined, the tenants of the lands with which your Lordships are concerned should have been placed, so far as money compensation could do it, *mutatis mutandis* in a similar position to that of the tenants on those adjacent lands, not in a position that is less favourable, and the respondents

(1) (1968), 67 LGR 449.

should have been placed, so far as money compensation could do it, *mutatis mutandis* in a similar position to that of the owners of those adjacent lands, not in a position that is more favourable. If the rule in *Pettitt's* case is assayed in this way it begins to look somewhat pinchbeck.

But there is yet a third respect in which justice and injustice are relevant to these appeals—at an intermediate stage, and not only as their end-products. An important question in these appeals is what is the proper construction to be put on s 24 (2) (b) of the 1948 Act. It is a canon of statutory interpretation, founded on happy experience, that Parliament is presumed to intend justice and to avoid injustice. I believe that that canon of interpretation is available in the instant appeals, so as to preclude a construction which allows landlord or tenant to receive either more or less in money than will compensate for what has truly been lost. But however that may be, I believe that the general law of compensation in any event says that the landlord and the tenant should each receive compensation for what has really been lost as a result of the water board requiring the land in which each had an interest. I do not, in other words, believe that this is one of those unfortunate cases where the law proceeds on a path which diverges from reality or leads to a conclusion which does not accord with justice.

I must, however, try to make good these propositions to your Lordships.

#### *The factual background*

Mr and Mrs Footitt owned a farm of some 132 acres in the parish of Thurlaston in Warwickshire. By a lease dated 12th August 1949 they let the farm to a Mr Bowie for a term of seven years from 25th March 1949. The lease contained a reservation providing for the re-entry of the Footitts pursuant to s 23 (1) of the Agricultural Holdings Act 1948 in certain circumstances; I have already referred to this clause, and I shall have to return to it in greater detail later. The lease expired on 25th March 1956; but thereafter, by virtue of s 3 of the 1948 Act, Mr Bowie remained in possession as tenant from year to year, the terms of the original tenancy being otherwise applicable.

The Shaw-Fox farm was of about 216 acres in the neighbouring parish of Draycote. It was let to a Mr Bailey by an agreement dated 24th March 1960, the tenancy being deemed by cl 2

'to have commenced on the twenty-fifth day of March one thousand nine hundred and fifty nine and continued from year to year until determined by either landlord or tenant on the twenty-fifth day of March in any year by twelve months' notice in writing.'

The Shaw-Fox lease, like the Footitt's lease, contained a reservation for re-entry by the landlord in certain circumstances, in this case on giving three months' notice in writing and not extending to more than one-tenth of the farm in any one year; the purposes were certain stated non-agricultural purposes 'or for any purpose mentioned in section 31' of the 1948 Act (to which I shall have to refer later); and provision was made for compensation to the tenant either by substitution of other land or by reduction of rent.

No notice to quit was served on either Mr Bowie or Mr Bailey under the reservation clauses or under or by reason of any other provision either contractual or statutory.

On 6th April 1966 the Minister of Housing and Local Government gave to the water board planning permission to construct a reservoir on part of the land demised to Mr Bowie and to Mr Bailey. So far as the Footitt/Bowie farm was concerned, the planning permission involved 129 out of the 132 acres; so far as the Shaw-Fox/Bailey farm was concerned, it was 120 out of the 216 acres. (The planning permission must,

of course, have been preceded by various carefully worked out steps and statutorily required formalities.) On 22nd August 1966 the Minister made the Rugby and South Warwickshire Water Order 1966, under the Water Acts 1945 and 1948, authorising compulsory acquisition by the water board of the land forming the site of the proposed reservoir. This order came into force on 7th March 1967. The water board served notices to treat on the Footitts and on Mr Shaw-Fox (to be treated as an effective notice in respect of the Shaw-Fox land) on 11th and 14th March 1967 respectively. The notices to treat related to the parts of the land required for the reservoir and invoked the Rugby and South Warwickshire Water Order 1966 and the Compulsory Purchase Act 1965.

Compensation in this case falls to be assessed under the Land Compensation Act 1961 and the Compulsory Purchase Act 1965. Nevertheless your Lordships were told from the Bar (although this does not appear in the evidence), that the water board agreed with Mr Bowie and Mr Bailey that they should be paid compensation as provided by the Agriculture (Miscellaneous Provisions) Act 1968, although that Act had not come into force so as to apply to the acquisitions instantly under consideration. I shall have to refer later to the provisions of that Act, if only so as to try to eliminate any element of confusion they might import into the construction of the Acts which concern your Lordships. It is sufficient at this stage to say that the water board agreed to pay to Mr Bowie and to Mr Bailey by way of compensation for disturbance such sums as would have been so payable by their landlords in the circumstances, plus four times the appropriate portion of the annual rent.

I go back to the main story. References to determine the proper basis of compensation payable by the water board to the respondents were made to the Lands Tribunal. Certain issues (which are those that arise before your Lordships) should, it was agreed, be disposed of as preliminary issues of law; and since the issues in the Footitts' case overlapped (were possibly virtually identical with) those in the Shaw-Fox case, all the references were consolidated. The Lands Tribunal were asked to choose between three possible bases for compensation: (i) that the respondents' interest was a fee simple in agricultural land subject to an annual agricultural tenancy in respect of which the respondents had at the date of the notice to treat no right to give an effective notice to quit; or (ii) that at the date of the notice to treat the respondents were entitled to give an effective notice to quit expiring Lady Day 1968; or (iii) that the Footitts were entitled to give Mr Bowie a 42 day notice to quit. The chairman of the Lands Tribunal, considering himself bound by *Pettitt's* case (1), answered that the correct basis of valuation in both cases was that the interest to be valued was a fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the respondents were entitled to give an effective notice to quit expiring on Lady Day 1968. As regards the contractual reservations for re-entry, the chairman said: 'I do not think that either claimant can rely on the terms of his re-entry clause'. It is not clear now far the Shaw-Fox/Bailey landlords have formally submitted any claim based on their own re-entry clause; at any rate that matter has not been pursued further.

The water board appealed to the Court of Appeal against the finding on the main issue; the Footitts cross-appealed against the finding on the provision for re-entry on 42 days' notice. The Court of Appeal dismissed the appeal on the main issue on the grounds (i) that they were bound by *Pettitt's* case which could not be distinguished; and (ii) that the water board's argument on a point not argued in *Pettitt's* case, based on the construction of s 24 (2) of the 1948 Act, was ill-founded. The Court of Appeal allowed the cross-appeal by the Footitts, and held that their compensation should be assessed on the basis that they were entitled at the date of

(1) (1968), 67 LGR 449.

the notice to treat to give Mr Bowie a 42 days' notice to quit. CAIRNS LJ, however, expressed considerable doubt on this point.

The water board now appeal to your Lordships both on the main issues and on the issue arising from the re-entry clause in the Footitt/Bowie lease. In addition to his argument based on the construction of s 24 (2) (b), counsel for the water board has argued before your Lordships, as he could not do in the Court of Appeal, that Pettitt's case was wrongly decided and that the dissenting judgment of LORD DENNING MR should be preferred.

#### *Pettitt's case*

Mr Pettitt was a tenant from year to year of a 58 acre farm. The Minister of Transport needed about seven acres of the farm for the construction of a motorway, which was to be driven right across the farm. He gave notice to treat on 6th September 1962. The question how much compensation should be paid to Mr Pettitt was referred to the Lands Tribunal. For the purpose of the instant appeals only two of the heads of compensation need be considered—the value to be placed on the seven acres taken and the compensation for the consequent severance and injurious affection of the farm. The Minister contended that the value of the claimant's interest under both heads should be limited to the period ending with the date on which a notice to quit the required land, given at the time of entry, would have expired (which he contended was Lady Day 1964). The Lands Tribunal, however, held that regard was to be had to the security of tenure afforded to Mr Pettitt by the Agricultural Holdings Act 1948, in particular s 24 (1), and assessed compensation under both heads accordingly. The Minister appealed. The majority of the Court of Appeal (RUSSELL and WINN LJ, LORD DENNING MR dissenting) held that, since the land was required by the Crown for a motorway, s 24 (1) was excluded by the provisions of s 24 (2) (b); and that accordingly the claimant's interest in the seven acres which were acquired for the motorway should not be envisaged as having lasted beyond Lady Day 1964.

LORD DENNING MR, in his dissenting judgment said:

'Such being the respective values before the motorway scheme was announced, [i.e. values on the basis that Mr Pettitt had security of tenure] I think that, prima facie, the owner and the tenant should be compensated for loss of those values. The owner should certainly get no more compensation because of the motorway scheme. In the case of the owner, the Minister could invoke the principle that "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition": see *Pointe Gourde Quarrying and Transport Co. v Sub-Intendant of Crown Lands* (1), per LORD MACDERMOTT. Likewise, it seems to me that the tenant should get no less compensation because of the motorway scheme. He should, I think, be compensated for the loss of his prospects of remaining in possession had there been no motorway scheme.'

RUSSELL LJ answered this last point by saying:

'The *Pointe Gourde* principle . . . I believe to relate not to the ascertainment of what is the interest to be valued, but to the value of the interest when ascertained.'

Under this head of claim in Pettitt's case, therefore, two matters were decided: (i) the tenant's property acquired should be valued on the basis that, s 24 (1) being excluded by s 24 (2) (b), the tenant at the relevant date was no longer a tenant with security of tenure under the Agricultural Holdings Act, but one liable to be turned

(1) [1947] AC 565.

out on a 12 months' notice to quit; and (ii) the fact that he became so by virtue of the Minister's entry under compulsory powers was not a consideration that must be excluded under the *Pointe Gourde* rule. (It is true that WINN LJ did not refer expressly to this second point, but he must, I think, be taken to have agreed with RUSSELL LJ about it.)

Counsel for the water board in the instant case argued before the Court of Appeal a point on the construction of s 24 (2) (b) which was not taken in *Pettitt's* case, but which the Court of Appeal decided against him. On that footing, the Court of Appeal held that the decision on the issue in *Pettitt's* case with which I have just been dealing covered the instant cases. As LORD DENNING MR said:

'If *Pettitt's* case was rightly decided (that the tenant only gets small compensation on the basis that he has only 12 months to go), it seems to follow that the owner of the farm should get large compensation on the basis that at the end of the 12 months he would get vacant possession.'

The other relevant issue in *Pettitt's* case is only indirectly of moment, but has a bearing on the canon of statutory construction against anomaly. The Court of Appeal upheld unanimously the Lands Tribunal decision that the tenant's compensation for severance and injurious affection was to be assessed on the basis (in effect) that he would have continued to enjoy security of tenure in respect of the whole 58 acres of the farm (which includes the seven acres taken for the motorway, compensation for which was, by the decision of the majority, to be assessed on the basis that he did not enjoy security of tenure thereof). The anomaly will be immediately apparent; but I shall have in due course to refer to it further.

*The common ground: the rival arguments: some initial comments*

There were certain matters which were common ground between the parties, and I think it would be convenient if I state them at this stage—(i) such a sum should be paid by way of compensation to any person who has an interest in land compulsorily acquired as will reimburse him for what he has lost (although the parties differed as to how 'what he has lost' should be adjudged); (ii) the date for ascertaining the interest compulsorily acquired is the date of the notice to treat (the references in *Pettitt's* case to the date of entry were presumably because there was no materiality in the date of entry being different from that of the notice to treat; the date of entry in the instant cases does not appear from the evidence); (iii) for the purpose of assessing compensation, the interests of the landlord and the tenant respectively must be valued on the assumption that the landlord gave notice to quit on the earliest date after receiving the notice to treat on which he could have given an effective notice to quit, even if he did not in fact give any such notice to quit; (iv) the Court of Appeal in the instant case were right in regarding compensation to be paid to landlords and tenants respectively as varying in inverse ratio—in other words, if *Pettitt's* case stands as good law, then (subject to the point of construction not argued in that case) the water board must fail.

The main arguments on each side were as follows. For the water board it was principally argued: (i) on the proper construction of the Agricultural Holdings Act Mr Bowie and Mr Bailey never ceased to be tenants enjoying security of tenure; and the respondent's compensation should be assessed accordingly; (ii) further, or alternatively, if Mr Bowie and Mr Bailey ceased, by virtue of some provision in the 1948 Act, to enjoy security of tenure on planning permission being given in relation to their land or on the compulsory purchase order or on the service of notice to treat, the law of compensation for compulsory acquisition of land (and in particular the *Pointe Gourde* rule) required that factor to be left out of account in assessing compensation.



On behalf of the respondents it was principally argued: (i) on the proper construction of the 1948 Act (in particular s 24 (2) (b)) Mr Bowie and Mr Bailey, on planning permission being given in relation to their land or on the compulsory purchase order or on the service of the notice to treat, ceased to enjoy security of tenure and become liable to 12 months' notice to quit; (ii) therefore, at the date of the notice to treat, the tenants had an annual tenancy and the respondents a fee simple in reversion to an annual tenancy and each should be compensated accordingly; (iii) the *Pointe Gourde* rule is limited to the valuation of the interest as ascertained at the moment of the notice to treat and does not affect the ascertainment of the interest to be valued; (iv) the 'scheme' for the purpose of the *Pointe Gourde* rule is limited to the compulsory purchase order (or the notice to treat thereunder) and does not embrace the planning permission.

Before I turn to examine these arguments in detail, there are three general observations which I hope I can make without seeming ungrateful to counsel for the respondents for advocacy of remarkable attraction and expertise.

First, whereas the water board can succeed by establishing either point of their argument, in order for the conclusion contended for by the respondents to be valid each link in their chain of argument must be good. In my judgment, there is not merely one link which is unsound, but every single one is so. There is therefore, in my opinion, nothing in the final concatenation to constrain your Lordships from holding, in consonance with reality and justice, that what the tenant has lost (so as to call for compensation), by reason of the water board's requirement and consequent acquisition of the land in which he had an interest, is the right to enjoy his leasehold interest in it indefinitely—with complementary effect on the landlord's interest and right to compensation.

Secondly, the legal situation which confronts your Lordships demands ultimately a simple answer to a simple question. The question is: What has the tenant lost for which he should be compensated by reason of the fact that the land in which he enjoyed a leasehold interest was required (the word in the section of the statute on which the respondents themselves rely) by the water board in such circumstances that they compulsorily acquired it? The answer is that he has lost a leasehold interest which, by reason of the Agricultural Holdings Act, he could have expected to enjoy indefinitely. To chop the simple question up into a number of other questions the combined answers to which return some conclusion inconsistent with the simple answer is not logic but chop logic.

Thirdly, even if the argument were logically unimpeachable, that would not be an end of the matter. Logic is a handmaid of the law, not her mistress: in the famous words of HOLMES J, 'The life of the law has not been logic; it has been experience'. The purpose and value of logic to the law is to ensure that persons whose relevant circumstances are similar receive similar treatment. It is, in other words, to promote equity: to use it to defeat equity is to misuse it. It follows, however, that logic is relevant when it comes to comparing the position of the respondents' tenants as compensated with adjacent tenants enjoying security of tenure under the Agricultural Holdings Act.

#### *Agriculture (Miscellaneous Provisions) Act 1968*

I venture to interpolate at this stage some observations on the 1968 Act, in the hope of thereby avoiding its confusing the real issues before your Lordships. By s 42 compensation in connection with compulsory acquisition of an agricultural holding is expressly to be assessed *without* regard to the tenant's prospects, if any, of remaining in possession after the earliest date on which, apart from the acquisition or taking of possession, the landlord could obtain possession of the holding in pursuance of a valid notice to quit served on the tenant as soon as possible after notice to treat has been

served on the landlord (but, interestingly, disregarding any provisions for re-entry such as are to be found in the two leases with which your Lordships are concerned). By ss 9 and 12 an acquiring authority (or, indeed, a landlord giving a notice to quit in accordance with the terms of the lease) has to pay a sum equal to four times the annual rent of the holding or, in the case of part of a holding, four times the appropriate portion of that rent, in addition to any compensation for disturbance payable by the landlord to the tenant (which itself becomes payable by the acquiring authority).

The construction of the 1968 Act is likely to present serious problems: first, it refers expressly only to the compulsory acquisition of the tenant's interest, but it might be held, on the 'inverse ratio' principle, impliedly to affect the compensation to the landlord; secondly, the Act was passed after the decision by the Lands Tribunal in *Pettitt's* case but before that decision was reversed by the majority of the Court of Appeal.

If *Pettitt's* case is affirmed, an acquiring authority may have to pay more for land subject to an agricultural tenancy than it would have to pay for similar land being farmed by the owner of the fee simple himself. What would be the position if *Pettitt's* case is overruled is far from easy to determine. Even assuming that the 1968 Act is construed as affecting only the tenants' interest, if *Pettitt's* case is overruled it does not follow that an acquiring authority will necessarily have to pay less for land subject to an agricultural tenancy than for similar land farmed by the owner in fee simple; how the respective figures compare may depend on such uncertain factors as the age and efficiency of the tenant—nor did I understand counsel for the water board to concede otherwise.

It is unusual for a later statute to be of much use in the construction of an earlier one; and this does not seem to me to be one of those exceptional cases. All that one can say is that the 1968 Act is an example of Parliament, when it wished security of tenure to be disregarded for the purpose of compensation on compulsory acquisition, saying so expressly—as will appear, the 1968 Act does not stand alone in this respect.

#### *Agricultural Holdings Act 1948*

At common law an agricultural tenancy, like others, could be for a year or for more or less than a year. By s 2 of the 1948 Act agricultural land could not be let for a term less than a year (which would, of course, allow tenancies from year to year); and by s 3 tenancies for two years or more, unless terminated by notice, were to continue as tenancies from year to year. (It was by virtue of this provision that Mr Bowie continued as a yearly tenant of Mr and Mrs Footitt after 1956.)

From s 23 inclusive onwards there is a series of sections dealing with notices to quit. At common law, in the absence of contrary agreement, yearly tenancies (as both tenancies with which your Lordships are dealing had become) were terminable by half a year's notice to quit. But by s 23 12 months' notice to quit an agricultural holding or part of an agricultural holding had to be given. I must set out s 23 (1) in greater detail:

'A notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy: Provided that this section shall not apply. . . (b) to a notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the use of the land for agriculture; . . .'

It was by virtue of this proviso, coupled with the reservation in their lease, that Mr and Mrs Footitt claimed to be entitled to be compensated on the basis that they held a fee simple in reversion to a 42 day lease.

Section 24 may be of crucial significance in this case. It is this section (which must be read together with the succeeding ones) which, indirectly, gives the agricultural tenant security of tenure. It does this by enabling the tenant, except in certain excluded cases, to challenge the notice to quit by a counter-notice, and thereby force the landlord to apply to the Agricultural Land Tribunal for consent to the operation of the notice to quit. If the landlord does not apply in time, or if his application is unsuccessful, the notice to quit does not take effect. I cite s 24 as amended by the Agriculture Act 1958:

'(1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Agricultural Land Tribunal consents to the operation thereof.

'(2) The foregoing subsection shall not apply where . . . (b) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise than by virtue of any provision of those enactments) such permission is not required, and that fact is stated in the notice . . .'

Section 31 provides that notices to quit part of a holding are not to be invalid in certain cases. Such a provision was required for two reasons: first, because at common law a notice to quit part of demised land is bad in the absence of a clause in the tenancy agreement allowing such notice to be given; and, secondly, because s 23 merely said that a less than 12 months' notice to quit part of an agricultural holding should be invalid, not that a 12 months' notice to quit part of such a holding should be good. It follows that ss 23 and 24 must be read together with s 31; and, indeed, since it was in both instant cases only part of the farms that was required by the water board, that s 31 as well as s 23 must be satisfied in both cases. (The reservation in the Shaw-Fox/Bailey lease, which invokes s 31, is of no materiality, since it permitted re-entry only into one-tenth of the farm in any one year, and a bigger proportion was affected by the planning permission, the compulsory purchase order and the notice to treat.) The relevant provisions of s 31 are as follows:

'(1) A notice to quit part of an agricultural holding held on a tenancy from year to year given by the landlord of the holding shall not be invalid on the ground that it relates to part only of the holding if it is given . . . with a view to the use of the land to which the notice relates for any of the objects mentioned in the following subsection, and the notice states that it is given . . . with a view to any such use as aforesaid . . .

'(2) The objects referred to in the foregoing subsection are the following, namely. . . (g) the making of a watercourse or reservoir . . .'

Sections 32 and 33 modify s 31, and, therefore, like s 31, must be read together with ss 23 and 24. Section 32 gives the tenant a right to cause a notice to quit part of a holding to operate as notice to quit the entire holding; and s 33 provides for reduction of rent where notice is given to quit part of a holding. The terms of s 33 are of great importance when it comes to construing ss 24 and 31; and I italicise the words which will be of particular significance.

<b>FOOD AND DRUGS</b> – Samples for analysis – Unwrapped meat pies – Purchase of six pies by sampling officer – Division into three lots each consisting of two pies – Submission of one lot to public analyst – Aggregate of meat in those two pies smaller percentage of their total content than that required under regulations – Liability of seller – Food and Drugs Act, 1955, s 93 (1), Sch VII, Part I, paras 1, 2. <i>Skeate v Moore</i> .. .. .	QBD	82
<b>FORCIBLE ENTRY.</b> See CRIMINAL LAW.		
<b>GAME</b> – Killing without licence – Exceptions and exemptions – Deer – Killing on enclosed lands – 'Enclosed lands' – Farmland as distinct from moorland – Deer hit on land with permission running to and dying on neighbouring land – Game Licences Act, 1860, s 4, s 5. <i>Jemison v Priddle</i> .. .. .	QBD	230
<b>GAMING</b> – Betting office – Licence – Application – Notice advertising application – Inclusion of matter additional to that required by statute – Effect on validity of notice – Betting, Gaming and Lotteries Act, 1963, Sch 1, para 6. <i>R v Inner London Area (West Central Division) Betting Licensing Committee. Ex parte Percy</i> .. .. .	QBD	273
<b>GAMING</b> – Club – Licensing – Application – Notice – Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2). <i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	CA	71
<b>GAMING</b> – Club – Registration – Refusal or cancellation – Appeal to quarter sessions – Finality of decision – Gaming Act, 1968, sched 7, para 4. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> – Club – Registration – Refusal or cancellation – Grounds – Discretion of licensing authority – Gaming Act, 1968, sched 7, paras 8, 18. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> – Club – Registration – Right of proprietary club to be registered – Gaming Act, 1968, Part III, sched 7. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>HOUSING</b> – Obtaining possession of council property from trespassers – Competency of proceedings – Proceedings instituted by authorised committee – 'Blanket' decision to institute. <i>London Borough of Southwark v Peters</i> .. .. .	CA	187
<b>HUSBAND AND WIFE</b> – Maintenance of wife – Provisional maintenance order – Jurisdiction – Husband resident and matrimonial offences alleged to have been committed outside United Kingdom – Wife ordinarily resident in England – Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1) – Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a). <i>Collister v Collister</i> .. .. .	Fam Div	163
<b>HUSBAND AND WIFE</b> – Summary proceedings – Maintenance of child – 'Child of the family' – Acceptance – Objective test – Circumstances constituting acceptance – Time of acceptance – Withdrawal – Liability of another person – Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <i>Snow v Snow</i> .. .. .	CA	54
<b>INDECENT PHOTOGRAPHS.</b> See CUSTOMS & EXCISE.		
<b>INFANT</b> – Adoption. See ADOPTION.		
<b>INFANT</b> – Care – Assumption by local authority of parental rights – Objection by parent – Allegation that objection out of time – Estoppel of authority – Need to appreciate ability of mother to care for child. <i>Re L (A C) (an infant)</i> .. .. .	ChD	19
<b>INSANITY</b> – See CRIMINAL LAW.		
<b>LANDLORD AND TENANT</b> – Small tenement – Recovery – Application to justices for warrant – Notice of application – Service – Substituted service – Need to prove due diligence by landlord in seeking tenant – Small Tenements Recovery Act, 1838, s 2. <i>Stoker v Stansfield</i> .. .. .	QBD	281
<b>LICENSING</b> – Club – Special hours certificate – Premises adapted for providing substantial refreshment for members – Licensing Act, 1964, s 78 (b). <i>Porter v Aberystwyth Justices</i> .. .. .	QBD	285
<b>LICENSING</b> – Gaming licence. See GAMING.		
<b>LICENSING</b> – Permitted hours – Exemption order – Special occasion – Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions – Function to be held by outside local organisation – Licensing Act, 1964, s 74 (4). <i>R v Metropolitan Police Commissioner Ex parte Ruxton</i> .. .. .	QBD	175
<b>LICENSING</b> – Permitted hours – Exemption order – Special occasion – Local football match – Match occurring nearly every week – Discretion of justices – Licensing Act 1964 (c 26), s 74 (4). <i>R v Llandiloos (Lower) Justices. Ex parte Thorogood</i> .. .. .	QBD	67

<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner. <b>Dutton v Bognor Regis United Building Co Ltd</b> .. .. .	CA	201
<b>LOCAL GOVERNMENT</b> - Elections. See ELECTIONS.		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <b>R v Coleshill Justices. Ex parte Davies</b> .. .. .	QBD	51
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine. <b>R v Southampton Justices. Ex parte Briggs</b> .. .. .	QBD	237
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2). <b>Northern Ireland Trailers Ltd v County Borough of Preston</b> .. .. .	QBD	149
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42. <b>Northern Ireland Trailers Ltd v County Borough of Preston</b> .. .. .	QBD	149
<b>OBSCENITY.</b> See CRIMINAL LAW; CUSTOMS AND EXCISE.		
<b>PILOT.</b> See SHIPPING.		
<b>POLICE</b> - Obstruction. See CRIMINAL LAW.		
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs. <b>Riggall v Hereford County Council</b> .. .. .	QBD	172
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declaration by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (2) (10). <b>London Borough of Ealing v Race Relations Board</b> .. .. .	HL	112
<b>RACE RELATIONS</b> - Provision of facilities - Discrimination - Members' club - Refusal to admit coloured man as member - Members of club 'section of public' - Impersonal quality distinguishing them from public at large - Clubs where admission by invitation - Race Relations Act, 1968, s 2 (1). <b>Race Relations Board v Charter</b> .. .. .	CA	249
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Need of tenants' consent to reference - Reference of number of contracts together - Rent Act, 1968, s 72 (1). <b>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</b> .. .. .	QBD	11
<b>ROAD TRAFFIC</b> - Causing death by dangerous driving - Evidence - Previous drinking - Admissibility - Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit - Evidence of substantial excess rightly admitted on major charge - Road Traffic Act, 1960, s 1. <b>R v Thorpe</b> .. .. .	CA	301
<b>ROAD TRAFFIC</b> - Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit - Specimen of blood for laboratory test - Analyst's certificate of proportion of alcohol - Admissibility in evidence - Failure to serve copy on defendant - Waiver - No objection to evidence before close of case for prosecution - Road Traffic Act, 1962, s 2 (2). <b>R v Banks</b> .. .. .	CA	306
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - 'Accident' - Broken down car pushed by other car - Interlocking of bumpers - Breath test - Damage to both cars - Road Safety Act, 1967, s 2 (2). <b>R v Morris</b> .. .. .	CA	194
<b>ROAD TRAFFIC</b> - Motorway - Hard shoulder - Part of verge - Marginal strip - Part of carriageway - Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f). <b>Wallwork v Rowland</b> .. .. .	QBD	137
<b>ROAD TRAFFIC</b> - Motorway - Prohibition against stopping on verge - Stopping permitted 'by reason of any accident, illness or other emergency' - 'Emergency' - Need for element of suddenness - Danger alleged to constitute emergency not apparent before driver got on motorway - Drowsiness - Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9. <b>Higgins v Bernard</b> .. .. .	QBD	314



<b>ROAD TRAFFIC</b> - Regulations relating to construction, etc., of vehicles - Using vehicle on road in contravention of regulations - 'Using' - Vehicle driven by person other than owner's servant at owner's request - Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64. <i>Crawford v Houghton</i> .. .. .	<b>QBD</b>	<b>234</b>
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Pilotage by unlicensed pilot after offer - Ship moving from one mooring to another - Pilotage district byelaws - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws Part IX, byelaw 2. <i>Crouch v McMillan</i> .. .. .	<b>QBD</b>	<b>179</b>
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Ship moving from mooring to discharge berth - Pilotage by unlicensed pilot after offer - General offer insufficient - Need of specific offer communicated in relation to particular movement of ship - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws, Part IX, byelaw 2. <i>Montague v Babbs</i> .. .. .	<b>QBD</b>	<b>144</b>
<b>TOWN AND COUNTRY PLANNING</b> - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a). <i>McDonald v Howard Cook Advertising Ltd</i> .. .. .	<b>QBD</b>	<b>79</b>
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Land in area zoned for residential building - No prospect of permission being given for that use - Land Compensation Act, 1961, s 16 (2). <i>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</i> .. .. .	<b>CA</b>	<b>93</b>
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Mining operations - Notice specifying substantial area - Actual working only in two smaller areas within specified area - Some operations more than four years before service of notice - Town and Country Planning Act, 1962, s 45 (1) (2). <i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. .. .	<b>QBD</b>	<b>276</b>
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Notice to be served within four years from carrying out of development - Mining operations - Initial working of area more than four years prior to notice - Subsequent working of area within four-year period - Whether new development or continuation of original development - Validity of notice - Town and Country Planning Act, 1962, s 12 (1), s 45 (2). <i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. .. .	<b>QBD</b>	<b>276</b>
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service on occupier of land affected - 'Occupier' - Licensee of caravan site - Right to be served with notice - Control over site - Duration of enjoyment - Town and Country Planning Act, 1962, s 45 (3). <i>Stevens v London Borough of Bromley</i> .. .. .	<b>CA</b>	<b>261</b>
<b>TRADE DESCRIPTIONS</b> - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <i>Naish v Gore</i> .. .. .	<b>QBD</b>	<b>1</b>
<b>YOUTHFUL OFFENDER, See CRIMINAL LAW; Magistrates.</b>		

1. The first part of the document is a list of names and addresses, which are arranged in a columnar format. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a roster of some kind.

2. The second part of the document is a series of paragraphs of text, which are written in a cursive script. The text is arranged in a columnar format, with the paragraphs separated by spaces. The text appears to be a letter or a report of some kind.

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'Where the landlord of an agricultural holding resumes possession of part of the holding either (a) by virtue of s 31 (1) of this Act... the tenant shall be entitled to a reduction of rent.'

*The interpretation of s 24 (2) (b)*

I have already cited s 24 (2) (b). It was argued for the respondents that its effect was to enable notice to quit to be given effectively under s 23 without the tenants being able to give a counter-notice under s 24 (1), since, at the moment of (or before) the notice to treat, this land was required by the water board for use other than for agriculture (ie, construction of a reservoir) in respect of which planning permission had been granted. It was argued for the water board, and controverted for the respondents, that 'required' in that paragraph should be read as 'required by the landlord'. This point was not argued in *Pettitt's* case, but the Court of Appeal in the instant case unanimously rejected the water board's contention. Before I come to consider the arguments put forward by each side on this part of the case, I venture to submit to your Lordships some general observations by way of approach to the questions of construction. In doing so I propose to use the terms 'Parliament' and 'draftsman' interchangeably, according as the context seems to make the use of either preferable.

The task of the courts is to ascertain what was the intention of Parliament, actual or to be imputed, in relation to the facts as found by the court. There are a number of established canons of interpretation to assist the courts in ascertaining and applying the parliamentary intention. These canons have two aspects: first, as a code of communication whereby the draftsman signals the parliamentary intention to the courts; and, secondly, as the quintessence of what experience has found to be the best guide to parliamentary intention. Different canons of interpretation will be more useful according to whether the first or second of these aspects is dominant. For example, if it seems likely that the draftsman has envisaged the actual situation facing the court, it is the more likely that an intention as to the legal result has been formed and evinced; so that the aspect of the canons as a code of communication will be dominant, and such a rule as that the words of a statute dealing with ordinary affairs are used in their ordinary meaning and with normal grammatical sense will be particularly significant. If, on the other hand, it seems likely that the draftsman had not envisaged the actual situation facing the court, it may be necessary to impute an intention to Parliament, by trying to ascertain what in all the circumstances would have been the likely intention of Parliament in relation to the actual situation had it been envisaged; so that the aspect of the canons as the quintessence of what experience has found to be the best guide to parliamentary intention will be dominant, and such a rule as that Parliament is to be presumed to intend justice and avoid injustice or anomaly will be particularly significant.

But the foregoing does not exhaust every possible relationship between Parliament and the actual forensic situation which is relevant to the parliamentary intention. It may seem likely that the draftsman has envisaged the actual forensic situation, in which case he is likely also to have evinced an intention in relation thereto. It may seem likely that the draftsman has envisaged a situation different from the actual forensic situation and evinced an intention in relation to the former which may have certain consequences for the latter: in that case it will be necessary to determine whether the consequences are inevitable; and, if not inevitable, how Parliament is likely to have regarded the consequences—whether welcome (as consonant with the general strategy of the Act), or acceptable, or to be avoided if at all possible.

On scrutiny of a statutory provision, it will generally appear that a given situation was within the direct contemplation of the draftsman as the situation calling for statutory regulation: this may be called 'the primary situation'. As to this, Parliament

will certainly have manifested an intention—'the primary statutory intention'. But situations other than the primary situation may present themselves for judicial decision—secondary situations. As regards these secondary situations, it may seem likely in some cases that the draftsman had them in contemplation; in others not. Where it seems likely that a secondary situation was not within the draftsman's contemplation, it will be necessary for the court to impute an intention to Parliament in the way I have described, i.e. to determine what would have been the statutory intention if the secondary situation had been within parliamentary contemplation (a secondary intention). But since the application of the primary statutory intention to the primary situation may inescapably affect some secondary situations, there must be an overriding rule that it is inadmissible to apply any canon of construction to ascertain a secondary (or imputed) statutory intention in relation to a secondary situation if the application of that canon of construction would have the effect of frustrating the primary statutory intention in relation to the primary situation. To apply that proposition to the instant case, it would be inadmissible to read the word 'required' as meaning 'required by the landlord' if to do so would frustrate the ascertainable statutory intention in relation to a situation which the draftsman is likely to have had in contemplation.

That primary situation and that primary statutory intention seem to me to be beyond doubt as regards s 24 (2) (b). By serving a counter-notice under s 24 (1) the tenant can prevent a notice to quit from taking effect without the landlord's first obtaining the consent of the Agricultural Land Tribunal. But if the notice to quit has been served because the land is required for a non-agricultural use for which planning permission has been given, a decision will already have been made that the land should be used for a purpose inconsistent with the agricultural tenancy. It was therefore necessary to obviate a second (and, theoretically, inconsistent) decision on the very same matter. Hence the provisions of s 24 (2) (b).

Not only does this seem to me to have been, beyond any doubt, the primary situation and the primary statutory intention, I find it quite impossible in any case to believe that the primary statutory intention was to bring about the result contended for by the respondents. For one thing, it is plainly unjust, for the reasons which I have already ventured to submit to your Lordships—the most cogent among many being that the expropriated agricultural tenant does not receive compensation which places him, so far as money can do so, in a similar position to a neighbouring agricultural tenant fortunate enough not to have his land expropriated for the construction of a reservoir, so that the expropriated tenant would be required to bear personally a disproportionate burden of the cost of constructing a reservoir for communal purposes. For another thing, almost the last place where I should expect to find Parliament evincing an intention as to how compensation should be assessed on compulsory purchase of agricultural lands is in a section dealing with the machinery of counter-notices to notices to quit.

But the fact that it was not the primary statutory intention to bring about the result contended for by the respondents does not dispose finally of their case: they may be able to succeed in spelling out a secondary statutory intention in regard to a secondary situation—namely, that which actually confronts your Lordships. Moreover, although it is not difficult to discern the primary situation envisaged in s 24 (2) (b) and the primary statutory intention in relation thereto, it is less easy to be certain whether the draftsman had the instant situation in contemplation as a secondary situation (a consideration that affects which canons of interpretation are dominant); and although one can be certain that Parliament would have wished to obviate the injustice inherent in the respondents' construction if it had been possible without

detriment to the vindication of the primary statutory intention, it remains for consideration whether that would be possible—to be specific, whether reading 'required' as meaning 'required by the landlord' would frustrate what is plainly the primary statutory intention in relation to the primary situation. Finally, the possibility must be borne in mind that the draftsman did have the instant situation in contemplation, but believed that injustice would be avoided by the application of the *Pointe Gourde* rule; if he did believe that, he was justified by the judgment of LORD DENNING MR in *Pettitt's* case, but was disappointed in his expectations by the majority of the Court of Appeal in that case. Parliament, of course, assumes responsibility for any mistake by the draftsman, however excusable, and Mr Pettitt, Mr Bowie, Mr Bailey, the payers of the water rate, and others in a similar position, must bear any consequent misfortune with such stoicism as they can command.

With this exordium I turn to examine the rival arguments on construction. The water board claim that the context demands that 'requires' should be read as 'required by the landlord' and that justice also so demands (construction according to context and construction to promote justice and obviate injustice both being established canons of statutory interpretation). The respondents, on the other hand, say that the words should be read in their ordinary meaning, without addition of words which could have appeared, but do not; that the general purpose of the Act demands the construction they favour; and that to read the words 'by the landlord' into the subsection would produce anomaly (construction according to plain words, construction according to the purpose of the Act and construction to obviate anomaly also being canons of statutory interpretation).

*Construction according to 'plain words' and to context.* I have already indicated that the canon of construction according to 'plain words' is dominant, because most relevant and therefore most useful, when the forensic situation calling for decision is likely to have been within the contemplation of the draftsman. I am perfectly convinced that the instant situation was not the primary situation with which he was concerned. On the whole I think it unlikely that the instant situation was within the draftsman's contemplation at all; although I cannot exclude the possibility that it was, and that he thought that it was taken care of by the *Pointe Gourde* rule. But, it is, in my view, unnecessary to pursue this question further; there is no room, in any case for the application of the 'plain words' canon—simply because the words are not plain. It is true that, if you look at s 24 (2) (b) alone, the words are plain enough, and 'by the landlord' does not appear in the paragraph. But statutory words must always be construed in their context, and this rule applies with particular force when provisions are interdependent. I have already ventured to point out why s 24 cannot be construed alone; it is self-evidently not independent; and it must be construed along with the sections with which it is connected, which include s 33. In that section appear the words 'the landlord . . . resumes possession'. This makes it at least permissible, if not absolutely necessary, to read the words 'by the landlord' into s 24 (2) (b). I would only add, with reference to the 'plain words' argument, that this is certainly not one of those cases in which it can be said that, whatever Parliament was aiming at, it hit the respondents' target fair and square; if Parliament has hit the respondents' target, it has done so with extreme obliquity and from a most unlikely angle.

*Construction according to the purpose of the statute.* It was argued for the respondents that the purpose of the statute was to affect the relationship of landlord and tenant, and to protect tenants, only so long as the land was used for agriculture. This is correct if it states no more than the truism that the Act deals with agricultural holdings, other contracts of tenancy being dealt with by the Landlord and Tenant Act 1954, from which agricultural tenancies were excepted (s 43 (1) (a)). (It is significant,



however, that, in the 1954 Act, where Parliament intended that compensation on compulsory acquisition should take no account of the tenant's security of tenure, it said so expressly (s 39)—just as it did in the 1968 Act.) But I do not accept the respondents' argument that the dominant purpose of this Act was to promote efficiency of agriculture, so that its provisions are only relevant while the land is being farmed. No doubt the Act erected long-stops to guard against inefficient husbandry, but, if this had been its dominant purpose, it would have been, but is not, made a ground for a landlord's resuming possession that the land would be more efficiently farmed if he resumed possession. The dominant purpose seems to me to be quite other. This is one of those many Acts (including the 1954 Act) regulating relations between landlord and tenant, rendered necessary by inequality of bargaining power between landlord and tenant, so that reliance on the common law and the terms of the contract of tenancy was liable to cause injustice to the tenant. The inequality of bargaining power particularly affected the tenant *after* his rights ceased at common law, ie, when the agricultural tenancy came to an end. To relegate the tenant to his rights at common law merely because he has ceased farming is, in fact, to run directly counter to the whole general purpose of the Act, which can be gathered from many other provisions than those which I have cited (eg those relating to compensation for tenant's improvements on the termination of the tenancy). The Act deals separately with agricultural holdings for reasons of convenience and of legal history. Other types of tenant are given security of tenure by other Acts. The canon of interpretation according to the general purpose of the Act favours the construction proposed by the water board rather than that advanced by the respondents.

*Construction with reference to anomaly.* The respondents relied strongly on an argument to the following effect. Section 24 (2) (b) is not confined to planning permission obtained by a statutory undertaker prior to compulsory purchase; it applies equally to planning permission, obtained in his capacity of 'prospective purchaser', by a private developer who subsequently buys by agreement from the owner (see Town and Country Planning Act 1962, s 16). On either construction this latter case falls within s 24 (2) (b), since, the land is in such circumstances required by the owner, ie in order to sell it to the developer. (To take such a case out of s 24 (2) (b) it would be necessary to add the further words 'required by the owner for his own purpose', which, as will appear, would frustrate the primary statutory intention.) But if an effective 12 months' notice to quit can be served in such a case, without the possibility of a counter-notice involving reference to the Agricultural Land Tribunal, what the owner has to sell to the 'prospective purchaser' who has obtained planning permission is the valuable fee simple in reversion to an annual tenancy. It would be anomalous (it is argued) if, simply because the purchaser is a statutory undertaker acquiring the land under compulsory powers, all that the owner should have to sell would be the far less valuable fee simple in reversion to a protected tenancy.

To this argument there are, in my judgment, four main answers. First, the alleged anomaly must be viewed as it would have appeared in 1948: *contemporanea expositio est fortissima in lege*. Secondly, the position of the landlord vis-à-vis his neighbouring landlord on the water board's contention is generally no more than the counterpart of that of the tenant, at best and in the particular instance, vis-à-vis his neighbouring tenant on the respondents' construction; the tenant, on the respondents' construction, will not be put, so far as money compensation can do it, in the same position as a neighbouring tenant-farmer, who continues to enjoy security of tenure. Thirdly, some other, truly startling, anomalies are thrown up on the respondents' construction. Fourthly, the law abhors anomaly because an anomaly involves treating A more favourably than B in similar circumstances; the canon of construction to obviate anomaly is, in other words, only a particular aspect of the canon of construction to

obviate injustice (see Maxwell on Statutes (12 edn, c 10) and Craies on Statute Law (7th edn, p 86)), and the balance of justice clearly favours the water board's construction of the statute.

First, then, for the contemporanea expositio. By the Town and Country Planning Act 1947 all rights to develop land were nationalised, a development charge of 100 per cent being payable on all private development (s 69). A compensation fund of £300,000,000 was set up, to be paid out to persons who had development values in land in 1949, their claims if necessary to be abated rateably (s 58). It was accepted by counsel for the respondents that both landlords and tenants of the lands with which your Lordships are concerned would have had claims on the compensation fund; that, for the purposes of such claims, the tenants would have been treated not as subject to a 12 months' notice to quit, but as enjoying security of tenure under the Agricultural Holdings Act, and that the landlords' claims also would be treated accordingly. It follows that the alleged anomaly virtually disappears; the owner has in effect no development right to sell to a private developer; and both he and his tenant will have received compensation for the loss of their development rights on the basis that the tenant had security of tenure. The anomaly would be if, when it came to compensation for all that remained (existing use value), landlord and tenant were to be compensated on the basis that the tenant did not have security of tenure. The point is emphasised by the fact that the 1947 Act itself (in Part V) amended the law relating to compulsory acquisition of land.

As for other anomalies arising on the respondents' construction, I put forward one of the most startling with some diffidence, since it was not explored in argument. However, it is a point which appears on the face of the decision in *Pettitt's* case, and I have already referred to it. It is that, although compensation for the seven acres compulsorily acquired was to be on the basis that the tenant did not enjoy security of its tenure, compensation for severance and injurious affection was to be on the basis that he *did* enjoy security of tenure of the whole 58 acres, including the seven acres compulsorily acquired. As WINN LJ put it:

'I think that there is no relevance to be attributed to the period of time at the expiry of which the claimant could be required to quit the 7.5 acres. The [Lands Clauses Consolidation Act 1845] requires an assessment of damage done to the tenancy as a whole, and this is a tenancy which, with respect to some fifty acres, would have continued for an interminable but substantial period of time. Had the whole of the land held under the tenancy, viz, fifty-eight acres, been acquired, it would, of course, have been appropriate to value the claimant's interest in the whole for such period only as he was entitled to retain possession and use of those fifty-eight acres. The fact, however, that part of the whole holding could not in the circumstances of the case be retained for as long as the rest of the holding does not, as I see the matter, mean that the damage to that part of the holding which is retained will be experienced only during the period before Lady Day 1964, at which date it must be taken that the claimant's interest in the 7.5 acres would have ceased. On the contrary, so long as he holds or is taken to have been likely to have held the other fifty acres, the difference between the value to him, for the purposes of his user, of the former holding and that of the reduced holding after the loss of the 7.5 acres is a continuing loss and damage ...'

Applied to the Foottitts' land, this would mean that Mr Bowie would be compensated for the loss of 129 acres on the basis that he did not enjoy security of its tenure, but that he would be compensated for its severance from and the injurious affection of the 129 + 3 acres on the basis that he *did* enjoy security of its tenure. And were reliance placed on the word 'is taken to have been likely to have held the other fifty

acres' in WINN LJ's judgment, and were it said that no farmer would nowadays be likely to remain in occupation of 3 acres (even with a cow), I would point out that this seems to involve the further anomaly that the more of a tenant's land is taken, the less compensation he gets.

There is yet another anomaly, which will also be relevant when it comes to determining the ambit of the *Pointe Gourde* rule. On the respondents' construction, the landlord would be compensated for the loss of something he could never actually enjoy, even on their own argument, namely, a fee simple in reversion to an annual tenancy. Fee simple nowadays implies absolute ownership—the right to enjoy, or dispose of, or transmit enjoyment of, the land in perpetuity. Two conditions have to be satisfied before s 24 (2) (b) comes into operation to preclude s 24 (1) from barring an effective notice to quit:—(i) the land must be 'required' for a use other than agriculture; (ii) planning permission must have been given for such use. The earliest date that the land was 'required' for a use other than agriculture, was the date of the notice to treat (it was common ground that the landlords must be taken to have given notice to quit *after* receiving notice to treat). But at the very moment of the notice to treat, the landlords became liable to surrender the land to the water board.

But the greatest anomaly of all is one I have already referred to: and it shows how far anomaly and injustice are overlapping concepts. On the respondents' construction the tenants who have been unfortunate enough to have their land required for the construction of a reservoir are not placed, so far as money compensation can do it, in as favourable a position as neighbouring tenant-farmers; so that Mr Bowie and Mr Bailey are required, in effect, themselves, at their moment of expropriation, to subsidise the construction of the reservoir for the benefit of their more fortunate neighbours.

I have no doubt that far greater and more outrageous anomalies arise out of the construction proposed by the respondents than arise out of the construction proposed by the water board. I myself respectfully agree with the view of LORD DENNING MR in *Pettitt's* case that the *Pointe Gourde* rule operates to prevent the landlords receiving more compensation and the tenants receiving less compensation as a result of the water board having, in order to carry out their scheme for a reservoir, had to obtain planning permission as well as a compulsory purchase order: I think that that well-established rule operates absolutely to prevent any alteration of the value of the land by the operation of any part of the machinery of the scheme, so that the planning permission did not, for compensation purposes, alter a valuable protected tenancy into a less valuable annual tenancy. But if this were not so, I think that the canon of construction by context (invoking s 33) would permit, and that the canons of construction to promote justice and to obviate the balance of anomaly would demand, that s 24 (2) (b) should be read, as proposed by the water board, to mean 'required by the landlord'—unless such a reading would frustrate the primary intention of Parliament in enacting that paragraph. Finally, then, in this part of the case, I turn to consider that question.

*Frustration of primary intention?* To read 'required' as meaning 'required by the landlord for his own purposes' would frustrate the primary statutory intention, since, where the landlord sells to a private developer who has got planning permission as 'a potential purchaser', counter-notice could be given under s 24 (1), and the question whether the land should be used for a non-agricultural use would fall for determination afresh, this time before the Agricultural Land Tribunal. Therefore, however much such a construction would be justified by contextual indications (which I cannot, in fact, find), and however requisite such a construction might be to do justice or prevent an anomaly, such a construction would be inadmissible. But merely to read 'required' as meaning 'required by the landlord', would not,

in my view, frustrate the primary statutory intention. There are only three situations which need be considered: first, cases of compulsory acquisition like the instant; secondly, the landlord himself being the developer; and, thirdly, the 'potential purchaser' being the developer. The first situation presents no difficulty; notice to quit is not in fact given, but is purely notional, so that the water board's interpretation only affects the quantum and incidence of compensation and does so in a way to obviate injustice and anomaly. Nor does the second situation (i.e. where the landlord is himself the developer) present any difficulty. The case falls squarely within the words 'required by the landlord', and no counter-notice can be given. Nor does the third case (planning permission obtained by a 'potential purchaser'); the land is required by the landlord—for sale to the 'potential purchaser'. It follows that in none of the three cases would a second hearing of the question of non-agricultural use be involved so that the primary statutory intention will not be frustrated.

It further follows that, in my view, the construction proposed by the water board is the correct one. But, were this not so, I think that they are right on the applicability of the *Pointe Gourde* rule, to which I now turn.

#### *The Pointe Gourde rule*

The status of the rule has not been questioned; the only question has been as to its ambit. It has a long history and high authority. It is most conveniently stated in the case which has lent it the name by which it is now usually known: *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1). In connection with the establishment of a naval base in Trinidad, the Crown compulsorily acquired quarry land owned by the appellant company. The value of the quarry land was increased by the construction of the naval base, which was nearby and required a large quantity of stone. It will be noted that this increased value was due, not to the compulsory acquisition itself, but to the undertaking for the benefit of which the compulsory powers were used. (To apply it to the present case, for 'naval base' read 'reservoir'.) The Privy Council held that the compensation for the quarry land compulsorily acquired should not take into account its increase in value due to the construction of the naval base. LORD MACDERMOTT said:

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the *scheme underlying the acquisition*.'

I venture to draw particular attention to the words I have italicised. It is not merely the effect on value of the acquisition itself which must be discounted, but also the effect on value of the underlying scheme. This is in line with numerous previous statements of the rule: I cite only a few of the many that are available (in all cases the italics are mine). In *Re Gough and Aspatia, Silloth and District Joint Water Board* (2), LORD ALVERSTONE CJ, presiding over the Court of Appeal, cited with approval what had been said, in the judgment appealed from by WRIGHT J.

'there is no value for which compensation ought to be given . . . if the value is created or enhanced simply by the Act or by the *scheme of the promoters*.'

LORD ALVERSTONE CJ added: 'In my opinion that clearly expresses what is the law on the matter'. It will be noted that it is not simply the value created or enhanced by the Act which gave compulsory powers of acquisition which must be discounted,

(1) [1947] AC 565.

(2) 68 JP 229; [1904] 1 KB 417; [1904-7] All ER Rep 726.

but any value created or enhanced by the scheme of the promoters. In *Re South Eastern Ry Co and London County Council's Contract* (1) EVE J, in a judgment affirmed by the Court of Appeal, stated the law as follows, his second, fourth and fifth propositions being the ones of crucial importance:

'the following propositions may, I think, be treated as established by authorities binding on this court: (i) The value to be ascertained is the value to the vendor, not its value to the purchaser; (ii) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (iii) market price is not a conclusive test of real value; (iv) *increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded*; (v) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (vi) the true contractual relations of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified.'

In *Viscount Camrose v Basingstoke Corpn* (2) LORD DENNING MR said:

'you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition.'

All these statements show that you must discount not merely value engendered by the acquisition itself but also value engendered by the scheme underlying or involved. But there is further high authority throwing light on what is meant by 'scheme' in this connection. In *Fraser v Fraserville City* (3) LORD BUCKMASTER said:

'the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, *excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.*'

In *Wilson v Liverpool Corpn* (4) WIDGERY LJ, a learned judge who has had deeper and wider experience of this branch of the law than any who has sat on the Bench, said:

'Whenever land is to be compulsorily acquired, this must be in consequence of some scheme or undertaking or project. Unless there is some scheme or undertaking or project compulsory powers of acquisition will not arise at all, and it would I think be a great mistake if we tended to focus our attention on the word "scheme" as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so-called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition'.

My Lords, if this is, as I believe, a correct statement of the law, it is, in my respectful submission, conclusive of these appeals. It is clear from this cited passage, as well as from the other passages that I have cited, that 'scheme', when used in the authorities in this branch of the law, extends to matters arising before, though connected with,

(1) 79 JP 545; [1915] 2 Ch 252.

(2) 130 JP 368; [1966] 3 All ER 161.

(3) [1917] AC 187.

(4) [1971] 1 All ER 628.



the compulsory purchase. Although what the 'scheme' consists of is a question of fact it is a question which in the instant cases admits of only one answer. The obtaining of planning permission for their reservoir was unquestionably part of the 'scheme or undertaking or project' of reservoir construction, in furtherance of which the water board's compulsory powers of acquisition, too, were exercised. To apply the actual terminology of WIDGERY LJ, the so-called *Pointe Gourde* rule prevents the acquisition of the land in question here being at a price which is inflated by the very project or scheme which gives rise to the acquisition; it therefore prevents the acquisition of these lands being at a price which is inflated by the planning permission which is part of the very project or scheme which gave rise to the acquisition, and, since the compensation payable to the tenant varies inversely with that paid to the landlord, the *Pointe Gourde* rule prevents the acquisition of the former's interest in the land being at a price which is deflated by the planning permission which is part of the very scheme or undertaking or project which gave rise to the acquisition.

Faced with a rule, carefully framed by high authority, which on the face of it applies exactly to the instant appeals, the respondents relied on the pungently expressed dictum of RUSSELL LJ in *Pettitt's case*:

'The *Pointe Gourde* principle . . . I believe to relate not to the ascertainment of what is the interest to be valued, but to the value of the interest when ascertained.'

My Lords, I believe that to attempt so to confine the *Pointe Gourde* rule is at variance with principle, is devoid of authority (indeed, contrary to authority), and is potential of injustice. I have already referred to the injustices; and I do not propose to repeat them.

As for principle, it is wrong to treat the *Pointe Gourde* rule as a fundamental rule standing by itself—as can be seen from EVE J's tabulation in *Re South Eastern Ry Co and London County Council's Contract* (1). On the contrary, it is a subsidiary rule, evolved to ensure that the fundamental rules of compensation are correctly applied where the value of the land acquired is affected by the scheme or undertaking or project underlying the acquisition. The basic rule is thus stated in Cripps on Compulsory Acquisition of Land (11th edn, p 673):

'What the Act gives to the owner compelled to sell is compensation, the right to be put so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to secure a money payment not less than the loss imposed on him in the public interest, but on the other hand no greater.'

The judgment of SCOTT LJ in *Horn v Sunderland Corp'n* (2) is clear authority for this proposition. He said:

'what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public's interest, but, on the other hand no greater.'

In a subsequent passage he said:

'The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public authority or

(1) 79 JP 545; [1915] 2 Ch 252.

(2) 105 JP 223; [1941] 1 All ER 480; [1941] 2 KB 26.

other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss.'

The purpose of the *Pointe Gourde* rule is thus clear. You must not allow the price to be paid for property compulsorily acquired to be inflated by reason of the fact that it is acquired compulsorily under parliamentary powers, because you would then be making the acquiring authority pay, not for the value of the property to the vendor, but for its value to themselves, including the value engendered by the very powers by which they acquired the property. Nowadays, powers by which acquiring authorities take over property compulsorily generally include not merely those of compulsory purchase but also of change of land use by planning permission, and the principle which excludes value engendered by powers of compulsory purchase equally applies to value engendered by planning permission. Moreover, if the price cannot on principle be inflated in this way, neither can it be so deflated. The confinement of the rule in the way contended for by the respondents strikes at the very root of this principle. What your Lordships are concerned with is compensation which will put the interested parties, so far as money can do so, in the position that they would have enjoyed if there had been no scheme requiring the surrender of those interests for an overriding public benefit.

Just how artificial, legalistic and destructive of the fundamental principles on which compensation is assessed it would be to attempt to restrict the *Pointe Gourde* rule in the way contended for by the respondents can be easily seen by accepting their construction of s 24 (2) (b), and then testing the value in the open market of the various interests in the land at various relevant times. Take first the interest of the landlords. It became more valuable as soon as the scheme for the reservoir was adumbrated, albeit that that interest was still a fee simple in reversion to a protected tenancy. It became then more valuable because, precisely from that moment, there arose a potentiality of the instant situation, whereby (ex hypothesi) the landlords would, on receiving notice to treat, be able to give their tenants an effective 12 months' notice to quit. When planning permission was given, the landlords' interest became more valuable still (albeit still in reversion to a protected tenancy), because the potentialities became even more likely to be realised. And still more valuable again, for the same reason, when the Minister made his order; and again when the order came into force. If the landlord had sold at any time during the period, these increases in value, due to the growing imminence of the potential notice to treat, would have been reflected in the market price. It is the market price which prima facie determines the compensation, except in so far as the market price reflects a value generated by the scheme of the acquiring authority. But every increase in value that I have just been considering had been generated by the scheme of the acquiring authority in connection with which compulsory acquisition took place—while the interest of the landlords remained precisely the same (the ownership in fee simple in reversion to a protected tenancy). The notice to treat is only the final step, converting the growing potentiality, which has been reflected in growing value and steadily rising market price, into actuality, whereupon there was yet again an increase in value which would have been reflected in the market price. All these changes in value, all generated by the scheme in connection with which compulsory acquisition took place, must, in accordance with long established principles, be left out of account in assessing compensation.

And while the value of the landlord's interest had been steadily growing during this period, that of the tenant had been decreasing inversely, albeit his interest had remained throughout that of a protected tenant. It has been decreasing for

precisely the same reason that the value of the landlord's interest had been increasing—namely, because the scheme in connection with which compulsory powers of acquisition would be used had been going steadily forward, bringing steadily more imminent the moment of the notice to treat, when (ex hypothesi) the protected tenancy was converted into an annual tenancy which the landlord would be able to give 12 months' notice to quit under s 23 unrestricted by s 24. All this surely shows how artificial, unjust and destructive of its rationale it is to attempt to limit the *Pointe Gourde* rule to the valuation of the interests as ascertained at the meta-physical moment of the notice to treat.

My Lords, not only is the respondents' attempted confinement of the *Pointe Gourde* rule, in my view, contrary to the principle underlying the rule, and oblivious of the necessities which led to its framing; such a confinement is also, I believe, contrary to authority. I have already quoted, from several cases of high authority, formulations of what is now called the *Pointe Gourde* rule which are inconsistent with the contentions for the respondents. I content myself with only two more. In *Re Lucas and Chesterfield Gas and Water Board* (1) FLETCHER MOULTON LJ said:

'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.'

In the instant cases, the inception of the authorisation of the scheme by which the lands were put to public uses was, at latest, the giving of planning permission. As for the equivalent in money to what has been lost, I have already pointed out in an earlier section of this speech that the respondents could never in reality have at their disposal a fee simple in reversion to an annual tenancy, because they were statutorily bound to surrender that interest to the water board at the very moment they acquired it—on the service of the notice to treat.

My last citation, by way of formulation of the *Pointe Gourde* rule is from the opinion of the Privy Council in *Cedar Rapids Manufacturing and Power Co v Lacoste* (2). LORD DUNEDIN said:

'the value . . . is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.'

Among the powers which the water board secured to make the undertaking as a whole a realised possibility was the planning permission. Compensation, said LORD DUNEDIN, must be based on the price which the land would have fetched before obtaining those powers. These lands with which your Lordships are concerned would at that time have fetched only such price as a fee simple in reversion to a statutory tenancy would have commanded.

(1) 72 JP 437; [1909] 1 KB 16; [1908-10] All ER Rep 251.

(2) [1914] AC 569; [1914-15] All ER Rep 571.

Apart from *Pettitt's* case itself, the only authority which remotely supports the limitation of the *Pointe Gourde* rule proposed by the respondents is *Re Morgan and the London and North Western Railway Co* (1). The claimants had granted an underlease of the land in question to the local corporation for the making of a public park. The underlease contained a proviso for re-entry if the land or any part of it should be 'required or taken by a railway or other public company under the power or authority of an Act of Parliament'. (I draw attention to the word 'required', which is the same as that used in s 24 (2) (b).) A railway company acting under powers conferred on them by Act of Parliament gave notice to treat for, and took possession of, part of the land. The claimants did not actually re-enter any part of the land, but they claimed compensation on the basis that they were entitled to do so. It was argued for the railway company that

'the Act of the Company cannot increase the value of the land to the claimants: *Penny v Penny* (2)'.

This was the only authority cited on behalf of the railway company on the point of what would now be called the *Pointe Gourde* rule. The Divisional Court held that compensation should be assessed on the basis that the land was land in hand. I do not think that *Morgan's* case was at all a decision on the *Pointe Gourde* principle; if it were, I would, I confess, find that case difficult to distinguish from the instant cases: on the other hand, on such a basis I would find it even more difficult to distinguish from *Penny v Penny*, which was decided the other way and which was not even referred to in the judgment in *Morgan's* case. *Morgan's* case was decided before the days of protected tenancies, and the common law of contract, which various statutes have since modified in the interest of tenants, gave a perfectly clear answer, even though *Darby* said that he had not arrived at his conclusion without difficulty. The ratio decidendi in my view, is:

'that which was thought possible or probable by the parties, when the claimants granted the underlease . . . , occurred.'

In other words, the parties to the underlease envisaged that the land might be compulsorily acquired, and agreed that in that event the claimants should recover possession, so as to be in a position to claim compensation on that basis (they could not in the circumstances be recovering possession of the land for their own enjoyment). Again,

'the claimants are the only persons who can make a title to the land and can sell the land to the railway company.'

Both these passages are sufficient to distinguish *Morgan's* case from *Pettitt's* case or the instant appeals.

In *Penny v Penny* (2) a testator had a lease of a house in which a family business was carried on. His will provided that two sons should be entitled to occupy the house during the subsistence of the lease 'so long as they may carry on the business therein'. The Metropolitan Board of Works, acting under powers of compulsory acquisition, served notice to treat on the executor/trustee and on the two sons. The notice to treat (or at least the entry thereunder) would preclude the sons from carrying on business in the house. The issue was how the interests of the executor/trustee (plaintiff) and the sons (defendants) should be valued. *PAGE WOOD V-C* by his order declared

(1) [1896] 2 QB 469.

(2) (1868), LR 5 Eq 227.

'that the plaintiff, as executor, is entitled to the leasehold premises, subject to the interest of the defendants . . . that [the defendants] . . . are . . . entitled to hold, use, occupy and enjoy the said leasehold premises, so long as they . . . but for the taking of the same premises by the Metropolitan Board of Works, might have carried on the business therein . . .',

and then proceeded to deal with the valuation accordingly. The learned judge said:

'the plaintiff's interest is not to be treated as having been increased through an act of the Board of Works . . . It is not the interest which has been acquired by the board that has to be estimated, but the value of the interest taken from the person with whom the board deals . . . every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by the public body is not to be thrown into the compensation fund.'

That case is, in my view, on all fours with *Pettitt's* case and with the instant appeals. The sons correspond with Mr Pettitt, Mr Bowie and Mr Bailey. The executor/trustee corresponds with Mr Pettitt's landlord and with the respondents. The Metropolitan Board of Works corresponds with the Minister of Transport and the water board. To translate, PAGE WOOD V-C says and orders that the instant respondents' interests are not to be treated as having been increased through an act of the water board, and he orders that Messrs Pettitt, Bowie and Bailey are to be treated for valuation purposes as entitled to hold, use, occupy and enjoy their respective agricultural holdings as long as they, but for the taking of those holdings by the Minister of Transport or by the water board, might have carried on their farming business therein. I have already pointed out that s 24 (2) (b) does not operate until the two conditions are fulfilled of there having been planning permission for non-agricultural use and the land being 'required' for such use. The lands with which your Lordships are concerned were only 'required' when notice to treat was served, just as the land in *Morgan's* case (1) was only 'required' when notice to treat was given. The alteration of value, consequent on alteration of interest, in all these cases took place on the service of the notice to treat. Such alterations, said PAGE WOOD V-C, in entire consonance with the authorities in this branch of the law and their underlying principle, must be left out of account in assessing compensation.

The only way in which *Morgan's* case can be distinguished from *Penny v Penny* (2) is by regarding the underlease in the former case as containing a provision whereby, on a contemplated compulsory acquisition, the underlessor should enjoy the entire compensation payable to the exclusion of the underlessee—the language of DAY J's judgment justifies such a view of this decision. But it is not, in my view, authority that an alteration of value consequent on an alteration of interest, itself consequent on service of a notice to treat (or any other act of an acquiring authority), may be taken into account in assessing compensation; that would be directly contrary to *Penny v Penny*, which *Morgan's* case did not purport either to disapprove of or to distinguish. *Morgan's* case is, however, useful as throwing light on the meaning of 'required' in connection with acquisition of land, and thus on s 24 (2) (b); it shows that land is 'required' by an acquiring authority on service of the notice to treat—though this is how I should have so construed it independently of any authority. (No different result, however, ensues if the land is taken to be 'required' at the moment of the planning permission or the compulsory purchase order; both are part of 'the scheme or undertaking or project'; and their effect on valuation must be disregarded.)

(1) [1896] 1 QB 469.

(2) (1868), LR 5 Bq 227.



*Conclusion of the main issue*

For the foregoing reasons, in my view, *Pettitt's* case was wrongly decided. I agree with the dissenting judgment of LORD DENNING MR. I would overrule *Pettitt's* case and allow these appeals.

*The special term in the Foottits' lease*

There were a number of reservations in the Foottit/Bowie case. The one that is in question in this part of the appeals is numbered 1 (3) (a) and reads as follows:

'The right pursuant to section 23 (1) of the Agricultural Holdings Act 1948—  
(a) from time to time to resume possession of any part of the said lands and buildings which the landlords may from time to time require for building mining roadmaking or any purposes connected therewith or for any other purpose (not being the use of the land for agriculture) upon giving to the tenant not less than forty-two days' previous notice in writing of such requirement . . .'

The Foottits' claim that this reservation became operative in the circumstances of the present case. The landlords, they say, required to resume possession of part of the demised land pursuant to s 23 (1) of the Agricultural Holdings Act 1949 for a purpose not being the use of the land for agriculture (i.e., construction of a reservoir)—not, it is true, so that they could themselves use the land for such purpose, but so that the water board could do so. It is not to be thought, the argument continues, that the landlords must themselves do the building, mining, roadmaking or reservoir construction; it is enough that they require the land so that those purposes can be carried out. Within the context of the lease the only person who can require the demised land is the landlord. The Foottits should therefore, it is claimed, be compensated on the basis that they had a fee simple in reversion to a lease of 42 days—with the concomitant result that the tenant would be entitled to compensation on the basis that all that he has lost was a 42 day leasehold interest in the demised land.

All my noble and learned friends who heard this appeal are, I understand, agreed that the argument for the Foottits on this part of the case is not valid, and that the appeal must succeed to that extent. I entirely agree. The land was not 'required' by Mr and Mrs Foottit, and certainly not for any purpose contemplated by s 23 (1); it was 'required' by the water board, just as it was 'required' by the water board in the purpose of s 24 (2) (b).

**LORD CROSS OF CHELSEA:** These are appeals by the Rugby Joint Water Board ('the board') against three orders of the Court of Appeal each made on 22nd October 1970 dismissing two appeals by the board and allowing a cross-appeal by the respondents Edward Hall Foottitt and Zoe Ruth Foottit from decisions of the Lands Tribunal given on 27th November 1969.

The facts are as follows. Mr and Mrs Foottit owned a farm of some 132 acres in the parish of Thurlaston in Warwickshire which by a lease dated 12th August 1949 they let for seven years from 25th March 1949 to a Mr Bowie. Clause 1 (3) of that lease was in the following terms:

'The right pursuant to section 23 (1) of the Agricultural Holdings Act 1948—  
(a) from time to time to resume possession of any part of the said lands and buildings which the landlords may from time to time require for building mining roadmaking or any purposes connected therewith or for any other purpose (not being the use of the land for agriculture) upon giving to the tenant not less than forty two days' previous notice in writing of such requirement and allowing to the tenant fair and reasonable compensation either by the substitution of other land for the land so required or by allowing a proportionate

reduction in rent and also making compensation for every crop or preparation for a crop on the land of which the landlords resume possession and (b) from time to time to resume possession of the farm buildings adjacent to the landlords' dwellinghouse included in this demise in the following events (i) If the landlords should desire to occupy them in order to increase the amenities of the landlords' dwellinghouse (ii) If the landlords should desire to vacate their dwellinghouse and dispose of the same with vacant possession (iii) If the landlords should build other farm buildings appropriate to the farm on land hereby demised in which case no reduction of rent in respect of the land so built upon or buildings so surrendered shall be made provided that any such notice by the landlords shall not terminate or entitle the tenant to terminate the tenancy hereby created except in regard to the land of which possession is resumed'.

After the expiry of the lease in 1956 Mr Bowie remained in possession as tenant from year to year.

The respondent Jean Helen Shaw-Fox was tenant for life of a farm of some 216 acres in the parish of Draycote in Warwickshire under a settlement of which her co-respondents, Patrick Hare Vivian Twist and Harold Ashworth Sibley, were trustees with her for the purposes of the Settled Land Act 1925. By a tenancy agreement dated 24th March 1960 Mrs Shaw-Fox let this farm to a Mr Bailey from 25th March 1959 on a tenancy from year to year which was expressed to be determinable by either party on 25th March in any year by 12 months' notice in writing.

On 6th April 1966 the Minister of Housing and Local Government granted the board permission under the Town and Country Planning Act 1962 to construct a water supply reservoir pumping station and ancillary works on land in the parishes of Thurlaston and Draycote which included parts of the farms let to Mr Bowie and Mr Bailey. By para 14 of the Rugby and South Warwickshire Water Order made on 22nd August 1966 by the Minister of Housing and Local Government under powers conferred on him by the Water Acts 1945 and 1948 which came into operation on 7th March 1967 the board was given power to purchase compulsorily such of the lands shown on the deposited plans and described in the deposited book of reference as they might require for the purposes of the construction of the works authorised by the order. On 11th and 14th March 1967 the board, acting under their compulsory powers, gave notices to treat to Mrs Shaw-Fox in respect of 120 of the 216 acres of her farm and to Mr and Mrs Footitt in respect of 129 of the 132 acres of their farm. On 4th October 1968 Mrs Shaw-Fox, Mr Twist and Mr Sibley applied to the Lands Tribunal for the determination by the tribunal of the amount of compensation payable to them as trustees of the relevant settlement in respect of the compulsory acquisition of their interest in the lands to which the notices to treat of 11th March 1967 related and on 7th March 1969 the board applied to the tribunal for the determination of the following preliminary point of law:

'That it may be determined on which of the following bases the interest of the claimants is to be valued: namely (a) that such interest is an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which the claimants had at the date of the notice to treat no right to give an effective notice to quit; or (b) that such interest is an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the claimants were entitled to give an effective notice to quit expiring at Lady Day, 1968.'

On 28th May 1969 Mr and Mrs Footitt made a similar application to the Lands Tribunal in respect of the lands affected by the notice to treat dated 14th March

1967 and on the same day the board applied to the tribunal for the determination of the following preliminary point of law:

'That it may be determined on which of the following bases the interest of the claimants is to be valued, namely: (a) that such interest is an interest in fee simple in agricultural land subject to an agricultural tenancy in respect of which the claimants had at the date of the notice to treat no right to give an effective notice to quit; (b) that such interest is an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the claimants were entitled to give an effective notice to quit expiring in not less than 42 days from the date of such notice as provided in the tenancy agreement dated the 12th August 1949 and made between the claimants of the one part and John George Morrison Bowie of the other part relating to the said land.'

As the preliminary point of law in each case was substantially the same the Lands Tribunal heard both cases together on 27th November 1969.

Under s 7 of the Compulsory Purchase Act 1965 which was the provision applicable to this case the tribunal, in assessing the compensation to be paid by the board, has to have regard, inter alia, to the value of the land to be purchased. In a case such as this where the land is subject to a tenancy what the tribunal must have regard to in assessing the compensation to be paid to the freeholder must be the value of his interest in the land—namely, the fee simple in reversion on the tenancy—and in order to value that it is obviously necessary to know the incidents of the tenancy and in particular its length. To discover that one has to consider not only the tenancy agreement but some provisions of the Agricultural Holdings Act 1948. By s 1 of the Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy and 'agricultural land' means land used for agriculture which is so used for the purpose of a trade or business. The following provisions in ss 23, 24 and 31 of the Act are particularly relevant to this case:

'23. (1) A notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy: Provided that this section shall not apply . . . (b) to a notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the use of the land for agriculture . . .

'24. (1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Minister [now the Agricultural Land Tribunal] consents to the operation thereof.

'(2) The foregoing subsection shall not apply where . . . (b) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise than by virtue of any provision of those enactments) such permission is not required, and that fact is stated in the notice . . .

'31. (1) A notice to quit part of an agricultural holding held on a tenancy from year to year given by the landlord of the holding shall not be invalid on the

ground that it relates to part only of the holding if it is given for the purpose of adjusting the boundaries between agricultural units or amalgamating agricultural units or parts thereof or with a view to the use of the land to which the notice relates for any of the objects mentioned in the following subsection, and the notice states that it is given for the said purpose or with a view to any such use as aforesaid, as the case may be.

'(2) The objects referred to in the foregoing subsection are the following, namely ... (g) the making of a watercourse or reservoir ...'

The question which arises is, of course, whether the reversionary interests of these landlords were at the dates of the respective notices to treat subject to tenancies which the landlords could determine on 12 months' notice without the consent of the Agricultural Land Tribunal or to tenancies in respect of which the tenants enjoyed statutory protection. This question came before the Court of Appeal in the case of *Minister of Transport v Pettitt* (1) in relation to the valuation of the interest of a tenant. Mr Pettitt was tenant from year to year of a 58 acre farm. In 1962 the Minister in pursuance of a compulsory purchase order gave notice to treat and enter in respect of seven acres needed for the construction of a motorway. The Minister contended before the tribunal that Mr Pettitt's interest should be regarded as an interest for a period ending with the date on which a notice to quit given by his landlord at the time of the notice to treat would have expired, i.e. Lady Day 1964. The tribunal rejected that contention and held that the interest must be valued on the footing that the tenant had the security of tenure afforded by the Agricultural Holdings Act 1948, s 24 (1). On appeal by the Minister the Court of Appeal (RUSSELL and WINN LJ, LORD DENNING MR dissenting) reversed the decision of the tribunal on this point. It appears not to have been argued in that case that as a matter of construction of the Act the landlord would not have served notices to quit since the land was not required for non-agricultural use by him or by anyone who could claim under him but by a public authority exercising compulsory powers. The ground on which LORD DENNING MR dissented was that the Minister was contending that the compensation payable to the tenant should be decreased by the existence of the motorway scheme which gave the landlord the right to serve a notice to quit and that such a contention was precluded by the principle illustrated by the Privy Council decision in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendant of Crown Lands* (2).

In his decision given on 27th November 1969 Sir Michael Rowe QC held that the decision in *Pettitt's* case covered the *Shaw-Fox* case and the main point raised in the *Footitt* case. There was, however, a subsidiary point raised in that case—namely, whether the compensation should be assessed on the footing that the landlords could have served a six weeks' notice under cl 1 (3) (a) of the lease. The tribunal decided that point against the landlords and held that in each case the interest to be valued was an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the claimant was entitled to give an effective notice to quit on Lady Day 1968.

The board appealed from that decision to the Court of Appeal and the *Footitts* cross-appealed on the question of the length of notice which they could have given. On the board's appeal what may be called the *Pointe Gourde* point was covered by the previous decision of the court in the *Pettitt* case. Counsel for the board, however, argued the point which had not been argued for the acquiring authority in that case—namely, that on the true construction of the Act the landlords could not have served notices to quit which did not require the consent of the Minister. The Court of Appeal

(1) (1968), 67 LGR 449.

(2) [1947] AC 565.

rejected that argument. On the cross-appeal, however, the court held, although CAIRNS LJ felt grave doubts on the point that cl 1 (3) (a) of the lease applied and that in that case compensation must be assessed on the basis that only a six-weeks' notice would have been needed.

It is at first sight puzzling that the answer to the question which arose in *Pettitt's* case and has arisen in this case should concern the acquiring authority at all. One would think that the aggregate of the sums to be paid by it to landlord and tenant for their respective interests in the land would be the same whether the tenant had only a tenancy determinable on six months' notice or had a tenancy enjoying statutory protection. The cake provided by the authority would be the same although in the former case the tenant would get a smaller and in the latter a larger share of it. We were told, however, that in practice as a matter of valuation the aggregate of the sums payable to landlord and tenant would almost certainly not be the same in each case. It would not, that is to say, follow that because, as has been agreed in the *Shaw-Fox* case, the landlord's interest will be worth £12,000 more if a six months' notice could have been given, the interest of the tenant would be worth £12,000 more if he had statutory protection. Again a further—and probably more important—reason for the concern of the acquiring authority in the question is that the compensation to be paid to landlord and tenant respectively is not determined at the same time in proceedings or negotiations to which both are parties but is fixed separately. Thus we were told that in this case the board had by agreement with the tenants acquired their interests on the basis now laid down by s 42 of the Agriculture (Miscellaneous Provisions) Act 1968—although that section did not in fact apply here. Under that section the interest of the tenant must now be valued on the footing that he had no statutory protection, but although it has acquired the interest of the tenant on the basis that it was unprotected—that is to say that the *Pettitt* decision was right—the board says as against the landlord that the *Pettitt* decision was wrong and that the landlord's interest must be valued as though the tenant had statutory protection. If they succeed in this appeal it must follow—as indeed counsel for the board readily conceded—that an acquiring authority will pay substantially less for land subject to an agricultural tenancy than for identical land which is being farmed by an owner in fee simple.

I turn now to consider the question of construction of the relevant provisions of the Agricultural Holdings Act 1948. It could not, of course, be suggested that s 24 (2) and s 31 (1) only apply when the landlord is proposing himself to put the land in question to some non-agricultural use. They must obviously also apply to the common case where the landlord is in negotiation with a developer with the necessary planning permission and proposes to sell or let the land to him with vacant possession when he has got rid of the tenant. What was submitted on behalf of the board was that, although it is true that the land was 'required' by them for a reservoir, the use of the words 'on the ground that' in s 24 (2) and 'with a view to' in s 31 (1) showed that they only applied to notices to quit the giving of which was necessary in order to enable the intended non-agricultural use to be achieved and that they did not apply to a case like this where the board was serving independent notices to treat on the tenants and could get possession of the land needed without any action by the landlord. In support of his submission counsel referred to several other sections in the Act. One of them—s 25 (1) (e)—does not appear to me to throw any light on the problem. But ss 33 and 60, each of which provides, inter alia, that certain consequences shall ensue if the landlord 'resumes possession' of part of the holding by virtue of s 31 (1), certainly tend to support counsel's argument.

In all probability the draftsman of the 1948 Act had not this particular problem in mind at all and it is this fact that makes the question of construction to my mind a difficult one. There is, as I see it, nothing in s 24 (2) itself which supports the argument



of the board. When once the board had obtained planning permission the landlord could, as I see it, properly say that he was serving the notice 'on the ground that' (ie 'because') the board required to use the land as a reservoir even though the serving of the notice would not itself be necessary for that result to be achieved. But ss 24 (2) and 31 (1) must be read so as to be consistent with one another and the use of the words 'with a view to'—not 'in view of'—in s 31 (1) certainly suggests that the serving of the notice is necessary to the achievement of the non-agricultural use and this reading receives some support from ss 33 and 60—although, of course, the landlord will on any footing normally resume possession after the service of a notice under s 31 (1) and one cannot deduce from those sections that he must always do so. So, as I see it, some strain has to be put either on the wording of s 24 (2) or on the wording of s 31 (1) in order to produce consistency between them in circumstances unforeseen by the draftsman. I ask myself then which reading produces the fairest and most reasonable result. I have no doubt that it is the reading favoured by the landlord. The general scheme of the Act is that the tenant is to have statutory protection so long as the land is being used as agricultural land but that if it is no longer to be so used the parties once more have the rights given them by the common law as modified by the tenancy agreement. If the landlord can serve an effective notice to quit when a private developer to whom he is willing to sell the land obtains planning permission why should he not be entitled to serve a similar notice when a public authority who can and probably will invoke compulsory powers obtains planning permission? As counsel for the landlords pointed out one can readily envisage a case where the authority after serving a notice to treat on the landlord enters into an agreement with him for the acquisition of the land which provides for the landlord getting rid of the tenant by serving the necessary notice to quit. In such a case there could be no doubt that the landlord could serve effective notice under ss 24 (2) and 31(1). It would be truly remarkable if his ability to serve effective notices depended on whether or not the authority was going to serve a notice to treat on the tenant as well as on the landlord. For these reasons I think that the Court of Appeal<sup>3</sup> was right to reject the board's arguments on the construction of the Act.

I turn now to the argument founded on the so-called *Pointe Gourde* principle. The earliest reported statements of that principle are, it appears, to be found in the judgments of GROVE and STEPHEN JJ in the case of *Re Countess Ossalinsky and Manchester Corp'n* decided in 1883 and reported under the heading 'Special Adaptability' in an appendix to Browne and Allan's *Law of Compensation* (1). The principle, as there stated, amounts, as I understand it, to this. You may take into consideration in assessing compensation any likelihood that the land in question—by reason of its situation or physical features—would in the natural course of events come to be required for some purpose which would give it a greater value than it has at present simply as agricultural land. But you must remember that what you are concerned with is the value of the land to the owner not its value to the acquiring authority. Consequently you must not take into account the special need for the land which the authority has and which moved it to obtain compulsory powers. That would be in effect to make it pay for those powers.

The facts in the *Pointe Gourde* case itself were that the Crown had compulsorily acquired certain lands owned by the company so that they could be used by the United States authorities in connection with the establishment of a naval base in Trinidad. On part of the land there was a large quantity of limestone which before the acquisition the company had quarried and sold. The compensation tribunal found (i) that the land had a special suitability or adaptability for the purpose of producing and marketing quarry products and had a market value as quarry land

(1) (1883), Browne and Allan's *Law of Compensation* (2nd edn, 1903), p 659.

prior to the date of acquisition and (ii) that the United States had a special need of a large quantity of stone for the construction of the naval base, and so, over and above the special adaptability of the land referred to in (i), its proximity to the base made it specially suited to the United States' special needs. The tribunal awarded \$15,000 compensation to cover the matters set out in (ii) but the Privy Council held that that item of compensation must be disallowed because it was well settled that compensation for the compulsory acquisition of land should not include an increase in value which was entirely due to the scheme underlying the acquisition. That decision appears to me to be entirely in accord with and not to be in any way an extension of the principle as stated in the *Ossalinsky* case. Counsel for the board referred us to a number of other cases, some decided before and others after the *Pointe Gourde* case, in which the principle has been applied, but, although the language used by the judges is not always exactly the same, I cannot for myself see that the principle has with the passage of time become any wider than it was in 1883. The way in which counsel sought to invoke the principle in this case was as follows.

'The obtaining of planning permission was a necessary part of the board's scheme for the construction of a reservoir; but for the obtaining of the planning permission the landlord would not have been able to serve an effective notice to quit; to give him anything in respect of his ability to serve such a notice could be to compensate him for an increase in value which is due to the scheme.'

To my mind that train of reasoning confuses the nature of the landlord's interest with its value. No one suggests that the sum of £27,200 which it is agreed is the value of the Shaw-Fox reversion if the landlord could serve an effective notice contains any element which infringes the *Pointe Gourde* principle. That principle is being invoked here in order to induce the court to say that the landlord's interest in the land—which is what has to be valued under s 7 of the 1965 Act—is not what in truth it was, if the board are wrong on construction, but something quite different. As RUSSELL LJ said in the *Pettitt* case, the *Pointe Gourde* principle as hitherto understood does not affect the ascertainment of the interest to be valued but only its value when ascertained. To accede to the board's submission on this point would involve an extension of the principle to which I would hesitate to agree, even if it seemed desirable in order to achieve justice between the parties, but for the reasons which I have already given on the construction point I do not think that there would be any injustice to the tenant—let alone that there would be any injustice to the board—in allowing the landlord to be paid the value of the reversion assessed on the footing that he could serve an effective notice to quit.

It remains to consider the subsidiary question whether the Footitts could at the date of the notice to treat served on them have served a six weeks' notice to quit on their tenant under s 23 (1) of the 1948 Act. The answer to that question depends on the construction of cl 1 (3) of the lease of 12th August 1949 which came to form one of the terms of the annual tenancy on which the tenant held over after the expiry of that lease. That clause which must be construed contra proferentem appears to me to envisage a notice given to enable the landlord to resume possession of land of which he requires possession so that it may be put to a non-agricultural use either by him or by someone whom he puts into possession of it. I do not think that the Footitts could have invoked it in the circumstances subsisting when the notice to treat was served on them. On that minor point, therefore, I think that the decision of the Lands Tribunal was right and the doubts of CAIRNS LJ justified and I would allow that appeal. But I would dismiss the two main appeals.

*Appeals dismissed. Cross-appeal allowed.*

Solicitors: Burton, Yeates & Hart; Gregory, Rowcliffe & Co.

Reported by G F L Bridgman, Esq, Barrister.

CHANCERY DIVISION

(MEGARRY, J)

6th, 7th, 8th October, 1971

THORNE RURAL DISTRICT COUNCIL v BUNTING

*Local Authority—Declaration—Registration by defendant of claims to properties under Commons Registration Act, 1965—Declarations sought by authority that defendants' claims not valid—Jurisdiction of court.*

The defendant who was the owner of a dwelling-house within the plaintiff council's rural district, registered under the Commons Registration Act, 1965, claims relating to various properties within the rural district. On the ground that the defendant's claims inhibited the potential development of land in the district, the plaintiff council sought declarations that the defendant had no such valid claims. On a preliminary point the question arose whether the council had any locus standi as plaintiffs in respect of any of the properties save one, namely, a road, which was the only property owned by the council.

HELD: the council did not have a substantial interest so as to justify it in claiming a declaration in respect of land which it did not own, and, therefore it had no locus standi to bring proceedings except in respect of the road.

PRELIMINARY POINT OF LAW submitted by the defendant, William Bunting, who contended that the plaintiffs, Thorne Rural District Council, had no locus standi entitling them to bring against him the present action in which they sought declarations that the defendant had no right to claims he had registered under the Commons Registration Act, 1965.

*Jeremiah Harman QC and Ian McCulloch for the plaintiff council.  
A J Balcombe QC and J R MacDonald for the defendant.*

**MEGARRY J:** I have before me an action and a motion by the plaintiff council. In the action, a preliminary point of law has arisen. The plaintiff council is a rural district council in Yorkshire. The defendant is a resident in the rural district in which he owns a house which has an area of somewhat less than 200 square yards. Originally there were three defendants, but the other two have now disappeared from the proceedings. The area of the rural district, I may say, substantially coincides with the ancient manor of Hatfield.

The defendant has registered various claims under the Commons Registration Act 1965 in respect of the whole area of the rural district. The claims are for a variety of rights of piscary, venary and aucupary, and a variety of profits in the soil together with a profit of pasture for 1,000 cattle. The plaintiff council claims declarations that the defendant has no such rights and also four injunctions, one of them restraining the defendant from exercising such rights, and three of them for mandatory orders requiring the defendant to remove or amend or procure the removal or amendment of various registrations that he has effected under the Act. By the motion the plaintiff council seeks the four injunctions. I may say that the claim to the rights apparently depends on such matters as an agreement between Charles I and one Cornelius Vermuyden in 1626, a contract of 1628, a decree and award of the Court of Exchequer in 1630, an Enclosure Act of 1811, and an Enclosure Award of 1825, as well as immemorial user. Doubtless there is much interesting historical matter to be explored. Many objections have been made to the registration of these various common rights, amounting, I understand, to nearly 900, and I have been told that considerable local feeling has been aroused. A main complaint

of the plaintiff council is that the defendant's claims have discouraged prospective developers from developing any land in the rural district.

The genesis of the preliminary point now before me is as follows. At the end of last week, with the motions facing him, the defendant requested the county council to cancel the registration for roughly half of the land in question. I understand that his applications for cancellation are not all complete, but that those remaining are in the course of being made. Under s 5 (5) of the Act the county council as the registration authority under the Act has a discretionary power on such an application to cancel or modify the registration. I shall refer to the area in respect of which, on the assumption that all the applications for cancellation are granted, there will remain an application by the defendant for registration as the 'blue land' from the hatching on a plan with which I have been supplied. The blue land excludes nearly all the land in the rural district which is owned by the plaintiff council and nearly all the land in the rural district in respect of which there are present prospects of development. The blue land also excludes a large number of small islands of land on which stand residences owned by others. The blue land still includes, however, a road owned by the plaintiff council called Broadbent Gate Moor Road, which I shall refer to simply as 'the road'.

With these two qualifications the plaintiff council has now achieved the major part of its objective, in that, subject to the county council cancelling the registrations the discouraging effect of registration has been removed from nearly all the land with prospects of development as well as from nearly all the plaintiff council's own land. Furthermore, the reduction of the defendant's area of claim to the blue land will meet the objections in all the 900 or so cases, save some 19, and of these 19 objections I understand that five are by the registration authority, the county council. In view of this substantial change, the question that arises is what course this action should now take.

At the opening of the case there was some argument on the relationship of these proceedings to the 1965 Act. This Act provides special machinery for the working out of claims to commons by commons commissioners who are to be appointed, there being an appeal on points of law to the High Court by way of Case Stated. The bulk of the Act came into force at the beginning of 1967, and the provisions as to the commons commissioners and appeals to the High Court on 1st January 1970. Unfortunately, even though a year and three-quarters has elapsed since these provisions came into force, no commons commissioners have yet been appointed, and the Act is accordingly not yet in full operation. In *Booker v James* (1) PENNYCUICK J had to deal with the position before 1970, and, by a narrow margin, in *Trafford v Ashby* (2) I had to do the interim period. In *Booker v James* PENNYCUICK J said:

'On the face of the Act the jurisdiction to determine the issue whether or not a particular piece of land is a common is entrusted to commons commissioners. It is plainly the intention of the Act to exclude the jurisdiction of the court, at any rate, in any ordinary case. The question may arise in future whether the court possesses some residual jurisdiction; for instance, to deal with cases where the registration, on the face of it, represents an abuse of the right of registration conferred by the Act.'

To that statement I ventured to lodge a caveat, saying in *Trafford v Ashby*:

'it seems quite plain that the Act of 1965 has provided appropriate machinery for settling disputes. It may well be that this is intended to be the

(1) (1968), 112 Sol Jo 421.

(2) (1969), 21 P & CR 293.

normal procedure. The remedy by making a declaration is, like that of an injunction, a discretionary remedy, and so the courts may often reach the conclusion that a matter would be more appropriately dealt with under the special machinery of the Act than by the general remedy of making a declaration and granting an injunction. Be that as it may, I cannot, for my part, at present see what there is in the Act of 1965 which so plainly excludes the jurisdiction of the courts that the remedy by way of declaration and injunction is taken away. The matter, in other words, seems to me to be one not of jurisdiction but of discretion. However, the matter has not been fully argued out in contested proceedings, and I wish to make it plain that I am doing no more than I professed to do at the outset, namely, lodge a caveat.'

Whichever of these views is right there seem to be obvious advantages in leaving all ordinary cases of dispute to the special procedure under the Act with the courts exercising jurisdiction only in cases where there would otherwise be some failure of justice. However, having regard to the fact that no commons commissioners have yet been appointed, I feel no doubt that even if (contrary to my provisional view) the matter is one of jurisdiction and not merely of discretion, the court retains sufficient jurisdiction to deal with the point that I have to decide. For today, counsel on both sides turned to a preliminary point of law which, by common consent, they wished to have argued and decided first, and in the event I did not think it right to refuse their request.

The point of law, as stated under RSC Ord 33, r 3, is in substance whether or not, in the events which have happened, the plaintiff council have any locus standi as plaintiffs before this court, save and except as to the road. On this, I have heard considerable argument, and I have had cited to me *Dyson v A-G* (1), *Guaranty Trust Co of New York v Hannay & Co* (2); *Anisimic Ltd v Foreign Compensation Commission* (3) and a number of passages from a textbook and the notes in the Supreme Court Practice to RSC Ord 15, r 16. In addition, during the argument yesterday, counsel for the defendant cited certain authorities to show that on the facts of this case the plaintiff council had no cause of action. Today, however, on the authorities that I have mentioned he accepted the contention that in proceedings for a declaration it is not necessary to show that there is a cause of action in the ordinary sense of the word. He contended, however, that this did not mean that anybody could sue for a declaration, however little real connection he might have with the subject-matter of dispute. The plaintiff, he said, must have a substantial interest recognised by the law. In the *Dyson* case the bone of connection was a form which had to be completed under threat of a penalty while in the *Anisimic* case, it was the disallowance of a claim to compensation.

In the present case counsel for the plaintiff council has pointed out the various matters which, he says, constitute a sufficient interest for the plaintiff council to support its claim to the declarations sought. First, he said that the plaintiff council was concerned in a financial way, in that the rateable value of properties in its area might well be affected by the existence or non-existence of the various claims to rights of common. Secondly, he pointed to the plaintiff council's delegated powers under the planning legislation, and said that the council was affected in that sense in a very real way. Thirdly, he pointed to the 1965 Act, and said (as was accepted by counsel for the defendant) that there was no limitation placed by the Act on the persons who might lodge objections to any claim to rights of common. He subsumed these three claims under the general head of an interest in the rural district and in its good

(1) [1911] 1 KB 410.

(2) [1915] 2 KB 536; [1914, 1915] All ER Rep 24.

(3) [1969] 1 All ER 208; [1969] 2 AC 147.



government, a head which is plainly capable of comprising other matters than the three specific heads that he put forward, though no doubt those were the most important.

It seems to me that these are somewhat shadowy interests to support the claim made for the declarations, and it was not suggested that the claims for injunctions could be in any better case. What is here in question is a series of declarations relating to the existence of rights of common over land owned by others. I leave on one side the road which is owned by the plaintiff council. In the whole of the rest of the blue land it is accepted that the plaintiff council has no proprietary interest, and can rely only on those interests put forward on its behalf by their counsel.

I accept that the remedy by way of declaration is wide and flexible, and that in recent years the tendency of the courts towards width and flexibility has, if anything, been accentuated. The remedy is, indeed, a valuable servant. But there must be some limit. For myself, I am at a loss to see why a local authority should be entitled to litigate a claim by A to rights of common over B's land by suing A for a declaration when B, who is the person most closely affected, is not even a party to the proceedings. If the local authority loses, why should B have his land incumbered by the consequent strengthening or apparent strengthening of an adverse claim over it which he might well have been able to defeat had he taken part in the proceedings? If the local authority wins, why should B have any consequent improvement of the value of his land effected at the ratepayers' expense? Why should A be vexed by litigation over his claim if B, the landowner, has no intention of resisting it, just because the local authority decides that it wishes to litigate the point? Further, even if the local authority is indirectly concerned with the existence or otherwise of the rights of common, and the matter is one of consequent financial interest to that authority, I do not see that this indirect concern amounts to such a substantial interest as to justify the authority in making a claim for a declaration.

In *Guaranty Trust Co of New York v Hannay & Co* (1) PICKFORD LJ discussed what is now RSC Ord 15, r 16, and said:

'I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions.'

BANKES LJ said, speaking of the rule:

'It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the in court exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors I think the rule should receive as liberal a construction as possible.'

(1) [1915] 2 KB 536; [1914, 1915] All ER Rep 24.

Construing the rule as liberally as one may, it seems to me that what the plaintiff council is seeking in this case is not in any real sense of the word 'relief', that is, something which will relieve the council from any real liability or disadvantage or difficulty which affects the council. In my judgment, the council's complaint is too indirect and insubstantial to justify proceedings for a declaration relating to land in which they have no proprietary interest. I also bear in mind that the making of the declaration is a discretionary remedy; there may be other cases where on other facts there is a more substantial reason for a local authority to claim a declaration in respect of land in their area not owned by the authority. But, accepting to the full for the purposes of this argument the points that have been put forward by counsel for the plaintiff council, it seems to me there are no sufficient grounds to support the claim for a declaration save in relation to the road. Accordingly, I answer the point of law that has been submitted for decision by holding that in the events which have occurred the plaintiff council has no locus standi to sue for the declarations sought save in respect of the road.

There has been some considerable argument about the ambit of s 276 of the Local Government Act 1933. I do not think I need go into that, save to say that on the facts of this case it does not seem to me to assist the plaintiff council.

*Order accordingly.*

Solicitors: Holloway, Blount & Duke, for Kenyon, Son & Craddock, Doncaster; Stileman Neale & Topping, for JJ Pearlman, Leeds.

Reported by Philippa Price, Barrister.

### CHANCERY DIVISION

(PENNYCUICK, V-C)

22nd, 25th, 26th, 27th October, 1971

**BIRMINGHAM CORPORATION v PERRY BAR STADIUM LTD AND ANOTHER**

*Market—Statutory monopoly—Injunction to restrain unlicensed person holding market—Birmingham Corporation (Consolidation) Act, 1883, s 89.*

In 1824 the city of Birmingham's Board of Street Commissioners was empowered to hold a market and collect tolls by a transfer to the commissioners of that right which had been granted by Royal Charter in 1154 to the lord of the manor. Under the provisions of an Improvement Act in 1851, the board's powers were transferred to the Birmingham City Council which had come into being following the grant of a municipal charter in 1838. Under the Birmingham Corporation (Consolidation) Act, 1883, the corporation being by s. 89 thereof empowered to continue holding the market and to establish such other markets as they thought fit, set up various new markets within their area and licensed certain persons to hold markets in return for fees. In October, 1971, the second defendants held a market on the first defendant's land under a licence granted by the first defendants for that purpose. On a motion by the corporation for an injunction to restrain the defendants from holding the market, the corporation contended that they had a monopoly to hold markets within the city limits.

**Held:** the provisions of the Birmingham Corporation Act, 1883, s 89, plainly pointed to a statutory monopoly vested in the corporation, and, having regard to all the circumstances of the case, the balance of justice and convenience required that an injunction should be granted.

MOTION by Birmingham Corporation, for an interlocutory injunction pending action to restrain the first defendant, Perry Barr Stadium Ltd, and the second defendant, Nigel Maby, who had been granted a licence by the first defendant, from holding a market within the city.

*J R Reid* for the plaintiff corporation.

*H Brooke* for the first defendant.

*D R M Henry* for the second defendant.

**PENNYCUICK V-C:** I have before me a motion on the part of the plaintiff corporation whereby it seeks an injunction to restrain both defendants pending the hearing of the action or further order from holding a market at Perry Barr, Stadium, Birmingham, on Sundays in any week, or otherwise using or permitting to be used any portion of their property in such a manner as to interfere with or prejudicially affect the market rights of the plaintiff corporation in the city of Birmingham. The plaintiff corporation claims to possess a monopoly right to hold a market in the city of Birmingham. The first defendant owns a property known as Perry Barr Stadium, at Perry Barr, now in the city of Birmingham. The first defendant has granted a licence to the second defendant to hold a market in Perry Barr Stadium on Sundays. The second defendant held his market for the first time on Sunday, Oct. 17, 1961, after protest on the part of the corporation. On 20th October the corporation commenced these proceedings and gave notice of motion. The motion was stood over and the second defendant held a market again on 24th October.

The market is of a mixed character and of very considerable extent. It appears that about 200 traders were present selling their goods in the market from stalls or otherwise, and on the first Sunday there were over 15,000 persons in the stadium. It is right to say that, on uncontradicted evidence from the defendants the market was well conducted and no complaint is made under that head. The first defendant, the owner of the property, adopted what I may call a neutral attitude. It has merely granted a licence and it does not seek to do anything in contravention of the plaintiff corporation's rights if established. For all practical purposes, the issue is now between the plaintiff corporation and the second defendant. I should mention that the second defendant also operates a Sunday market in other towns.

The evidence on matters of fact is quite short, and nothing turns on it. Mr Griffiths, a deputy general manager employed by Birmingham Corpn, gives an account of what took place and what he saw on Oct. 17.

'On the car park of the Stadium I observed a concourse of buyers and sellers. This concourse had the appearance of constituting a market. There were approximately 200 traders selling goods from vehicles, open and covered stalls, and spaces on the ground. A number of the stall-holders were known to me as persons having stalls in the retail markets run by the city of Birmingham. The points of sale were arranged in rows, so that there were avenues for pedestrian flow. The goods offered for sale included fruit, vegetables, eggs, groceries, hot-dogs, beverages, knitwear, dresses, shoes, carpets and crockery. The general public had free access to the site and a very considerable number of people were present.'

Then there is evidence on the part of the second defendant that he conducts markets elsewhere, and as I have said there is no suggestion that this market is not properly conducted. The real question on the notice of motion is, I think, almost wholly one of law.

I will read the first few paragraphs from the affidavit sworn on behalf of the plaintiff corporation by Mr Pitt, a solicitor employed in the corporation town clerk's department. He says:

'By a charter of Henry II in 1154 Peter de Birmingham was granted a market. In 1824 the right to hold the market and to collect the market tolls was transferred to the Board of Street Commissioners in the city of Birmingham by the then lord of the manor . . . . Following the Municipal Corporation Act 1835, a municipal charter was granted to the city of Birmingham in 1838, and by an Improvement Act of 1851 the powers and rights of the Street Commissioners were transferred to the council. By section 89 of the Birmingham Corporation (Consolidation) Act, 1883, the corporation were and are empowered to continue the pre-existing markets and to establish such other markets as they may think fit. There are at present three existing wholesale markets and one retail market established in the city under the franchise of market of 1154 and the powers contained in the Act of 1883. In addition there are two new retail markets established under Part III of the Food and Drugs Act, 1955.'

He refers to certain Acts concerning Sunday trading, which I do not intend to read, and then to the correspondence with the defendants' solicitors concerning their proposal to open this market. In an affidavit in reply Mr Pitt says:

'... The [plaintiff corporation] in addition to the various markets they run, license seven markets within the city of Birmingham. For the privilege of being allowed to run these markets, the proprietors pay licence fees. If it appears that [the second defendant] can hold a market unlicensed, the [plaintiff corporation's] licence fees from these licensed markets will be endangered. This is particularly important at the moment when negotiations are under way but have not been concluded for the grant of a licence for a market to be held at Corporation Square, Bull Street, Birmingham. The fees payable in respect of licences to hold markets are considerable and in the case of some of the licences payment is calculated by reference to the turnover of the market.'

Then there is produced a copy of a typical licence agreement. Later on, he says:

'... the [plaintiff corporation's] loss stems not only from the fall in trade at their existing markets, but also from the damage to the value of their franchise, the decrease in turnover at their licensed markets, and the loss of the opportunity to collect the tolls to which they are entitled.'

I shall refer in a moment to the Birmingham Corporation (Consolidation) Act 1883. Before doing so, I should mention that, at the date of that Act, Perry Barr was not included in the city; it was so included by the Birmingham Extension Act 1927. Section 16 of that Act provides:

'Subject to the provisions of this Act the unrepealed provisions of the local Acts and of any other local Act (including any local Act passed or to be passed during the present session of Parliament) or of any other provisional order duly confirmed by Parliament and affecting the existing city or the corporation as the same respectively are in force within the existing city on the appointed day shall extend and apply to the city and any reference therein to the existing city and the corporation shall be deemed to refer to the city and the corporation thereof.'

The city is the extended city, and no point is taken on the fact that Perry Barr was not part of the city in 1883.

Section 89 of the 1883 Act provides as follows, so far as now material:

'The market undertaking of the corporation as it exists at the commencement of this Act including all property rights powers and privileges of the corporation in relation to markets and fairs shall continue vested in and may be held exercised and enjoyed by the corporation subject to the provisions of this Act and the corporation shall have the following powers (namely): ... (ii.) They may continue and from time to time provide market places and market houses for the sale of marketable articles and places for fairs with offices approaches and conveniences; (iii.) They may continue the market and fairs held at the commencement of this Act and may from time to time alter the days on which and the places at which the same respectively are or may be held and may establish and hold new markets and cattle fairs but not within the parish of Edgbaston ...'

Section 89 contemplates the existence at the commencement of the Act of the market undertaking and provides that all property, rights, powers and privileges shall continue to be vested in and may be held, exercised and enjoyed by the corporation. On this motion, however, the plaintiff corporation has adduced no evidence as to the nature of the existing rights and powers, and counsel for the plaintiff corporation very properly accepted that, for the purpose of this motion, he must rely on the powers expressly conferred by s 89 itself, those powers supplementing whatever rights and powers the plaintiff corporation already possessed, which latter rights and powers are not in evidence on the motion. It seems to me that s 89, and in particular paras (ii) and (iii) which I have read, plainly points to a statutory monopoly vested in the plaintiff corporation, the nature of the monopoly being the holding of markets within the boundary of the city. A monopoly of this kind created by statute differs only in name from a monopoly of the same kind created by charter, the latter being referred to as a franchise. On this point, I have been referred to *Birmingham Corpn v Foster* (1), where ROMER J said:

'I think that the plaintiffs in this case are entitled to an injunction. I shall assume in this case that, in accordance with the principle laid down in the case of *Manchester Corpn v Lyons* (2) ... the plaintiffs here must, in respect of their market, rely upon their statutory market rights, and not rely upon any special privileges or rights, if there were any, attached to the old manorial market which has been referred to. But, under the statute, the plaintiffs have undoubtedly market rights. They alone have the right to establish a market ...'

That is a statement concerning this particular corporation and is directly in point here.

I was also referred to what was said by SARGANT J in the case of *Hailsham Cattle Market Co v Tolman* (3):

'On these facts I have no doubt that, had the plaintiffs' market been an ordinary or normal charter market, the monopoly incident to such a market would have entitled them to complain of, and succeed in restraining, the defendant's proceedings. (See for instance *Elwes v Payne* (4).) And the case of *Birmingham Corporation v Foster* (1) is an authority, were one needed, that the owners of a statutory market are in as favourable a position in this respect, apart from any express or implied provisions in the statute to the contrary.'

(1) (1894), 70 LT 371.

(2) (1882), 22 ChD 287; [1881-85] All ER Rep 1090.

(3) [1915] 1 Ch 360; affd. CA [1915] 2 Ch 1.

(4) (1879), 12 ChD 468.



The judge decided the particular case against the owner of the monopoly on a ground not now in point, and his decision was affirmed by the Court of Appeal.

Before leaving this point, I would refer to 25 Halsbury's Laws (3rd edn.) para 788, where, after enumerating the existing types of market, it is said, under the heading of 'Disturbance':

'The owner of a market or fair is entitled to protection from disturbance, and disturbance may consist in any unjustifiable interference with the owner's exclusive right to hold his market or fair and take the profits thereof.'

A monopoly right created by statute may, of course, be cut down, either expressly or by implication, by other provisions in the relevant statute. For an instance of such cutting down by implication, see the case of *Abergavenny Improvement Comrs v Straker* (1) But I am unable to find any provision in this Act either expressly or by implication cutting down the monopoly rights and powers conferred by s 89 on the plaintiff corporation.

Section 90 contains certain penal provisions on any person—I summarise it—who sells within the borough except in some market or fair lawfully authorised or in his own dwelling place shop or place etc, any animal article or thing in respect of which tolls, rents, stallages or charges are by this Act authorised to be taken. Then s 91 authorises the corporation itself to demand and receive tolls, rents, stallages and charges. I find nothing in ss 90 or 91, or any other section of this Act to which I have been referred, which could be construed as cutting down the plaintiff corporation's monopoly right.

I should mention at this stage, in order to complete the picture, that s 3 of the 1883 Act incorporates the provisions of the Markets and Fairs Clauses Act 1847, except insofar as any of these provisions are expressly varied by the later Act. Section 13 of the 1847 Act contains another prohibition on selling, in these terms:

'After the Market Place is opened for public Use every Person other than a Licensed Hawker who shall sell or expose for Sale in any Place within the prescribed Limits, except in his own Dwelling Place or Shop, any Articles in respect of which Tolls are by the special Act authorized to be taken in the Market, shall for such Offence be liable to a Penalty not exceeding Forty Shillings.'

It may well be that s 90, as originally enacted, displaces s 13 and there is some authority on that point. Then, however, s 110 of the Birmingham Corporation Act 1903 provides as follows:

'Section 90 . . . of the Act of 1883 except the first proviso of that section is hereby repealed and in construing section 13 of the Markets and Fairs Clauses Act 1847 as incorporated in the Act of 1883 the prescribed limits shall mean the city.'

I think it is really quite clear that by that section Parliament intended to treat s 13 of the 1847 Act as incorporated in the 1883 Act in so far as it was not already thereby incorporated. I mention those points in view of a number of arguments on a rather different issue which were addressed to me with respect to the 1883 Act and the provisions of that Act. I conclude, therefore, that there is nothing in the 1883 Act which cuts down the monopoly right of the plaintiff corporation.

That being the position, it seems to me that the plaintiff corporation is entitled to enforce its monopoly right by whatever form of action is available in these courts, that is, an action for damages and for an injunction. The suggestion was made by counsel for the second defendant that the penal provisions in s 90 of the 1883 Act might exclude the ordinary remedy. It seems to me that that is plainly not so. This

(1) (1889), 42 ChD 83.

is not the case of a new statutory wrong coupled with a statutory remedy. The wrong, i.e. the disturbance of a market, is one which has always existed under the common law and I see no reason to think that the ordinary remedy at law for this wrong is excluded by the penal provisions in the 1883 Act. That is none the less so because so far as I am concerned today the particular monopoly right now vested in the plaintiff corporation is provided by the same statute, the 1883 Act, as contains the penal provisions. On this point, I should refer to the case of *Stevens v Chown* (1) the headnote of which reads as follows:

'Where a statute provides a particular remedy for the infringement of a right of property thereby created or re-enacted, the jurisdiction of the High Court to protect that right by injunction is not excluded, unless the statute expressly so provides.'

And the learned judge elaborated that point.

Counsel for the plaintiff corporation relied on the penal provisions and their alleged breach by the second defendant or persons claiming under him as a separate ground of action from the disturbance of the plaintiff corporation's monopoly right. There was a great deal of argument on that issue and a number of cases were cited on it. As I have said, I am satisfied that the monopoly right exists and I am also satisfied that the second defendant is disturbing that monopoly right. That being so, the plaintiff corporation has no need to have recourse to the alternative ground, but I would add that if I were not satisfied as to the monopoly right I would certainly not be disposed to grant an injunction on the alternative ground. Counsel for the plaintiff corporation also relied on the Shops Act 1950 and its provisions with regard to Sunday trading. Again, I would certainly not make an injunction on that ground if I was not satisfied as to the monopoly right, and I propose to say no more about it.

In order to obtain relief the plaintiff corporation will have to show damage at the trial of the action. For the purpose of this motion, it is sufficient—and this is accepted by counsel for the second defendant—that the plaintiff corporation should show a likelihood of damage. It seems to me that the passages I have read from the affidavit of Mr Pitt do establish the likelihood of damage. It is really apparent that if some other party, unauthorised by the plaintiff corporation, establishes a market within the city of Birmingham, the value of the plaintiff corporation's monopoly right must be reduced. Obviously, if it is known that traders can get away with establishing a market without recourse to the licence of the plaintiff corporation, other traders are less likely to spend their money on obtaining a licence from the plaintiff corporation. There is also the point as to interference with the existing markets carried on by the plaintiff corporation itself.

I now come to a point which has caused me some difficulty, namely, whether it is right for me, in the exercise of my discretion, to make an interlocutory injunction in this case. Leaving aside for the moment something which was said in *Elwes v Payne* (2), I feel no doubt that I should do so. It seems to me that, the plaintiff corporation having established disturbance of its monopoly right, the balance of justice and convenience is in favour of putting an end to that disturbance at once. I do not see any ground for saying otherwise. This is not a case of delay on the part of the plaintiff corporation, nor, I think, is it a case where the second defendant is likely to have incurred capital expenditure, or anything like that, and I cannot see any special circumstances which would make it right to allow him to go on carrying on his market to the detriment of the plaintiff corporation pending the trial of this action. What has troubled me is the decision of the Court of Appeal in the case of *Elwes v Payne* nearly 100 years ago. The headnote reads as follows:

(1) 65 JP 470; [1901] 1 Ch 894.

(2) (1879), 12 ChD 468.

'The plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursday. The defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The plaintiffs brought their action to restrain the defendants from holding their proposed sales as being an interference with the plaintiffs' market:—*Held* by the Master of the Rolls, that, having regard to modern facilities for traffic, a market on Monday was *prima facie* an injury to a market on Thursday, that what the defendants were doing was in fact the establishment of a rival market, and that an interlocutory injunction ought to be granted. *Held* on appeal, that, the defendants undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted and it turned out that the defendants were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, and the plaintiffs succeeded at the trial, there would be no difficulty in giving them compensation, and their market would suffer no permanent injury from the sales by the defendants in the meantime.'

The Court of Appeal thus reversed the decision by LORD JESSEL MR.

In the argument in the Court of Appeal, the first sentence was: 'It is by no means certain that the sales on Monday will hurt the market on Thursday.' JAMES LJ said:

'I do not intend to express any opinion that the plaintiffs will not succeed at the hearing of the action in establishing their franchise, which does not seem to be seriously in dispute, and in establishing that what the defendants propose to do will be a nuisance to that franchise; but this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this. The only question that it seems to me right to decide at the present moment is whether there has been such a case made out as to induce the court before the rights are finally determined to do something which shall interfere with the *prima facie* rights of the defendants [i.e. the right to trade] . . . The order of the Master of the Rolls is not in accordance with my view of what ought to be done, having regard to the greater amount or less amount of damage to be sustained by these parties. If the defendants are stopped from beginning a trade which may become a very valuable trade, then, supposing they should turn out to be right, they will have been prevented from carrying on a trade which they had a perfect right to carry on, and there would be great difficulty in determining the amount of damage they would have sustained. I do not know how they would be compensated if it should turn out that they are right. On the other hand, if the plaintiffs succeed at the trial, it does not seem to me that there will be the slightest difficulty in giving them full compensation for everything that they can shew they have lost.'

COTTON LJ put it more generally:

'I am ready to admit that in such a case irremediable mischief need not be shewn, but I think that there is fallacy in the use of these words, "The plaintiffs are in possession, and the defendants are interfering with and disturbing their possession." The plaintiffs are, no doubt, in possession of a franchise, but they are not in possession of anything with which the defendants are directly or physically interfering. The question is whether or not what the defendants are doing is an interference with the right of the plaintiffs. That is the question to be tried at the hearing. Where the plaintiffs are in possession and the defendants are physically and directly interfering with that possession, the only question

is whether the defendants can justify those acts which are directly and physically interfering with the possession and the quiet enjoyment of the property as enjoyed by the plaintiffs at the commencement of those acts of the defendants. But where the interference is not physical or direct, but is indirect and only comes in the shape of the consequences which the acts of the defendants may have upon the market, the case is very different. Therefore, upon the balance of convenience and inconvenience, in my opinion there should be no injunction.'

That is rather a strong decision against the grant of an interlocutory injunction in the circumstances of that case, but at the end of it all it is a decision based on the balance of convenience in the particular case having regard to the circumstances of that case. It will be observed that although the existence of the plaintiffs' franchise was not seriously in dispute it was, on the face of it, not apparent that the plaintiffs would suffer injury from the market which the defendants were proposing to establish. It must be borne in mind that the plaintiffs held a cattle market usually on Thursday, and it was proposed by the defendants to hold a cattle auction on Monday. Then it was considered that the defendants would be likely to suffer greater hardship from the injunction if they succeeded than would the plaintiffs from the refusal of the injunction. Counsel has not been able to find any subsequent case on which an interlocutory injunction has been either granted or refused in comparable circumstances.

In the present case, the plaintiff corporation is in a different position from that of the plaintiff in *Elwes v Payne* (1). The plaintiff corporation does not merely hold a market itself. It grants licences to other persons to do so within the city. There is evidence of the likelihood of loss on the part of the plaintiff corporation and there is really no reason to suppose that the second defendant will suffer greater hardship by an injunction should he ultimately succeed in the action, than would the plaintiff corporation from the refusal of the injunction should the plaintiff corporation succeed in the action. As I have said, the second defendant's business is not, in the nature of things, a business involving much capital outlay. And, finally, an important point, the plaintiff corporation will certainly be good for any damages that might ultimately be awarded to the second defendant. I am certainly moved by what the Court of Appeal said in that case, and specifically by the statement of JAMES LJ.

'this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this.'

But looking at the whole of the circumstances in the present case, I think that the balance of justice and convenience does require that I should make an interlocutory injunction, and I do not think that *Elwes v Payne*, in principle, compels me to do otherwise. I propose, accordingly, to grant an injunction against the second defendant. I have not, except at the outset, referred to the position of the first defendant, which has not at present, so far as I can see, invaded any right of the plaintiff corporation. I can see no reason why I should grant interlocutory relief against the first defendant.

*Injunction granted against second defendant.*

Solicitors: Sharpe Pritchard & Co. for T. H. Parkinson, Birmingham; Barlow, Lyde & Gilbert, for Duggan, Elton & James, Birmingham; Barlow, Lyde & Gilbert for Field & Sons, Leamington Spa.

Reported by Philippa Price, Barrister.

(1) (1879). 12 ChD 468.

**COURT OF APPEAL (CIVIL DIVISION)**

(SALMON, EDMUND DAVIES AND STAMP, LJ)

26th, 29th, 30th November 1971

**R v BARNET AND CAMDEN RENT TRIBUNAL. Ex parte FREY INVESTMENTS LTD**

*Rent Control—Contract referred to tribunal—Reference by local authority—Setting aside—Matters which must be shown—Capricious, frivolous, or vexatious action—Rent Act, 1968, s 72 (1).*

On an application to the court for an order of prohibition to prevent a rent tribunal from considering a reference to it under s 72 (1) of the Rent Act, 1968, by a local authority of a contract for the furnished letting of a dwelling an order will be refused if it appears that there has been a valid, conscientious, bona fide exercise by the authority of the powers conferred on them. Consideration by the authority of a factor not properly relevant or an omission to take into consideration every relevant factor is not ipso facto sufficient to enable a reference by them to the prohibited. For an order to be granted it must be shown that they acted capriciously, frivolously, or vexatiously, or were actuated by mala fides. They need not take into account the views of tenants or whether there is any real likelihood of the rents being reduced, and their powers are not inhibited by the fact that tenants do not want a reference to be made.

Per STAMP, LJ: I would have thought it wrong in principle for the High Court, on an application for an order of prohibition to prevent a local authority from referring a rent or rents to the appropriate statutory tribunal, to go into the merits of the decision to refer, for, if the reference is without merit, it must be assumed that the rent tribunal will take no action on it. . . . An authority has no duty to the landlords in determining whether to exercise their rights to refer or not. . . . I cannot accept that the court has a general power to examine the proceedings of local authorities to see whether in coming to a purely administrative decision not affecting rights they have taken into account all those factors which ought to be taken into account in order to arrive at a wise or current decision.

APPEAL by landlords, Frey Investments Ltd, against a decision of a Queen's Bench Divisional Court, reported ante p 11, dismissing their application for an order prohibiting the Rent Tribunal for Barnet and Camden from proceeding with the hearing and determination of 22 references made by Camden London Borough Council under Part VI of the Rent Act 1968, relating to four tenancies at 36 Bartholomew Villas, London, NW, two tenancies at 9 Patshull Road, London NW, five tenancies at 11 Patshull Road, one tenancy at 13 Patshull Road, nine tenancies at 37 Patshull Road, and one tenancy at 42 Patshull Road.

Ronald Bernstein QC and E J Prince for the landlords.

J S Colyer for the council.

The tribunal did not appear.

**SALMON LJ:** The appellants (to whom I will refer as 'the landlords') applied to the Divisional Court for an order of prohibition to prevent the Barnet and Camden Rent Tribunal from considering 22 tenancy agreements which had been referred to it by Camden Borough Council for consideration. The basis of the application for an order of prohibition was that the borough council had exceeded their powers in referring these tenancy agreements to the rent tribunal. The Divisional Court refused the order, and against that decision the landlords now appeal.

The section under which the reference was made by the council is s 72 of the Rent Act 1968. Section 72 (1) provides:



'Either the lessor or the lessee under a Part VI contract or the local authority may refer the contract to the rent tribunal for the district in question.'

Then sub-s (2) provides that when there has been such a reference the tribunal may require the landlords to supply it with such information as the tribunal reasonably requires. Subsection (3) provides for penalties which can be exacted from the landlords in the event of their failing to supply the information without reasonable cause.

Section 73 (1), omitting the immaterial words, provides as follows:

'(1) Where a Part VI contract is referred to a rent tribunal . . . the tribunal shall consider it and then, after making such inquiry as they think fit and giving to each party to the contract . . . an opportunity of being heard or, at his or their option, of submitting representations in writing, the tribunal, subject to subsections (2) and (3) below,—(a) shall approve the rent payable under the contract, or (b) shall reduce the rent to such sum as they may, in all the circumstances, think reasonable, or (c) may if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision.'

I need not read sub-ss (2), (3) or (4). Subsection (5) is in these terms:

'Notwithstanding anything in this Part of this Act, a rent tribunal shall not be required to entertain a reference made otherwise than by the local authority if they are satisfied . . . that the reference is frivolous or vexatious.'

I consider it of the utmost importance to uphold the right, and indeed the duty, of the courts to ensure that powers shall not be exercised unlawfully which have been conferred on a local authority or the executive, or indeed anyone else, when the exercise of such powers affects the basic rights of an individual. The court should be alert to see that such powers conferred by statute are not exceeded or abused, and I hope that nothing that I say in this judgment will be construed as in any way casting doubt on the principle which I have just enunciated.

Counsel for the landlords in the course of his most interesting argument has referred us to a number of authorities on this topic and he cites in particular the judgment of LORD GREENE MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn.* (1). The passage on which he relies sums up LORD GREENE's opinion:

'the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.'

It is, I think, important to observe that in that particular case the question was whether the local authority had come to a right conclusion when considering an application to allow cinemas owned by the plaintiffs to be opened on a Sunday.

There have been a number of other cases to which we have been referred such as *Hanks v Minister of Housing and Local Government* (2) and *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* (3). Cases such as these in which a licence is being sought for

(1) 112 JP 55; [1947] 2 All ER 680; [1948] 1 KB 223.

(2) 127 JP 78; [1963] 1 All ER 47; [1963] 1 QB 999.

(3) 128 JP 120; [1964] 1 All ER 1.

the purpose of enabling the applicant to carry on his business and earn his living or in which town planning permission is sought or a compulsory purchase order is being challenged vitally affect the basic rights of the persons concerned and seem to me to differ very substantially from the case which we are now considering. In a case such as the present, no decision is taken by the authority invested with a power which vitally affects the basic rights of the individual. The only decision taken by the council is to refer the matter to the rent tribunal so that the tribunal may consider whether or not the rent is too high. The party concerned (i.e. the landlords) have every opportunity of appearing before the tribunal, and it is the decision of that tribunal which affects their basic rights.

For my part I doubt whether the principle laid down by LORD GREENE applies, or was intended to apply, to cases of the present kind. For example, I think it would be difficult to suppose that, if the council referred the matter to the rent tribunal without having considered some material matter, that would necessarily vitiate the reference. I say that particularly because under the Act the local authority, in contradistinction to the tribunal, have no powers to demand information in relation to the tenancy agreements and necessarily may be in a position where all the material facts cannot be known to them. It is of course conceded that the local authority must act bona fide. It is not here suggested that there has been any mala fides on the part of the local authority. Moreover, I consider that it is implicit in this Act that when the local authority make a reference to the tribunal they shall not act frivolously or vexatiously. In my judgment, unless the landlords can show either mala fides or that the council acted frivolously or vexatiously it is impossible to say that the council in referring the matter to the rent tribunal were acting ultra vires.

I do not think that it has been seriously suggested that what the council did was either frivolous or vexatious. The complaint made against them by counsel for the landlords in the course of his most persuasive argument was that they referred the matter to the tribunal without taking into account the views of the tenants or whether there was any real likelihood of the rents being reduced. Counsel further argued that the council wrongly took into account the landlords' refusal to allow inspection of certain premises which were not the subject-matter of the tenancy agreements in question. These tenancy agreements referred to 22 rooms in seven houses belonging to the landlords, each of which the landlords had let to a tenant. There are now, in effect, only 12 applications because the tenants have moved out of the rooms which were the subject-matter of the other ten tenancy agreements.

The object of the legislature in giving the local authority the power to refer the tenancy agreements to the rent tribunal was clearly conferred so as to take care of cases in which tenants, perhaps of working class dwellings, were not in a position to look after themselves, or were afraid of making a reference to the tribunal. There are many districts—and Camden is apparently one—where there is a great shortage of reasonably priced working class dwellings, and a tenant who applied to the tribunal might well consider that if he offended the landlord by so doing he might find himself in the street or compelled to go and live in a district which was inconvenient for his purposes. I would not like to be understood as making any criticism of the landlords whatsoever. It is not for us to decide whether they are good or bad landlords. It is only fair to say that much of the evidence which was placed before the court went to show that they are good landlords. That, however, is not, as I say, the issue for us to consider.

In Camden there exists a body which calls itself Camden Housing Action. Again it is not for us to say whether this body performs a useful function. They have busied themselves with presenting arguments and facts to the council with a view to persuading the council to exercise the powers conferred on them by the 1968 Act. In the summer of 1970 they were urging the council to exercise its powers in relation

to property belonging to the landlords and let to tenants. The council attempted to obtain information in relation to a number of properties belonging to the landlords by sending its valuation officers to make such enquiries as they could about the tenancy agreements and the premises to which they referred. The valuation officers succeeded in interviewing 22 tenants. These officers reported that they felt that the rents were a little high.

The matter, I think, was first considered by the council, or its housing committee, on 2nd July 1970. It came before the same committee again on 15th September when a report from the town clerk was considered. The town clerk reported what he had learned from the valuation officers. In that report the town clerk also referred to *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd* (1), and suggested that the judgment of the Divisional Court in that case had rather stultified the effect of s 72 of the 1968 Act. His advice was that in the light of that case and the present circumstances there would be little chance of success in respect of the complaints which were in substance that the rents were too high and that the accommodation was inadequate. Representatives from the Camden Housing Action Group attending that meeting of the committee advanced reasons for differing from the view expressed by the town clerk and urged the council to exercise its powers under s 72 on the basis that there was a real chance that the tribunal might reduce the rents in question.

At that meeting—which apparently lasted some time—the council adjourned the matter so that the opinion of counsel might be taken, and the opinion of counsel was taken. He advised, or expressed the hope, that the council should take action. The committee met again on 27th October and further considered the matter, and on 1st December, when they met again to consider the problem, counsel's opinion, or a resumé of counsel's opinion, was before them. The committee then decided to exercise their powers under s 72 and that decision of the committee was ratified by the council on 6th January. It is quite plain that there were some councillors who were against any action being taken, and there was an illuminating written report from Councillor Colin Jaque urging the council not to refer. I do not propose to read the report, but it really came to this, that in his opinion it would not be in the best interests of the tenants to refer the tenancy agreements in question.

It is quite obvious that the council did not act precipitately. Indeed, it is plain that the council went into this matter with the most meticulous care and, having considered all the matters before them, came to the conclusion that it would be right to refer the tenancy agreements in question to the tribunal. It is said that they did not take into account the tenants' views, but an affidavit has been sworn by Mr Kosky, the chief legal officer to the council, and according to his evidence he stated:

'At the meeting on the 15th September I summed up the feelings of the tenants as conveyed to the valuation officers, that the council would receive a measure of support from the tenants if it referred their contracts to the Rent Tribunal although some of them were against this and others who would support the action were not prepared to attend at the rent tribunal to say so. I knew these facts from seeing the valuation officers' notes of their interviews with the tenants.'

It is right to say that before the Divisional Court there were affidavits from the tenants who said that they did not want their tenancy agreements referred, but those affidavits were not before the council. Three of the councillors have sworn affidavits to the effect that they have no recollection of the views of the tenants (which the legal

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.

adviser says he put before the council) having been brought to their attention. It may be they have no recollection, but there has been no application to cross-examine the legal adviser and no reason to suppose that what he stated in his affidavit is other than accurate.

It is suggested that the council approached the problem that confronted them on the basis that the tenants were not making any complaint and, presumably, were not supporting a reference by the council. I do not think, however, that the powers of the council to refer can conceivably be inhibited by the fact that the tenants themselves do not want references to be made. The reasons why they do not want reference to be made are sometimes obscure and may be very difficult to discover. No doubt the wishes of the tenants are something which the council should bear in mind, but, even if the tenants are against references being made, there is nothing to prevent the council from taking a different view. I cannot think that there is any substance in the contention that the council came to their decision without taking the tenants' views into account. If Mr Kosky's affidavit is accepted—as I think it should be—obviously the tenants' views as reported by the valuation officers were taken into account. But even in the absence of any affidavit from Mr Kosky the council approached the case on the basis that the tenants were making no complaint and did not wish reference to be made. So whether the negative evidence of the three councillors to whom I referred is correct or whether the positive evidence in Mr Kosky's affidavit is correct, the council were taking the views of the tenants into consideration—although they may have misunderstood them.

As far as the argument that the council did not consider whether there was any likelihood of the rents being reduced is concerned, in my judgment there is equally little substance in that contention. They had the opinion of the council's officers that the rents were a little too high, i.e. that they were a little higher than what would have been the reasonable rent. It would be for the tribunal to decide whether or not the rents in those circumstances should be reduced, and there would be nothing to prevent the tribunal from coming to a decision that they should be reduced. On the material before this court it seems to me that there was ample material on which the council could reasonably come to the conclusion that there was something for the tribunal to consider and a reasonable likelihood that it might reduce the rents.

As to the allegation that they wrongly took into account the landlords' refusal to allow inspection of certain premises of the landlords, I am afraid that, in spite of the argument that has been addressed to us, I consider that this contention also is ill-founded. It is quite true that after the 22 tenants in question had been interviewed and it was discovered by the landlords that they had been interviewed, the landlords took steps to prevent the council's officers interviewing the tenants of the remaining houses about which a complaint had been made by the Camden Housing Action. This, of course, may have been out of consideration for the other tenants and to spare them the necessity of having to meet the council's officers and of being questioned about their tenancy agreements and their premises. On the other hand, I should have thought that the council were perfectly entitled to take the view that that might have been because the landlords were most unwilling for the council to be fully informed about the tenancies. It is a factor which might justifiably have strengthened the impression of those members of the council who thought there was something to refer to the tribunal. If the landlords had said to the council: 'We don't mind what enquiries you make; we are not at all nervous about our rents being thought to be too high, go ahead and get all the information you want', that, I imagine, would have told in their favour. The fact that they were, apparently, unwilling that the council should be apprised of the facts is a point—not a very important point, but a point—which the council would be entitled to take into consideration in deciding whether

or not there was a case to refer to the tribunal. I naturally agree that if the landlords could show, for example, that the council were referring the tenancy agreements to the tribunal out of spite because they disliked the landlords and did not genuinely believe that there was anything of substance in the information that the rents were too high, then that would have been an excess of power. It would also have been capricious and vexatious, and might well have come within the classification of being *mala fides*. But there is not any ground that I can discern on which the Divisional Court could have come to such a conclusion, and it clearly did not do so. Nor do I.

I recognise that when a reference is made by the council to the tribunal, although it is true that no decision has been taken against the landlords which affects their basic rights in the sense that I have indicated, it follows that they may be put to expense and inconvenience. Nevertheless, in my judgment, the landlords are given all the protection which is reasonably necessary if the Act requires, as in my view it does require, only that the council shall act *bona fide* and not make a decision capriciously or vexatiously. The assumption must be, until the contrary is proved—and the onus of proving the contrary is on the landlords—that the council did act properly. I cannot discern any evidence from which it would be possible to draw the inference that the council in this case acted other than properly. I do not mean by that in the slightest to influence the tribunal in the decision at which it arrives. The council may have come to a wrong conclusion. It may be that the tribunal will find that the rents are such that they ought not to be reduced. It may come to a different conclusion. It will not take the fact that the council have referred the rents as an indication that the rents are too high, any more than it would take into consideration the fact that the landlords have thought it worth spending the money involved in going to the Divisional Court and coming to this court as an indication that the landlords wish to prevent the tribunal from considering these tenancy agreements because they recognise that the rents are too high.

Before I part with the case it is important that I should refer to *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd* (1). This decision turned on its own very special facts. If, as has been suggested, this decision has inhibited councils from referring cases in which they considered that there was a reasonable prospect of the tribunal reducing the rent, then it can only be because *Bell's* case has been misunderstood. That case concerned a large block of flats of which LORD GODDARD CJ said that the tenants enjoyed all the amenities usually afforded in high class blocks of flats in the West End of London and were people well able to look after themselves—a very different class of accommodation and a very different type of tenant from the accommodation and the tenants with which we are concerned. In that case the council in question had referred 302 tenancy agreements to the rent tribunal merely because the rent tribunal had reduced the rents of two flats in this block. The decision can be correctly set out in this way:

'the method of reference adopted by the local authority indicating, as it did, that no investigation or inquiry could have been made by them into the nature of the contracts of tenancy referred by them to the tribunal, did not constitute a valid and *bona fide* exercise by the local authority of the powers conferred on them by Parliament. It was never intended by the [Furnished Houses (Rent Control) Act 1946] that a local authority should refer cases of contracts in respect of which they had neither received a complaint from the tenant, nor had themselves made any inquiry to see whether there was a *prima facie* case or anything to indicate that there was any unfairness in the rent charged.'

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.



The present case is entirely different, not only because we are dealing with a different class of property and a different type of tenant, but because in this case there was an investigation and a careful investigation, and enquiry by the council into the relevant facts. Indeed, one of the complaints made by the landlords is that the council made too many enquiries, not that they made none. LORD GODDARD said:

'No doubt, the reason why it was provided that cases might be referred by a local authority was because it was recognised that there might be tenants who would hesitate themselves to refer the case for fear of the consequences that might befall them, but it could never have been intended that local authorities could refer cases respecting which they had neither received complaint from the tenant nor had made any inquiry whether there was a *prima facie* case . . . The borough council in question have decided as a matter of policy that in the case of any property in respect of which two or more reductions in rent had been made, all the contracts of letting to which the Act applied relating to such property should be referred to the tribunal.'

Then he said this, which points the difference—or one of the many differences—between that case and the present:

'This may be a perfectly proper course to take in respect of certain cases, as, for instance, one or two houses in the same ownership all of which are let out in separate tenements to poor or working class persons, but to apply this policy to 555 flats without any inquiry, or, indeed, knowledge, whether the Act applies or not is an entirely different matter.'

He goes on to point out that any other view might lead to the conclusion that the council without any information or enquiry as to the tenancies in question could refer all the flats within their jurisdiction to the rent tribunal, which would clearly be highly inconvenient for the landlords and equally inconvenient for the tribunal.

LORD GODDARD also said:

'In our opinion, the action of the borough council in referring the whole of these flats in the manner they have done is not a genuine exercise of the powers conferred on them by the Act, and we cannot refrain from saying that it is regrettable that in the form of reference information purports to be given to the tribunal which is quite inaccurate and has been given without the slightest attempt to see that it was accurate.'

In the present case the fullest information was given to the council. The size of the rooms let—and they were all very small—the number of persons occupying each room, the rent, and the condition of the premises, the standard of furnishing and the facilities were all given. In the great majority of cases, these were assessed as fair to poor. So obviously the most careful enquiries had been made. It is not suggested that any of the information contained in the references is wrong. This case is entirely different from *Bell's* case.

There are two sentences in the judgment of LORD GODDARD that have been seized on. The first sentence is: 'It was never intended that this Act should provide for general rent fixing throughout a district.' That, of course, is correct, and if all the flats in a district could be referred to the rent tribunal by the council without making any enquiry, it might be said that the council were being used as a general rent fixing tribunal, but nothing of the kind happened here. The second sentence is: '[It] is to deal with individual cases where hardship exists or may be reasonably supposed to exist.' Those words could, perhaps, be given a very wide meaning. I think, however, that all that LORD GODDARD intended to lay down was that if the council

referred tenancy agreements to the tribunal in circumstances in which no reasonable council could have done so, then the council were acting ultra vires. In that particular case no reasonable council could have properly referred the tenancy agreements to the tribunal, having made no enquiry about them. It seems to me that it is of paramount importance that the decision in the *Bell* case—which, if I may respectfully say so, was clearly a correct decision on its facts—should be applied only to special facts similar to those which existed in that case. The decision should not be extended or understood so as to inhibit a council from referring tenancy agreements to the tribunal in circumstances such as exist in the present case. For these reasons, I would dismiss the appeal.

**EDMUND DAVIES LJ:** It is generally agreed that the vast majority of members of local authorities perform without fear or favour tasks in the public service, yet experience shows that they receive as a result more brick-bats than bouquets. It is frequently insufficiently recognised that without their voluntary service local government as we know it in this country would be impossible. That is but one of the many reasons why, as I think, adopting the words of LORD READING in *R v Brighton Corpn, ex parte Thomas Tilling Ltd* (1), the court ought to be very slow in interfering with their decisions.

Here we are concerned with the manner in which Camden Borough Council have applied s 72 of the Rent Act 1968, which empowers them to refer, in appropriate cases, contracts of furnished lettings to a rent tribunal. The prime question involved is: Since prohibition of the references of 22 contracts is sought by the landlords, what test should be applied in considering whether or not the references were right and proper?

*R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd* (2), is, as SALMON LJ has already said, widely different in its facts from the present case. But, properly understood, I think there is nothing in the decision of LORD GODDARD which should inhibit local authorities from taking steps, in circumstances which appear to them proper, from referring furnished letting contracts to the statutory body. For the test which LORD GODDARD enunciated was:

'In considering whether there has been a valid reference by the local authority, it is necessary, in our opinion, to consider whether on the facts of this case there has been a valid and bona fide exercise of the powers conferred by Parliament on them.'

The question has been canvassed whether the test enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* (3) by LORD GREENE MR is appropriate to cases such as the present. For my part, I would think, having regard to the limited powers of a local authority to glean relevant information under the Rent Acts, that it would be imposing on them a hardship which they ought not properly to bear if a reference which they had conscientiously and bona fide made could be impeached simply by pointing out that they appeared to have taken into consideration a factor which was not properly relevant or that they had omitted to take into consideration every relevant factor. Certainly the failure to have regard to proper circumstances and the fact that improper considerations were taken into mind may help those who attack the decision of the council along the road towards the goal that they have to attain, but the fact that the council may conceivably, in the judgment of some, or indeed all, have paid some attention to a factor which is not strictly relevant ought

(1) (1916), 80 JP 219.

(2) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.

(3) 112 JP 55; [1947] 2 All ER 680; [1948] 1 KB 223.

not, in my judgment, to be ipso facto sufficient to enable a reference made by them in a case such as the present to be prohibited.

The reason I think that the strict *Wednesbury* (1) approach would be a hardship is that, while the local authority have to do the best they can to glean information relating to furnished lettings, their ability to gain it is limited and quite unassisted by the statute. Once a reference has been made to the tribunal, on the other hand, it is vested with a power, under s 72 (2) of the Act, to obtain a great deal of information essential to enable it to come to its determination in the particular case. I look, for example, at the statutory form which is to be found in Sch 1 to the Furnished Houses (Rent Control) Regulations 1946, headed 'Particulars concerning which lessors may by notice be required to give information', and there are not less than 11 paragraphs of particulars which should furnish the tribunal with the sort of information necessary to come to a decision. I repeat that the local authority have no such power to glean information and they have to do the best they can. It may come from a variety of sources. It may come from the tenants themselves, and, indeed, as LORD GODDARD said in the *Bell* case (2), the wishes of the tenants surely ought at least to be taken into account. They may gain some information from outside bodies. They must, of course, be careful not to act on gossip or rumour which may be maliciously inspired or honestly mistaken. In most cases one would hope that a landlord, on being approached, would co-operate with them in his own interest and give the information they were seeking, although there is no shadow of doubt he is under no obligation to co-operate in any way.

Like SALMON LJ, I think that the proper test to apply is whether or not in resolving to refer a Part VI contract to the rent tribunal there are grounds for concluding that the council were actuated by mala fides or were acting capriciously or vexatiously. As I have already said, in considering that matter the demonstration (if such be forthcoming) that they have taken irrelevant matters into consideration or omitted relevant factors may be of the greatest assistance, but that latter aspect is not conclusive. Nevertheless, out of respect to the able and helpful submissions of counsel for the landlords, I feel that I too should make quite short comments on the four matters falling into two groups which counsel relied on as showing that the *Wednesbury* test (1), if applied to this case, ought to result in prohibition being granted.

He said that the council failed in two respects. They failed to take into account the views of the tenants. I have already adverted to LORD GODDARD's observation in the *Bell* case (2) that they ought surely to be taken into consideration. The exact position in relation to that matter is, I think, obscure on the conflicting affidavits and it is impossible for this court to resolve such conflict as existed. But I think and hope that I am right in concluding that, putting it at its lowest, most members of the council's housing committee must have been aware of the fact that very few, if any, of the tenants of the 22 Part VI contracts with which we are concerned wanted a reference at all. Accordingly, I do not think that that first ground of complaint urged by counsel for the landlords is established, and established it, like all other complaints, must be by the applicants. For at the end of the day it is for them to satisfy the court that the council have acted in a manner which ought to be impeached.

The second factor which it was urged should have been taken into consideration by the council and was in fact ignored was that in the circumstances obtaining it was unlikely, to put it at its highest, that any of these 22 references to the rent tribunal would result in a reduction in the rent. I do not know what is to be said about the action taken by Mr Kosky, the chief legal officer to the council, and the town

(1) 112 JP 55; [1947] 2 All ER 680; [1948] 1 KB 223.

(2) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.

clerk. One thing that is quite clear is that the town clerk conveyed to the housing committee in unmistakable terms the view formed by Mr Kosky that the prospects of success were extremely tenuous. But even though that view was expressed, that is by no means the end of the matter. Certainly that is a relevant factor in considering whether a council acted capriciously or vexatiously, but there may still be circumstances where the public weal requires that when, for example, rumours are going about, the air should be clarified by a reference to a tribunal which can establish in an authoritative manner where the truth lies.

Counsel for the landlords went on to say that the council wrongly took into consideration at least two classes of irrelevant matters. First, that they were actuated by resentment of the landlords refusing inspection of premises other than the 22 furnished dwellings which were the subject-matter of the references. I know it is said by Mr Frey in one of his memoranda (and doubtless with a determination to express as best he could his view of what happened) that in his belief the hostility or irritation so engendered was, as it were, a turning point in the ultimate decision formed by the council. But other views are expressed and, like SALMON LJ, I am not satisfied that this council in the last resort did not act responsibly, despite the action of the landlords which, although wholly understandable, may perhaps in all the circumstances have been a little unwise. But they must not think that by this observation I am criticising them in any respect, for we do not know all the facts. There is a faint suggestion that the council's officers did not act as courteously as they might have done. I do not know the truth about that either. There may be a number of reasons why the landlords took the attitude they did, but in the last resort I am not satisfied that this in turn influenced the decision of the council to refer.

It is lastly said by counsel for the landlords that the council wrongly allowed themselves to be influenced by the persistent and sustained pressure of the small body of, I think, six persons known as Camden Housing Action, who had expressed quite strongly worded views critical of the Part VI contracts in respect of which the landlords were the lessors. That the housing committee were impressed by the activities of that group LORD WIDGERY CJ thought beyond question, for in the course of his judgment he said:

'As a result of this pressure—and it seems to me there is no doubt it was as a result—the housing committee of Camden decided to make investigations of the terms of letting in the houses with which Messrs Frey were associated.'

For my part I am quite prepared to accept this view expressed by LORD WIDGERY, but who is to say that it is wrong for a council to allow their determination to be affected by the view expressed—it may be persistently and vociferously and strongly—by a pressure group? Is that enough of itself to indicate that the council are allowing themselves to be overborne and persuaded to make a decision which is mala fide or vexatious or capricious? Answering the question I have myself posed, I would have thought it must depend on what the action group say and how they say it, and, insofar as their assertion could be tested, the extent to which it appeared to have some foundation? If it was manifestly baseless, if there were suspicion of some ulterior motive, be it financial or political or inspired solely by personal aggrandisement, then of course the council should dismiss it from their minds. But if what was said by the action group provided food for thought, and if it appeared to have at least some reasonable degree of support, for my part I reject the idea that it would be improper to be influenced by what the action group said. In this particular case and in relation to this particular pressure group, I am not satisfied that the council, when (as I am prepared to accept) they were impressed by what they said, were thereby led into doing something which they ought not to do.

Despite the lack of anything like an amplitude of knowledge on the part of the council, there was, in my judgment, sufficient material to enable them to arrive at the conscientious conclusion, uninfluenced by any unworthy considerations, that these references should be made. Unlike *Bell's* case (1), they had information of the size of rooms, of rents, and they had particulars of the extent of the furnishings. They had the view expressed by those who had visited the premises that the rents were a little high. They had their own knowledge of the pressing need of furnished accommodation in the district. When all those matters are considered in combination, as I take it the housing committee considered them, and when I ask myself the question, 'In the light of all that material, is it established that they acted capriciously or vexatiously?'—for lack of bona fides is expressly disclaimed by counsel for the landlords—the answer to which I am driven is that it is not so established.

I assiduously refrain from hinting at even the approach to the outline of a shadow of an idea as to what I think ought to be, or probably will be, the conclusion of the rent tribunal in any one of these 22 cases, but that the statutory body should have an opportunity to adjudicate on this matter of considerable public interest I have no doubt. For those reasons, I concur with SALMON LJ in holding that this appeal should be refused.

**STAMP LJ:** I reach the same conclusion by a somewhat different route. Were the matter untouched by authority I would take the view that just as s 72 of the Rent Act 1968 plainly confers an unrestricted right on tenants and landlords to refer a tenancy agreement to the rent tribunal, so it confers an unrestricted right on the local authority to do so—a right which the council, as the housing authority, has a duty, in a proper case, to exercise. One may search the Act in vain to find any condition or provision which fetters or limits the council's action in this regard. It is to be observed that all that is done when resort is had to s 72 is to refer to the competent statutory body the fixing of the rent. I would have thought it wrong in principle for the High Court on an application for an order of prohibition to prevent the council from referring a rent or rents to the appropriate statutory tribunal, to go into the merits of the decision to refer, for, if the reference is without merit, it must be assumed that the rent tribunal will take no action on it. In determining whether or not to invoke the section the council are in no sense exercising a judicial function and they are not even, as I see it, exercising such a discretion as a licensing authority exercise, or as a local authority exercise in relation to Acts such as the Town and Country Planning Act or as has to be exercised in determining whether to make a compulsory acquisition.

In my view, such cases as *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* (2) are different sorts of cases. In cases such as those the authority in reaching a decision have to weigh, and have an obvious duty to weigh, one thing against the other, and there is a body of legislation guiding them in the performance of their powers or duties. Here there is no such body of legislation and, as I have said, I find nothing in the Rent Act 1968 which suggests to me that the council have any duty to the landlords in determining whether to exercise their right to refer or not.

If, therefore, the matter were *res integra*, I would myself take the view that in the absence of any allegation that the council had been acting *ultra vires* or *mala fide*, the present proceedings were misconceived and failed in limine. Reliance, however, was placed on the decision of the Divisional Court in *Bell's* case (1), which has already been referred to by SALMON and EDMUND DAVIES LJ. So far as the decision in that case rested on the view that the local authority there were not acting *bona fide*, it is,

(1) 113 JP 209; [1949] 1 All ER 720; [1949] 1 KB 666.

(2) 112 JP 55; [1947] 2 All ER 680; [1948] 1 KB 223.



I will assume without expressing an opinion, perhaps not open to criticism, but I cannot accept, as appears to be suggested in a part of the judgment heavily relied on by the landlords in this case, that the court has a general power to examine the proceedings of local authorities to see whether in coming to a purely administrative decision not affecting rights they have taken into account all those factors which ought to be taken into account in order to arrive at a wise or correct decision. The authorities cited by the court in *Bell's* case in support of the general proposition that the court can interfere with the exercise of powers by local authorities were *Biddulph v St George's, Hanover Square* (1), and *Dormer v Newcastle-upon Tyne Corp'n* (2). In both of those cases the plaintiff was complaining that the action of the defendants constituted a tort, and read in that context the dicta in those cases relied on by the court in *Bell's* case do not, in my judgment, support the general proposition. Manifestly there can be no general rule that the court can in any case, and on the application of whomsoever, interfere with the exercise of the local authority's powers. As is pointed out in Professor de Smith's *Judicial Review of Administrative Actions*, 2nd edn (1968), p 3, the administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer and if their every act or decision were to be reviewable by a judicial body the business of administration could be brought to a standstill. Aliter if the act or decision affects a right.

There being no evidence in this case that the council acted ultra vires or dishonestly, so that that situation does not fall to be considered, I would not enter into the question whether they did or did not make mistakes in coming to the conclusion to refer to the tribunal the tenancy agreements here in question. I too would dismiss the appeal.

**Bernstein QC:** One point in my argument none of your Lordships has mentioned, and that is that the authority did not consider each of the 22 cases separately, but considered them as a block and made a block reference. That point is in effect comprised within STAMP LJ's judgment, but not within the judgments of SALMON and EDMUND DAVIES LJJ.

**SALMON LJ:** I thought it followed from what I said that to my mind it is not established that this was a block reference within the meaning of 'block reference' as used in *Bell's* case (3). The details of each particular tenancy were before the council, and, although they may not have voted on each case separately, I do not think it follows that that is a block reference.

**EDMUND DAVIES LJ:** I also thought that the council, with the material before them, must have separately considered each of the cases. I do not accept any proposition to the effect that if they do not severally announce a decision in respect of each of the cases in turn, but reserve the announcement of their conclusion until they have considered all of them, a block reference such as that condemned in *Bell's* case is the result. Had I done what I intended, that is what I would have said.

**STAMP LJ:** I would have agreed with SALMON and EDMUND DAVIES LJJ.

*Appeal dismissed.*

Solicitors: M S Marks & Co ; Town Clerk, London Borough of Camden.

Reported by G F L Bridgman Esq, Barrister.

(1) (1863), 27 JP 579.

(2) 104 JP 316; [1940] 2 All ER 521; [1940] 2 KB 204.

(3) 113 JP 209; [1949] 2 All ER 720; [1949] 1 KB 666.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, ASHWORTH AND GRIFFITHS, JJ)

15th, 21st December, 1970

ATKINSON v MURRELL

*Gaming—Lottery—Distribution of money by chance—Chain letter scheme—No identifiable prize fund—Betting, Gaming and Lotteries Act, 1963, s 42 (1) (f)*

By s 42 (1) of the Betting, Gaming and Lotteries Act, 1963: ' . . . every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere . . . (f) uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery . . . shall be guilty of an offence.'

The appellant used premises for the purpose of collecting correspondence connected with a chain letter scheme known as "World Wide Roulette." The scheme worked in the following manner: The participant bought an envelope from a seller for £1 and filled in his name and address at the bottom of a list enclosed in the envelope. He sent a postal order for £1 to the person whose name was at the top of the list and sent to the management in the envelope provided the list and £1 for management expenses. On receipt of this the management deleted the top name on the list and sent to the participant three envelopes for him to sell with his name at the bottom of the list in each envelope. The participant sold his three envelopes for £1 and waited for his name to come to the top of the list when money from fresh participants started to be sent to him. If all the participants who took part in the scheme followed it through and there was no break in the chain a participant whose name reached the top of the list might in theory receive £729. The participants who sent and received money under the scheme were complete strangers to each other. Justices convicted the appellant on an information charging him with using premises connected with the conduct of a lottery, contrary to s 42 (1) (f) of the Betting, Gaming and Lotteries Act, 1963. On appeal,

**HELD:** (i) that a participant in the scheme who received money from other participants did so as a matter of chance since any payment was dependent on the chance that the chain would not break before his name reached the top of the list; once he had entered the scheme, a participant had no further control over events and could exert no skill or influence over the ultimate outcome.

(ii) it was not an essential feature of a lottery that there should be an identifiable prize fund provided that the scheme achieved the overall object of the distribution of money by chance; the scheme in the present case was designed to achieve that end and was, accordingly, a lottery; and the appellant was rightly convicted.

## Case Stated by the City of London justices.

An information was preferred by the respondent, George Murrell, an inspector of the City of London Police, against the appellant, George Atkinson, for that he on 19th May 1971 at 23 Holborn Viaduct in the city of London did use premises situated thereat for purposes connected with the conduct of a lottery known as World Wide Roulette in that he did use the premises for the purposes of the collection of correspondence in connection with the promotion of the lottery contrary to s 42 (1) (f) of the Betting, Gaming and Lotteries Act 1963. On 14th July 1971 two further informations were preferred against him in relation to like offences alleged to have been committed by him at 127 Aldersgate Street in the city of London and on or before 25th May 1971 at 333 Gray's Inn Road, London, WC1, respectively. The justices convicted the appellant on each of the three informations, fined him £50 on each, and ordered him to pay £100 towards the costs of the prosecution. The appellant appealed.

R A R Stroyan for the appellant.

Alexander Millar for the respondent.

*Cur adv vult*

21st December. **GRIFFITHS J** read the following judgment: I am instructed by Lord Widgery CJ to say that he is in agreement with the judgment that I am about to read.

This is an appeal by way of Case Stated from a decision of the City of London justices sitting at the Guildhall Justice Room whereby they convicted the appellant on three informations alleging that he used certain premises for purposes connected with the conduct of a lottery contrary to s 42 (1) (f) of the Betting, Gaming and Lotteries Act 1963. At the hearing before the justices the appellant admitted that on the dates charged in the informations he used premises at 23 Holborn Viaduct, 127 Aldersgate Street and 333 Gray's Inn Road respectively for the purpose of collecting correspondence connected with the conduct of a scheme known as 'World Wide Roulette'. Section 41 of the Betting, Gaming and Lotteries Act 1963 provides: 'Subject to the provisions of this Act, all lotteries which do not constitute gaming are unlawful'. It was not contended before the justices or in this court that any of the provisions of the Act which exempt certain lotteries applied, and accordingly the sole question was whether or not the scheme known as World Wide Roulette was a lottery within the meaning of s 41. The justices decided that the scheme was a lottery and it is conceded that, if they were right in their view, the appellant was properly convicted under the provisions of s 42 (1) (f) of the Act.

Before turning to the reasons why the appellant contends that the scheme is not a lottery, it is first necessary to give a description of the scheme itself. It is in essence an organised form of the fairly familiar 'chain letter'. The description of the scheme is conveniently taken from the Case Stated:

'(i) Participant buys an envelope from a seller for £1. (ii) Participant fills in his name and address at the bottom of the list enclosed in the envelope. (iii) Participant sends postal order for £1 to the person whose name is at the top of the list contained in the envelope. (iv) Participant sends to management in the envelope provided the list with his name at the bottom and £1 for management expenses. (v) Management delete top name on list on receipt. (vi) Management send to participant three envelopes for him to sell with his name now at the bottom of the lists in each envelope in position number 6. (vii) Participant sells his three envelopes for £1. (viii) Participant waits for his name to come to the top of the list when money from fresh participants starts to be sent to him.'

If the scheme is followed through by all participants who join and there is no break in the chain, it should in theory be possible to receive the sum of £729 when a participant's name comes to the head of the list.

The justices heard evidence from witnesses who had joined the scheme and made the following findings of fact. (i) Each witness entered the scheme deliberately and sent £1 to the person whose name was at the top of the list by their own decision. (ii) Each witness sent his £1 to the person whose name was at the top of the list who was a complete stranger to him and each of them who received any money under the scheme did so from persons who were complete strangers to them and not from the management. (iii) Each of the persons who obtained sums of money were sent different totals and none of them received the anticipated £729. It was agreed that it was possible for them to have done so (provided the chain did not break).

Counsel for the appellant submits that this scheme cannot be a lottery for two reasons. First, he says that it is an essential feature of a lottery that there should be a prize fund from which prizes will be distributed to the winners. He points out that in this scheme there is no prize fund held by the organisers as each participant pays

his £1 directly to another participant whose name appears at the head of the list. Secondly, he says that the distribution of prizes must be by pure chance for a scheme to be a lottery and that in this scheme, the participant at the head of the list who is sent £1 by someone joining the scheme, receives it, not as a matter of chance, but by virtue of the decision of the new participant to send it to him. As counsel for the appellant neatly put it, he receives it not by chance but by choice.

There is no statutory definition of a lottery either in the Betting, Gaming and Lotteries Act 1963, or in any of the preceding legislation in which lotteries have been declared unlawful. There is, however, a considerable body of authority in which various schemes have been considered and decisions given as to whether or not they were lotteries. It is now well established that one essential feature of a lottery is that the receipt of a prize must depend entirely on chance: see *Hall v Cox* (1). Starting from this firm ground, it is convenient to consider counsel for the appellant's second contention first. Does a participant in World Wide Roulette, if he is fortunate enough to receive payments from other participants, do so as a matter of chance? In my view the answer to this question is clearly 'Yes', any payment is dependent on the chance that the chain will not break before his name reaches the top of the list. Once he has set the machinery in motion by entering the scheme he has no further control over events and can exert no skill or influence over the ultimate outcome. On this aspect of the scheme the facts of the present case are very similar to those in *Director of Public Prosecutions v Phillips* (2). A company, having bought a quantity of notecases at a price of less than 1s 6d each, devised the following scheme for selling them to the public. The company issued a leaflet to the public which informed any person who wanted to take part in the scheme that on filling up and sending in an attached order form, together with £1, there would be sent to him a notecase and a supply of the leaflets, the order forms of which would be marked with a number allotted to him; that he should then get other persons to give orders for notecases using these forms; that he would be entitled to no benefit from the first three orders, but would be paid a commission of 10s on every other order received on his forms and on sales made as a result of these orders; that whenever an order was received on one of his forms, after the first three, a supply of forms also marked with his number would be sent to the buyer and that the participant would be paid a commission of 10s on each of the first three sales made by everyone to whom one of the forms so numbered was sent; and that there was no time limit to the scheme but the maximum commission payable to the participant was £20,000. This court held that this scheme was a lottery within the meaning of the Lotteries Act 1823. In the course of his judgment, LORD HEWART CJ said:

'There is here the publication of a scheme. What is the nature of that scheme? Is it not a scheme in the words, cited from Webster's Dictionary and approved by HAWKINS J in the well known case of *Taylor v Smetten* (3), for the "distribution of prizes by lot or chance"? There is no magic in the word "distribution". The word "payment" will do just as well. There is no magic in the word "prizes". "Commission" or "reward" will do just as well. Here, as it seems to me, it is quite obvious that the person who accepts the invitation contained in this leaflet is paying the sum of 1l. in order that he may have the opportunity of setting a ball rolling, over whose revolutions, after the first four at any rate, he will have no control, and it is a pure matter of chance whether the return upon his money will prove to be a few shillings or a great many pounds.'

(1) [1899] 1 QB 198.

(2) 98 JP 461; [1935] 1 KB 391; [1934] All ER Rep 414.

(3) (1883), 48 JP 36; 11 QBD 207.

In their judgments both LORD HEWART CJ and DU PARCQ J cited with approval the Scottish decision of *Barnes v Strathern* (1) in which a similar scheme for selling bonds was held to be a lottery, contravening the Lotteries Act 1823. Speaking of the scheme, LORD BLACKBURN said:

'All that has to be done by a person who desires to win a prize is to purchase a bond or ticket of one colour in the series, and to persuade four other people as deluded as himself to purchase four tickets of the next colour. That done, his own bond has cost him nothing, and he has started a snowball which may or may not result in the purchase from the undertakers of something like 5500 bonds. If that is the result, he will win a prize of £150. A real snowball started rolling at the top of a hill may or may not end in an avalanche. It is pure chance whether it disintegrates soon after it is started or whether it comes to rest against an unforeseen obstacle, and its ultimate fate depends in no way on the skill of the person who starts it. So, in the case of the bonds, it seems to me that the prospect of the issue of any one bond resulting in the ultimate issue of 5500 bonds in a consecutive series depends in no way on the skill of the holder of the first bond. The failure of any one individual in the series to find purchasers of four bonds of the next colour, the death of the holder of a bond before he has done so, or the loss by him of one of the bonds of the next colour before he has succeeded in disposing of it, are all incidents which might defeat the chance of the holder of the first bond in the series winning a prize, and are incidents over which we can have no control. Indeed, he is not invited to attempt to control in any way the snowball he has started, and one of the inducements held out to purchasers of bonds is the opportunity of winning £150 for nothing. In my opinion the scheme, ingenious as it undoubtedly is, is nothing but a lottery ...'

Everything said in the judgments in those cases can be said with equal force about the scheme in the present case and they are in my view conclusive authority for the view that the ultimate receipt of the money by any participant depended on pure chance.

I turn now to consider whether it is an essential ingredient of a lottery that there should be a prize fund. It is undoubtedly a usual feature of a lottery that there is an identifiable prize fund or prize. It may be a prize fund to which all participants in the lottery contribute as in the ordinary sweepstake, or it may be a prize put up by some independent person, such as the bicycle presented to be raffled in a working-men's club in *Bartlett v Parker* (2). And the attention of this court has not been drawn to any authority in which a scheme has been held to be a lottery where the prize or prize fund has at no time been in the hands of the organisers of the scheme.

In support of the submission that there could be no lottery without a prize fund, the appellant placed the recent decision of this court in *Whitbread & Co Ltd v Bell* (3) in the forefront of this argument. The defendants in connection with their business of brewers and owners of licensed premises, conducted a scheme called 'Win with Whitbread'. A sealed envelope containing a leaflet with three adhesive-backed perforated letters was handed to persons visiting some of their premises, and also a supply of coupons. Only one envelope was received by each person during any one opening period and it was immaterial how many drinks a person had or who purchased them. Each coupon set out words connected with the defendants and the prize was won by filling in all the blank spaces with the appropriate letters to

(1) 1929 S.C.(J.) 41.

(2) 76 JP 280; [1912] 2 KB 497.

(3) 134 JP 445; [1970] 2 All ER 64; [1970] 2 QB 547.



complete one word, or by receiving an instant winner coupon which immediately entitled the holder to a prize. The defendants were charged with using their premises for purposes connected with a lottery known as 'Win with Whitbread' contrary to s 42 (1) (f) of the 1963 Act. They were also charged with an offence under s 47 (1) (b) of the Act which is not material. The justices dismissed the informations which alleged that the defendants were running a lottery. The prosecutor appealed from the justices' decision and their argument is summarised by LORD PARKER CJ as follows:

'Nowhere in the history of lotteries or in this Act is there a statutory definition of a lottery. At least it consists of the distribution of prizes by chance, that is to say, cases where there is no element of skill whatever on the part of the participant. If there is any degree of skill involved, then there is no lottery. If authority is needed for that, it is to be found in *Hall v Cox* (1). It is clear, however, and indeed admitted, that that is not a complete definition. The prosecutor maintains that the only further element, apart from allurement, is that there should be something in the nature of a commercial venture, and that the absence of any payment or contribution by the participants, as was found in the present case, is not conclusive. Looked at realistically, the prosecutor says that the whole object of the promotion was to increase the sale of liquor, and that as the coupons themselves state, what no doubt was the fact, that the defendants' pubs displayed the "Win with Whitbread" sign, there was here an advertisement or allurement of the scheme. Accordingly, says the prosecutor, the justices ought to have convicted.'

LORD PARKER then continued:

'For my part I am quite unable to accept that argument. There is, so far as I know, no case of a successful prosecution for running a lottery which has not involved some payment or contribution by the participants, and indeed the trend of authority has all been the other way.'

LORD PARKER, after reviewing a number of authorities, concluded his judgment on this part of the case as follows:

'Finally there is another Scottish case, *Douglas v Valente* (2). It was decided by the Sheriff-Substitute (J. S. Mowat), who considered the dictionary meanings and the cases concerning lotteries, and said: "Despite that observation, I am satisfied that the whole trend of judicial decision and the majority of judicial observations, as well as the more recent dictionary definitions, favour the view that in its ordinary sense a lottery involves contribution to the prize fund by the participants." I entirely agree, subject, possibly, to the deletion of the words "to the prize fund", unless by that is meant to include profits out of which the prizes are provided. Accordingly, so far as the information alleging offences against section 42 of the Act of 1963 are concerned, I would dismiss them.'

This case is clear authority for the proposition that it is an essential feature of a lottery that the participants make a payment or contribution for the purchase of their chance. But for my part I think it would be reading too much into the language of LORD PARKER to conclude that he intended to state authoritatively that the existence of a prize fund or profit out of which prizes were to be provided, contributed to by

(1) [1899] 1 QB 198.

(2) 1968 Sc. L.T. 85.

the participants, was invariably an essential feature of a lottery. If this was his view, it could not be reconciled with the decision of the Divisional Court in *Bartlett v Parker* (1) in which a bicycle provided by a third party was the prize for the lottery. The whole argument in *Whitbread & Co Ltd v Bell* (2) was whether or not there had to be contributions by the participant. It was never necessary for the court to consider the destination of those contributions and I cannot derive any real assistance from the authority in the resolution of the problem now before this court.

Suppose that in the present scheme the arrangement was slightly different and that the new entrant, instead of sending his contribution to the man at the head of the list, sent it to the organisers who in their turn transmitted it to the person at the head of the list. It would then seem that there would be a prize fund being distributed by the organisers. Indeed, I understood counsel for the appellant to concede that if this were the case, he would be in difficulty on this point. But such an alteration in the administration of the scheme in no way alters its character; in either case it remains a scheme for the distribution of money by chance. I remind myself of the words of the Lord Justice-General (LORD CLYDE), in *Barnes v Strathern* (3):

'There is no limit to the ingenuity of the devisers of projects such as this, and there is, accordingly, no end to the variety of schemes which may constitute a lottery.'

Whereas it is true that most lotteries involve a scheme which creates an identifiable prize fund, I can find no reason to conclude that this is an essential feature of a lottery, provided the scheme achieves the overall object of the distribution of money by chance. This scheme is designed to achieve that end and it is in my view a lottery.

Accordingly, in my judgment, the magistrates came to a correct decision and I would dismiss this appeal.

**ASHWORTH J:** I agree.

*Appeal dismissed.*

Solicitors: Rowe & Maw; Director of Public Prosecutions.

Reported by T R Fitzwalter Butler Esq, Barrister.

(1) 76 JP 280; [1912] 2 KB 497.

(2) 134 JP 445; [1970] 2 All ER 64; [1970] 2 QB 547.

(3) 1929 S.C.(J.) 41.

**QUEEN'S BENCH DIVISION**

(LORD PARKER, CJ, JAMES AND BRIDGE, JJ)

25th June 1968

**JAMES v HALL**

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Disqualification—Special reasons—Vehicle parked on highway—Driving of vehicle few yards from highway to private parking place—Road Traffic Act, 1962, s 5 (1).*

By s 5 (1) of the Road Traffic Act, 1952: 'Where a person is convicted of an offence specified in Part I of the first schedule to this Act [which includes by virtue of s 5 (2) (a) of the Road Safety Act, 1967 an offence under s 1 (1) of that Act] the court shall order him to be disqualified for such period not less than twelve months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.'

The respondent pleaded guilty to driving a motor vehicle with a blood-alcohol concentration exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act, 1967. The justices held that the following special reasons for not disqualifying him existed; (i) that he had drunk only a small quantity of alcohol; (ii) that he was unaware that he was affected thereby; (iii) that he had no intention of driving home; (iv) that he had driven only a few yards with the intention of parking his car. On appeal by the prosecutor, who contended that none of the aforementioned facts could constitute a special reason,

**HELD:** though there was great doubt whether either (i) or (ii) could constitute a special reason, (iv), being a reason special to the offence, could amount to a special reason, and, as the prosecutor did not ask for the case to be sent back to the justices, the appeal should be dismissed on that ground.

**CASE STATED** by justices for the county borough of Darlington.

On 14th November 1967 an information was preferred by the appellant, P.c. James, against the respondent, Ronald Hall, charging that he in the county borough of Darlington on Sunday 22nd October 1967 did drive a motor vehicle on a road, having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from a laboratory test on the specimen provided exceeded the prescribed limit at the time the specimen was provided, namely, 80 milligrammes of alcohol in 100 millilitres of blood, contrary to s 1 (1) of the Road Safety Act 1967.

It was contended on behalf of the respondent that if the justices were satisfied that he had drunk but a small amount of alcohol, was unaware that he was affected thereby, had no intention of driving any distance, and had only driven a few yards with the intention of parking his motor car, the justices would be justified in holding there were special reasons under s 5 (1) of the Road Traffic Act 1962 for not disqualifying the respondent for holding or obtaining a driving licence. The justices convicted the respondent of the offence, fined him £35, ordered him to pay £10 10s for costs and further ordered his licence to be endorsed. They were, however, of the opinion that the contentions made on his behalf were correct and that the facts constituted special reasons for not disqualifying him and accordingly they did not do so. The prosecutor appealed.

*Ian Warren* for the appellant.

The respondent appeared in person.

**LORD PARKER CJ:** This is an appeal by way of Case Stated from a decision of justices for the county borough of Darlington, refusing to disqualify the respondent who had been found guilty of an offence contrary to s 1 (1) of the Road Safety

Act 1967, in that he had been found to be driving a vehicle having consumed alcohol in such quantity that the proportion of alcohol in his blood exceeded the prescribed limits of 80 milligrammes of alcohol in 100 millilitres of blood. In so refusing to disqualify the justices treated certain matters as special reasons.

The sole question here is whether the matters that they relied on, or any of them, did amount to special reasons. It was contended before the justices that the following facts constituted special reasons: first, that the respondent had drunk but a small amount of alcohol; secondly, that he was unaware that he was affected thereby; thirdly, that he had no intention of driving home; and, fourthly, that he had only driven a few yards intending to park his car. The justices held that those facts constituted special reasons for not disqualifying him.

As has been said so often, these questions of special reasons are extraordinarily difficult, and for my part I would not interfere readily with findings made by justices in these matters, unless it is quite clear that they have gone wrong in law. For myself I have grave doubts whether the fact that he had drunk but a small amount of alcohol, let alone that he was unaware that he was affected thereby, could be special reasons. But I find it unnecessary to come to a conclusion in that regard because it seems to me that the fact that he was only proposing to drive a few yards to remove his car from the highway into his friend's driveway could amount to a special reason, being a reason special to the offence. Counsel for the prosecutor has very fairly said that, if we come to that conclusion, he would not ask for the case to be sent back to enquire whether the justices would have come to that conclusion on that fact alone. I think myself that the justices would have been fully entitled to do so, and on that ground and that ground alone I would dismiss this appeal.

**JAMES J:** I agree.

**BRIDGE J:** I also agree.

*Appeal dismissed.*

**Solicitors:** Bower, Cotton & Bower, for Freeman, Son & Daly, Darlington.

**Reported by** T R Fitzwalter Butler, Esq, Barrister.

# QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND FORBES, JJ)

4th February 1972

COOMBS v KEHOE

*Road Traffic—Driving with blood-alcohol concentration exceeding prescribed limit—Disqualification—Special reasons—Vehicle parked on highway—Vehicle driven from one parking place to another—Route covering 200 yards along busy street—Potential source of danger to other road users—Road Traffic Act, 1962, s 5 (1).*

The respondent, who was a lorry driver, parked his lorry in a street and went into a public house to collect his wages. He then consumed alcoholic liquor and decided to move his lorry lest occupiers of houses in the street where he had parked it should complain about its being parked there overnight. He drove some 200 yards through a busy street to another parking place, and, while parking his lorry there, collided with two vehicles. He pleaded guilty to driving with a blood-alcohol concentration above the prescribed limit, contrary to s 1 (1) of the Road Safety Act, 1967, but justices refused to disqualify him, holding that a special reason existed by reason of the facts that at the time of the commission of the offence the respondent was only parking his lorry and that the distance involved was not more than 200 yards. On appeal by the prosecutor, who contended that no special occasion existed,

HELD: distinguishing *James v Hall* (ante p 385) and holding that it was a very special case which ought not to be extended, although a man who drove only a few yards in circumstances in which his manoeuvre was unlikely to bring him into contact with other road users and thus unlikely to produce a source of danger might be able to rely on that fact as a special reason in the particular circumstances, the position was different where a vehicle was driven 200 yards through a busy street and so was a potential source of danger to other users of the road; in those circumstances the fact that the driver was only parking his vehicle and only covering a short distance could not amount to a special reason; the case must, therefore, be remitted to the justices with a direction to impose the mandatory disqualification provided by s 5 (1) of the Road Traffic Act, 1926b.

CASE STATED by Cardiff justices.

On 29th June 1971 informations were preferred by the appellant, Leslie Coombs, against the respondent, Timothy Kehoe, for driving with a blood-alcohol concentration above the prescribed limit, contrary to s 1 of the Road Safety Act 1967, and driving without due care and attention, contrary to s 3 of the Road Traffic Act 1960. On 6th August 1971, the respondent pleaded guilty at Cardiff Magistrates' Court to both of the charges, and the justices in respect of each offence, fined him £15 and ordered his licence to be endorsed, but they refused to disqualify him in respect of the first offence there being a special reason for not doing so in that at the time of the commission of that offence, he was only parking his motor lorry and the distance involved was not more than 200 yards. The prosecutor appealed.

David Williams for the appellant.

Charles Welchman for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the city of Cardiff in respect of their adjudication as a magistrates' court in Cardiff on 6th August 1971. The appeal is brought by the prosecutor, and the charges which were before the justices against the respondent, Mr Kehoe, were one of driving with a blood-alcohol concentration above the prescribed limit contrary to s 1 of the Road Safety Act 1967, and, secondly driving without due care and attention, contrary to s 3 of the



Road Traffic Act 1960. The respondent pleaded guilty to both offences, and the only question for the justices, as it is the only question for us, is whether there were special reasons which entitled the justices to do as they did, namely, refrain from imposing a period of disqualification.

The facts were that at about 9.00 p.m. on 16th April 1971 the respondent drove a Bedford motor lorry from Hamilton Street in Cardiff a distance of approximately 200 yards to a point opposite 83 Cowbridge Road East, in Cardiff. We have been supplied with an extract from the Ordnance map of Cardiff, which shows that that journey involved his driving through some length of Hamilton Street, which can fairly be described as a side street, turning left into another street called Kings Road, proceeding along Kings Road for a short distance and then turning into the main A 48 road which is called Cowbridge Road East at that point. When he got outside 83 Cowbridge Road East he sought to park his lorry in a space some 80 feet long between two other motor cars, but while executing the parking manoeuvre he collided first with one car and then with the other. His movements immediately prior to this had been that he had parked his lorry in Hamilton Street earlier in the evening; he had been to a public house to collect his wages; he had obviously stayed in the public house some time and consumed alcohol; and then he felt he should not leave his lorry in Hamilton Street where the frontagers might complain if it was left overnight, so he set off back to Hamilton Street to pick up his lorry and park it in the space in Cowbridge Road East.

The justices thought that there were special reasons which entitled them not to disqualify, and they took two points. The first was that at the time of the commission of the offence the respondent was only parking his lorry and the distance involved was not more than 200 yards; in other words they were treating as a special reason the fact that this was not a man going on a journey at the relevant time, but a man whose lorry was awkwardly placed and a man who wished to put it in a more suitable situation, or as the justices say, to park it some 200 yards away.

They were influenced by another point, which I must say makes no appeal to me, that in some way it was a special reason that the respondent had been obliged to go to the public house for the purpose of collecting his wages. I would say no more about that because that obviously cannot be relevant in the present context.

The short and very important point is whether it can be a special reason for this purpose if all that the accused is doing at the relevant time is parking his vehicle, in the sense that he is moving it from one unsuitable place to a more suitable place. The justices were referred to a decision in this court in *James v Hall* (1). The facts there were that the accused had been attending his daughter's wedding. He made a number of social calls on friends. It seems fairly clear that he ended up in the house of a friend who hospitably invited him to stay the night. He had at that time some 124 milligrammes of alcohol per 100 millilitres of blood, and this was no doubt a kindly and well intended suggestion. Accepting that invitation to stay the night, the accused in *James v Hall* then realised that his car was standing in the street outside the house in which the offer of a bed had been made. Realising that it would be better to get it off the road, he went out with a view to driving it into his friend's driveway. In that case the justices had held that that was a special reason, and this court upheld the justices' decision. LORD PARKER CJ said that the fact that the respondent in that case intended to drive only a few yards in order to remove his car from the highway into his friend's driveway could amount to a special reason, it being special to the offence.

Once it is established that some fact could amount to a special reason, the justices, and the justices only, decide whether it should be treated as a special reason. I have

(1) ante, p. 385.

no doubt that the justices, having been referred to that case, were influenced by it, and counsel for the respondent today says that we ought to apply a similar principle. He says it should be accepted that if the man is driving his vehicle, not on a journey, but simply to move it to a more suitable place in which to park it, that is a circumstance which the justices can regard as a special reason, and he would submit that all that he is putting before us is an application of the *James v Hall* principle.

Counsel for the appellant prosecutor resists that, because, he says, a line must be drawn somewhere, and even if the decision in *James v Hall* was right, the line cannot be so drawn as to include this particular act of driving in the same category. For my part I think *James v Hall* was a very special case and one which should not be extended. It is one thing to say that a man who drives literally a few yards—by that I mean 10 or 15 yards, something of that kind—and in circumstances in which his manoeuvre is unlikely to bring him into contact with other road users and thus unlikely to produce a source of danger, is a sufficient special reason in the particular circumstances, and quite a different thing to say that a man parking his lorry may be excused disqualification if he drives through busy streets for 200 yards, inevitably in those circumstances his lorry being a potential source of danger to someone on the road.

In my judgment, as I say, one should confine *James v Hall* to its own very special circumstances and not recognise the general principle submitted by counsel for the respondent that if one is parking his car, that is a special reason. I think in the present circumstances, although I have every sympathy with the justices, that they erred in that they treated as a special reason something which in law could not be a special reason. I would allow the appeal and send the case back to the justices with a direction that they must impose the mandatory disqualification.

**MELFORD STEVENSON J:** I agree.

**FORBES J:** I agree.

*Appeal allowed.*

Solicitors: Lewin, Gregory, Mead & Sons, R H C Rowlands, Cardiff; Hallinan, Blackburn, Gittings & Hambleton, Cardiff.

Reported by T R Fitzwalter Butler, Esq, Barrister.

QUEEN'S BENCH DIVISION

(LORD WIDGERTY, CJ, MELFORD STEVENSON AND FORBES, JJ)

3rd, 4th February 1972

COZENS v BRUTUS

*Public Order—Insulting behaviour conducive to breach of peace—'Insulting'—Behaviour affronting other people and evidencing disrespect or contempt for their rights—Behaviour foreseen by reasonable person as likely to cause resentment or protest—Public tennis match—Disruption of match by defendant jumping over barrier and running on court—Public Order Act, 1936, s 5, as replaced by Race Relations Act, 1965, s 7.*

*Public Order—Public place—Open space to which public have access—Tennis court—Grounds consisting of courts, administrative buildings, and partly covered stands around one court—Match disrupted on that court—Public Order Act, 1936, s 9.*

The respondent was charged with using at the All England Lawn Tennis Club insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act, 1936, as replaced by s 7 of the Race Relations Act, 1965. The annual open lawn tennis tournament was in progress at the club. The grounds of the club included 16 tennis courts as well as the club's administrative buildings and partly covered stands surrounding the centre court. The public were admitted to the grounds, but no one was allowed to go on the grass of the courts other than players, ball boys, and club officials. Low barriers were erected around the courts which marked them out from the areas to which the public had access. During a doubles match on No 2 court the respondent stepped over the barrier on to the court blowing a whistle. He threw leaflets about and approached the players at one end, attempting to hand one a leaflet. Nine or ten other persons then came on the court, holding up banners with slogans and more leaflets were distributed. Play was stopped as a result of these disruptions. A constable on duty asked the respondent to leave, but the respondent pushed him aside and sat down on the court. The spectators displayed strong resentment. The constable dragged the respondent away amid cheers from the onlookers, and the other demonstrators then left the court voluntarily. The incident lasted between two and three minutes. Justices dismissed the informations being of opinion that the respondent's behaviour was not 'insulting' within the meaning of s 5. On appeal by the prosecutor,

**Held:** (i) behaviour which affronted other people and evidenced a disrespect or contempt for their rights, and which reasonable persons would foresee was likely to cause such resentment or protest as had occurred in the present case was 'insulting' behaviour within the meaning of s 5; (ii) on the facts found by the justices No 2 court constituted an 'open space' within the meaning of s 9 of the Public Order Act, 1936, even though there were on it buildings incidental to its use as an open space; the case must, therefore, be remitted to the justices to continue the hearing.

**CASE STATED** by Wimbledon justices.

An information was preferred by the appellant, John Cozens, against the respondent, Dennis Brutus, that on 28th June 1971, at the All England Lawn Tennis Club, Wimbledon, SW, he had used insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act 1936 as replaced by s 7 of the Race Relations Act 1965).

On the hearing of the information at Wimbledon Magistrates' Court on 30th July 1971, the justices came to the conclusion that the respondent's behaviour was not insulting within the terms of the offence alleged against him. Insulting behaviour being an essential element of an offence within s 5 of the Public Order Act 1936, they did not consider the other points raised before them, and accordingly they dismissed the information without calling on the respondent. The prosecutor appealed.

*Richard Du Cann* for the appellant.

*Brian Capstick* for the respondent.

**MELFORD STEVENSON J:** This is an appeal by Case Stated against an adjudication by the Wimbledon justices on 30th July 1971, when they dismissed an information alleging that the respondent had, on 28th June 1971 at the All England Lawn Tennis Club Church Road, Wimbledon, used insulting behaviour whereby a breach of the peace was likely to be occasioned contrary to s 5 of the Public Order Act 1936 as replaced by s 7 of the Race Relations Act 1965.

The facts as found by the justices were these. On the afternoon of Monday, 28th June 1971, the annual open tennis tournament was in progress at the All England Lawn Tennis Club in Wimbledon. The public were admitted, on payment, to the grounds, which included 16 tennis courts. The administrative buildings of the club are within the grounds and contiguous with the main tennis court known as the centre court. This court is entirely surrounded by stands for spectators. These are partly covered, the court itself being uncovered as are all the other courts and stands. Sitting or standing space is provided in these stands and around all the courts for spectators who are both members of the public and club members. No one is permitted at any time to go on the playing area of any of the courts or the grass immediately adjacent to the playing area other than the players, ball boys, or club officials. Low barriers are erected around the courts which mark out these areas from that to which the public have access.

At 2.30 p.m. on the no 2 court there was a men's doubles match in progress involving players called Davidson and Bowrey against two other players, Pilic and Drysdale. Mr Drysdale is a South African. When the match had been going on for some thirty minutes, and when one of the players was about to begin his service, the respondent stepped from among the audience over the barrier and on the court below blowing a plastic whistle. He threw leaflets about and approached the players at one end. He attempted to hand Mr Bowrey a leaflet but he would not accept it. On the whistle blowing, nine or ten other persons also made their way on to the court, some holding up banners or placards on which slogans were written, and more leaflets were distributed. Play in the match could not continue after the respondent had walked on to the court, and there is exhibited to the case a leaflet of a political nature to which I do not think it is necessary to refer in detail.

The appellant, who brings this appeal, is a constable of the Metropolitan Police Force. He was on duty in uniform at the time. He went on to the court, went up to the respondent as he turned to the second player, and asked him to leave. The respondent made as if to leave, but then he pushed the appellant to one side and sat down on the court. When the respondent interrupted the play in the match, there were loud shouts from the spectators in the stands who seemed upset. They gesticulated, waved their programmes, shook their fists at him, and a number of them shouted: 'Off, off'.

It was necessary for the appellant to lift and drag the respondent bodily from the court. When that had been done there were cheers from the crowd. Once the respondent was off the court he co-operated and went quietly with the appellant away from the court. Some of the crowd in a corridor under the stand showed hostility towards the respondent and gesticulated and tried to strike him. All the other demonstrators left the court voluntarily, shepherded by another police constable. Nobody other than the respondent sat down, and no one else was arrested. The whole incident from start to finish lasted two to three minutes. In the corridor coming from the court the respondent was told why he had been arrested and when he was later charged he said: 'I had no intention of breaking the law or causing a breach of the peace. This was an entirely peaceful protest.'

At the end of the prosecution's case, a number of contentions were put before the justices—that there was no evidence to show that the respondent intended to cause

a breach of the peace; that the incident took place on the court itself and since this was not open to the public did not occur in a public place; and that the behaviour itself was not insulting and amounted to no more than annoyance.

The appellant contended that, the charge being that the respondent did use insulting behaviour whereby a breach of the peace was likely to be occasioned, it was immaterial whether he intended a breach of the peace or not. It was also said that the court had to consider the grounds as a whole, and if the complex in reality was an open space to which at the material time the public were permitted to have access, it mattered not if there was a small area within the grounds that at the material time the public were not intended to use. Lastly it was said that to interrupt a tennis match with such behaviour was an affront both to the players and to the audience who had come for the purpose of watching tennis, and, taking into account that the respondent actually sat down on the court, his behaviour actually caused a breach of the peace as well as amounting to conduct that was likely to do so.

The justices, having considered the evidence, dismissed the information and rested their conclusion on the statement that the respondent's behaviour was not insulting within the meaning of s 5 of the Public Order Act 1936. The justices say:

'we did not consider the other points raised before us and accordingly dismissed the information without calling upon the respondent.'

They state the question which this court has to consider to be whether

'on the above statement of facts, we came to a correct determination and decision in point of law, and, if not, the court is respectfully requested to reverse or amend the same.'

The language of s 5, omitting words which do not matter for our present purpose, is this:

'Any person who in any public place . . . (a) uses . . . insulting . . . behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'

It therefore becomes necessary to consider the meaning of the word 'insulting' in its context in that section. In my view it is not necessary, and is probably undesirable, to try to frame an exhaustive definition which will cover every possible set of facts that may arise for consideration under this section. It is, as I think, quite sufficient for the purpose of this case to say that behaviour which affronts other people and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest such as was aroused in this case—and I rely particularly on the reaction of the crowd as set out in the Case—is insulting for the purpose of this section. There is no doubt that the elements I have ventured to describe are plainly established by the finding of the justices here, and I therefore feel no difficulty in coming to the conclusion that this was insulting behaviour for the purpose of this section.

It is perhaps desirable, although not strictly necessary for the purpose of deciding this case, to refer to the contention that I read out just now to the effect that this tennis court was not an open space, although the justices do not adopt it or rest their decision on it. The decision of this court in *Cooper v Shield* (1) dealt with a disturbance at a railway station arising out of the arrest of a number of hooligans



who arrived at a railway station and later were prosecuted under this section. The court had to consider the meaning of the words 'open space' as defined in s 9 of the 1936 Act, which is the definition section, but I would particularly like to draw attention to a paragraph at the end of the judgment of LORD PARKER CJ, in which he said this:

'I would like to add without deciding it that the position may be very different when one is considering what ordinarily one would call open spaces and ask oneself the question whether they cease to be open spaces because incidental to their use they happen to be buildings. One immediately thinks of a racecourse and stands; one thinks of a football ground with stands. It seems to me, as I say without deciding the matter, that in those cases it is perfectly apt to describe the complex as an open space notwithstanding that as incidental to the use of that open space there are buildings. In my judgment quarter sessions came to a right conclusion and I would dismiss the appeal.'

Those words are obviously of the utmost relevance if one has in the present case to consider whether no 2 court on the findings of these justices constituted an open space for the purpose of this section. For myself I have no doubt that it did, and I would remit this case to the justices with a direction to continue the hearing.

**FORBES J:** I agree.

**LORD WIDGERY CJ:** I also agree. The findings of fact in the Case are to be regarded as provisional in the respect that the respondent has not yet had a chance of calling such evidence as he may desire to call. The appeal will be allowed and the matter will be sent back to the justices with a direction to continue the hearing.

*Case remitted.*

Solicitors: *Solicitor, Metropolitan Police; B M Birnberg & Co.*

Reported by T R Fitzwalter Butler, Esq, Barrister.

QUEENS BENCH DIVISION

(ASHWORTH, MELFORD STEVENSON AND FORBES, JJ)

17th February 1972

EVANS v EWELS

*Criminal Law—Indecent exposure—Exposing person with intent to insult female—Meaning of 'person'—Limitation to penis—Vagrancy Act, 1824, s 4.*

By s 4 of the Vagrancy Act, 1824, a man who wilfully, openly, lewdly and obscenely exposes his person with intent to insult any female is guilty of an offence.

In the aforementioned section 'person' means the penis and does not comprise any other part of the human body.

CASE STATED by Salop Quarter Sessions.

On 18th February 1971, Ludlow magistrates convicted the appellant, Anthony Charles Evans, on an information preferred by the respondent, Donald Ewels, of having on 4th November 1970 at Craven Arms in the county of Salop, openly, lewdly and obscenely exposed his person with intent to insult a female contrary to s 4 of the Vagrancy Act 1824, and ordered him to pay a fine of £15. The appellant appealed against that conviction.

*I E Jacob for the appellant.*

*A Barker for the respondent.*

**ASHWORTH J:** This is an appeal by way of Case Stated from an adjudication by the court of quarter sessions for the county of Salop. On 18th February 1971 justices sitting at Ludlow convicted the appellant of having on 4th November 1970 at Craven Arms openly, lewdly and obscenely exposed his person with intent to insult a female contrary to s 4 of the Vagrancy Act 1824, and ordered him to pay a fine of £15. He appealed from that conviction to quarter sessions, who dismissed the appeal with costs.

The facts can be shortly stated. They begin with an earlier incident, which I only mention to dispose of forthwith. Apparently in May 1970, some five months before the relevant incident, the appellant had intentionally exposed himself to the complainant at Craven Arms and on that occasion, as the case finds, it was indeed his penis that he exposed. In November 1970 it was found that he walked past the complainant in the street at Craven Arms at about 4.00 p.m. and 'his trousers were unfastened at the front exposing a patch of bare skin low down on his stomach in a "V" shape'. I have quoted the words as they are set out in the Case, and no further information as to the size of this patch or the location of this patch is given to this court.

The next finding is that 'such exposure was intentional on the appellant's part and was done to insult the complainant, who was insulted by it'. On that it was said that he had exposed his person with intent to insult her. At quarter sessions the court expressed its opinion in the following form:

'We were of the opinion that (i) the word "person" in section 4 of the Vagrancy Act, 1824 does not refer only to the private or sexual parts of the body: it includes any part of the body which might cause insult to a female if wilfully, openly, lewdly and obscenely exposed to her; (ii) the exposure of a patch of bare flesh low down on the stomach, and hence close to the private parts, might cause insult in such circumstances, and did so in the present case.'

Thirdly, a matter I need not refer to in detail, a reference to the previous incident as bearing on identification and on intent. They dismissed the appeal with costs.

The first question for this court is whether exposing the person within the section is confined to exposing private or sexual parts. The section in question, so far as material, in very short and simple language refers to:

'every person wilfully, openly, lewdly, and obscenely exposing his person with intent to insult any female.'

The sole question for this court at the present time is the meaning and scope of the word 'person'. Counsel for the appellant contends that at the time of the passing of the Act, and a fortiori today, the word 'person' in the context refers and refers only to the penis. On the other hand, counsel for the respondent, supporting the decision of both courts below, says that the word 'person' must not be given any restricted or special meaning of that sort; it means any part of the living body.

There is not a great deal of authority on this matter, and for my part such as I have seen tends to support the appellant's submission. I start with a case in 1848, *R v Orchard and Thurtle* (1). That refers to incidents in a urinal. It is to be observed that in the indictment the charge was set out as being for exhibiting and exposing 'their persons and private parts to each other in indecent postures and situations' and so on. In the course of his judgment CRESSWELL J said this:

'Although the place in question is in Farringdon-market, it is not a public place for the purpose of this indictment. Every man must expose his person who goes there for a proper purpose.'

It is quite plain that in that particular sentence he gave to the word 'person' the restricted meaning for which counsel for the appellant contends.

In *R v Holmes* (2) which came before the Court for Crown Cases Reserved five years later in 1853 there was an indictment for the nuisance of indecently exposing the person in a public omnibus. In the course of that case again there was argument, and I observe that LORD CAMPBELL CJ, having been referred to *R v Orchard and Thurtle*, said this, as had been said by CRESSWELL J:

'In a public urinal, the person must necessarily be exposed by those who use it for lawful purposes.'

The next matter to which I would desire to refer is a passage at page 319 of the second edition of Smith and Hogan on Criminal Law. In a section of the work dealing with this very offence of indecent exposure under the Vagrancy Act 1824, the authors say this:

'Unlike the common law offence this crime is limited to exposure by a male to a female and requires a specific intent to insult. It has been suggested, though there is no authority on the point, that there is another limitation on this offence which is not applicable to the common law offence—that is, that "person" means "genital organ" and "however deliberate be the intent to insult the female, and however great the insult she feels, the exposure of the backside is not within the section".'

That last quotation is taken from a work edited by Professor Radzinowicz called 'Sexual Offences'.

It seems to me that at any rate today, and indeed by 1824, the word 'person' in connection with sexual matters had acquired a meaning of its own, a meaning which made it a synonym for 'penis'. It may be, as counsel for the appellant said, that it

(1) (1848), 13 JP 269; 3 Cox CC 248.

(2) (1853), 17 JP 390.

was the forerunner of Victorian gentility which prevented people calling a penis a penis, but however that may be I am satisfied in my own mind that it has now acquired an established meaning to the effect already stated. It is, I venture to say, well known among those who practise in courts that the word 'person' is so used over and over again; it is the familiar synonym of that part of the body, and I would use, as one of the reasons for my decision in this case, that interpretation which was prevailing in 1824 and has become established in the 150 years since then.

But there is another reason in my view why one should be inclined to give the word 'person' in s 4 the meaning which I have suggested. I look at the mischief to which the Vagrancy Act 1824 was directed. One has only to read through the catalogue of what one may fairly call a series of public nuisances, not in the strict legal sense of that term but as descriptive of the mischief against which the legislation was directed, to see that what Parliament was concerned to do in the Vagrancy Act 1824 was to collect a number of no doubt prevalent offences, make them summary offences, and thus save the time, expense and difficulty of proceeding by indictment at common law or under some other Act. Approaching the matter in that way, I find in this catalogue an offence described as 'exposing the person with intent to insult a female.' If there were nothing else, I should be very inclined to say that the mischief to which that section was directed was the mischief of exposing the penis with intent to insult a female, and did not cover the variety of occasions when other parts of his body may be exposed, even though on those occasions there was indeed an intent to insult a female.

Counsel for the respondent, who has helped the court by attempting to uphold this conviction, suggested that if this view were taken, the words which appear in s 4, 'lewdly, and obscenely exposing his person', would become wholly unnecessary, because any exposure of the penis with intent to insult a female must of itself clearly be lewd and obscene. I am inclined to think that there is force in that, but it does not in the least militate against the view which I have formed as to the true meaning of the word 'person'. It will not be the first time in which one finds in a section a number of words used over and above what was strictly necessary to enact what was required.

For these reasons, though this court is differing from the court of quarter sessions, I would allow this appeal and quash the conviction.

**MELFORD STEVENSON J:** I agree.

**FORBES J:** I agree.

*Conviction quashed.*

Solicitors: Kenneth Brown, Baker, Baker & Co, for G H Morgan & Sons, Ludlow; Phillips & Co, Ludlow.

Reported by T R Fitzwalter Butler, Esq, Barrister.

**COURT OF APPEAL (CIVIL DIVISION)**

(SACHS, EDMUND DAVIES AND STEPHENSON, LJJ)

12th, 13th January 1972

**DYMOND v PEARCE AND OTHERS**

*Highway—Obstruction—Nuisance—Parking of vehicle for long period—Removal of part of highway from public use—Collision between motor cycle and parked vehicle—Injury to pillion passenger—Collision due wholly to negligence of motor cyclist—Obstruction not a source of danger.*

A lorry owned by the second defendant was parked for a long period by its driver, the third defendant, on a highway. The lorry, which was some 7½ ft wide, was parked on the outside of a very shallow bend in the northbound carriageway of the highway, which was divided into twin carriageways, each 24 ft in width, by a central reservation. The lorry was parked immediately beneath a street lamp and its lights were properly illuminated. Not less than 16 feet of the carriageway was left unobstructed for northbound traffic to pass between the offside of the lorry and the central reservation. The first defendant, a motor cyclist, after lighting-up time approached, travelling in a northerly direction, the point where the lorry was parked, the plaintiff being his pillion passenger. There was nothing to obstruct his view of the lorry for at least 200 yards. Traffic was light and there was no mist or fog, but he collided with the parked lorry and the plaintiff was injured. The plaintiff recovered judgment against the first defendant in default of defence. He also brought an action against the second and third defendants (the owners and driver of the lorry) alleging that they were negligent with regard to the parking of the lorry, or, alternatively, that the parking of the lorry constituted a public nuisance. The trial judge held that the parking of the lorry was not negligent and did not constitute a nuisance, but that the injuries received by the plaintiff were due entirely to the negligence of the first defendant in failing to keep a proper look-out. Accordingly, he gave judgment for the second and third defendants. On appeal by the plaintiff,

**Held:** the leaving of a large vehicle on a highway for a considerable period other than in a lay-by constituted a nuisance in that it reduced the width of the highway and removed part of it from public use, but the judge had rightly decided that the second and third defendants were not liable for the injuries sustained by the plaintiff on the ground that those injuries had been caused solely by the first defendant's negligence; the nuisance caused by the lorry having been left in the position in which it was left was not a cause of the accident, or (per EDMUND DAVIES, LJ) the nuisance arising from the obstruction was not such that a reasonable man would be bound to realise the likelihood of risk to highway users from the presence of the obstructing vehicle.

Per SACHS and STEPHENSON LJ. A person who has created a nuisance by obstructing the highway, even though not liable in negligence, might be liable in nuisance if an unexpected supervening event occurred so as to render the obstruction the cause of the accident.

**APPEAL** by the plaintiff, Paul Leslie Dymond, against a decision of BRIDGE J at Exeter Assizes dismissing his action for damages for personal injuries and consequential loss against Christopher Albert Pearce (first defendant), Ranco Controls Ltd (second defendants), and Alfred George Noonan (third defendant).

R J S Harvey QC and A R Tyrrell for the plaintiff.

C Fawcett QC and M J Turner for the second and third defendants.

**SACHS LJ:** This is an appeal from a judgment of BRIDGE J given at Exeter Assizes on 25th June 1971. On that occasion there came before the learned judge the claim of a pillion riding passenger on a motor cycle. The driver of that motor cycle had in Wolsley Road, Plymouth, driven it into the back of a large stationary lorry at about 9.45 p.m. on 29th August 1966, a bank holiday. The plaintiff passenger having recovered judgment in default of defence against the driver of the motor



cycle, who was the first defendant, was seeking at assizes to recover damages also against the second and third defendants, who were respectively the owner and driver of the lorry. The case against those two defendants was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge, however, found against the plaintiff on both issues. Hence this appeal.

The facts in essence are simple and were related by the learned trial judge as follows:

'Wolseley Road, Plymouth, carries at certain times of day a substantial volume of traffic. It is in a built-up area, and subject to the statutory speed limit of 30 mph. In the relevant length it is divided into twin carriageways by a central reservation which is broken at points to allow traffic to cross into side streets or to make "U" turns. Each carriageway is some 24 feet in width. The lorry, which was parked by the [third defendant], was on the outside of a very shallow right-hand bend in the northbound carriageway. The lorry was some 7½ feet wide; accordingly it left unobstructed not less than 16 feet of the carriageway for northbound traffic to pass between the offside of the lorry and the central reservation. The time of the accident, as I have already indicated, was 9.45 p.m. late in August after lighting-up time. The street lamps in Wolseley Road were alight; they afforded excellent illumination. The lorry was parked immediately beneath a street lamp and its lights were also properly illuminated. Approaching the point where the lorry was parked in a northerly direction, as was the [first defendant], there was nothing whatever to obstruct the view of the parked lorry for a distance of at least 200 yards. I am quite satisfied on the evidence that this accident happened for one reason only, namely that the [first defendant] simply was not looking where he was going. If he had been, the accident could not have occurred, because there was the lorry plain for all to see. I have heard the evidence of a Miss Lashbrook, which I accept. She and another girl with two boys, all in their teens, were standing on the pavement talking and laughing together as the motor cycle passed by, and her evidence is that both the [first defendant] and the [plaintiff] turned to look at the group on the pavement. They waved and one of them shouted. It is quite plain to my mind that it was because the [first defendant], perhaps in a Bank Holiday mood, allowed his attention to be distracted in that way from the road ahead of him that he reached a position, travelling as he himself says, at a speed of 30 to 35 mph, so close behind the lorry before he realised it was in his path, and when he did realise that it was too late to take avoiding action.'

How the lorry came to be parked on that dual carriageway was stated in the course of some further findings of the learned trial judge. He referred to the fact that the third defendant lived in a semi-detached house, 37 Wordsworth Crescent. That crescent ran parallel to Wolseley Road, but on the opposite side of the carriageway where the lorry was parked. The third defendant's house fronted on to Wordsworth Crescent; it had no traffic entrance on to the Wolseley Road, nor, so far as we were informed, had it any other access to it beyond a common passageway leading from Wolseley Road to Wordsworth Crescent. In one sense, however, it can properly be said that the Wordsworth Crescent houses backed on to Wolseley Road. Wordsworth Crescent was an extremely narrow residential street and one in which it was quite impracticable to park a large lorry. The third defendant on this occasion had gone to his employer's, the second defendant's, premises some five miles away from his home at about 5.00 p.m. having in mind a long journey which he was going to make with the lorry the next day. He loaded the lorry in question and then drove it back towards his home with a view to making an early start on a drive to London the

following morning at about 4.00 a.m. He adopted that course for his own convenience, as he preferred this way of doing his work to fetching the lorry from the second defendant's premises in the early morning. He parked it in Wolseley Road at about 6.00 p.m. and in due course he went and turned on the lights when lighting-up time came.

So far as negligence is concerned, it is sufficient to say that the finding of the learned trial judge in favour of the defendants was right. To park a lorry, even of the size of the one under consideration, under a good street lamp on a one-way carriage track 24 ft wide with its tail lights on at the appropriate time cannot be said to be negligent, at any rate when there was no evidence of difficulties likely to be caused to traffic (the traffic was said to be light at the relevant time), or as to the risk of heavy mist or fog supervening. Moreover, the lorry was parked in that position on a bend which is the more likely to be clear of other vehicles pursuing a normal course.

Accordingly, in this court the real challenge concerned the learned trial judge's finding on the issue of nuisance. He held that the leaving of the lorry on the highway did not constitute a nuisance; that even if it did, damage of the kind suffered was not a foreseeable consequence; and, moreover, that the nuisance was not in any event the cause of the accident.

The first question to be answered is whether or not this lorry when left on the main road from 6.00 p.m. with a view to its not being moved until 4.00 a.m. constituted at 9.45 p.m. an obstruction of the highway which in law should be held to be a nuisance. It is at the outset to be observed that it was conceded by counsel for the second and third defendants, that there was no question in this case of the third defendant being able in relation to the road where the lorry was left to assert any special right as being the occupier of adjoining premises. That was an inevitable concession, in view of the fact, already mentioned, that 37 Wordsworth Crescent had no traffic exit on to Wolseley Road; nor was the lorry parked on the Crescent side of the road. It follows that the question whether the lorry constituted an obstruction falls to be determined in the same way as if the driver was any other vehicle user who had no such special rights.

The law on the question as to what constitutes a public nuisance in a highway is plain, despite the fact that in certain authorities cited to us dealing with wholly different sets of facts there can be found phrases apt to deal with those facts which, if taken out of context, could impair the clarity of the position. The relevant law is compactly stated in the judgment of SIR RAYMOND EVERSHERD MR in *Trevett v Lee* (1) where he said:

"The law as regards obstructions to highways is conveniently stated in a passage in SALMOND ON TORTS: "A nuisance to a highway consists either in obstructing it or in rendering it dangerous" and then a number of examples are given. I will not take up time reading them, but a reference to these examples seems to me to show that *prima facie*, at any rate, when one speaks of an obstruction to a highway one means something which permanently or temporarily removes the whole or part of the highway from the public use altogether."

The phrase there quoted from the 11th edition of Salmond on Torts [p 303] is again found in the 15th edition [p 106], with a footnote accurately referring to the fact that it had been approved by SIR RAYMOND EVERSHERD.

Next one can find in the judgment of DENNING LJ in *Morton v Wheeler* (2) a statement which is relevant, although the case itself was concerned with danger arising from some 'sharp, fearsome-looking spikes' bordering the highway. There

(1) [1955] 1 All ER 406.

(2) (1956), *The Times*, February 1st.

DENNING LJ clearly recognised the existence of these two categories of nuisance affecting a highway when he said:

'As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely, a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely. . . . Danger stands, however, on a different footing from obstruction.'

When looking at authorities concerned with highway nuisances it is important to remember that there are these two categories, because otherwise phrases relating to the second—danger—category may be read as necessarily applying to the first—simple obstruction. It is, however, *prima facie* common to both categories—which can in fact overlap—that in neither is it necessary to prove negligence as an ingredient (see per LORD SIMONDS in *Read v J Lyons & Co Ltd* (1), per DEVLIN J in *Farrell v John Mowlem & Co Ltd* (2), and per DENNING LJ in *Morton v Wheeler* (3)); that in both proof of what is *prima facie* a nuisance lays the onus on the defendant to prove justification (compare *Southport Corporation v Esso Petroleum Co Ltd* (4)); and that, of course, neither is actionable—in the sense that a claim for damages can succeed—unless the plaintiff can establish that damage has actually been caused to him by the nuisance.

Leaving on one side those in somewhat special positions, such as frontagers, the common law rights of users of highways are normally confined to use for passage and repassage and for incidents usually associated with such use, such as temporary halts and those emergency stops which often give rise to difficulties, and have had to be considered in a number of authorities. The leaving of a large vehicle on a highway for any other purpose for a considerable period (it is always a matter of degree) otherwise than in a lay-by *prima facie* results in a nuisance being created, for it narrows the highway. With all respect to the views expressed by the learned trial judge as to the ways of life today, I am unable to accept his conclusion that the parking for many hours for the driver's own convenience of a large lorry on a highway of sufficient importance to have a dual carriageway did not result in the creation of a nuisance. One has only to think of the effect of thus reducing the width of such a road to about 16 ft when two other large lorries or similar vehicles happen to be overtaking each other to appreciate why his conclusion cannot stand. The more vehicles that were to adopt the same tactics in these container lorry days, the worse the situation would become.

The law on this point has not changed merely because nowadays one comes across large numbers of cases in which owners or users of vehicles 'obstruct the highway to a greater degree than is permissible hoping that no one will object', to adopt the phrase of LORD REID in *The Wagon Mound (No 2)*, *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* (5). It follows that in my judgment the driver's convenience was no justification for the lorry being left in Wolsley Road by the third defendant. It thus constituted an actionable nuisance at the time when the first defendant drove into it.

But the mere fact that a lorry was a nuisance does not render its driver or owner liable to the plaintiff in damages unless its being in that position was a cause of the

(1) [1946] 2 All ER 471; [1947] AC 156.

(2) (1954), 1 Lloyd's Rep 437.

(3) (1956), The Times, February 1st.

(4) 118 JP 411; [1954] 2 All ER 561; [1954] 2 QB 182; *revid in part* 120 JP 54; [1955] 3 All ER 864; [1956] AC 218.

(5) [1966] 2 All ER 709; [1967] AC 617.

accident. Counsel for the plaintiff strove manfully to get us to hold that once nuisance is established the usual rules as to causation do not apply. He urged that there existed some form of strict liability which does not obtain even when a breach of absolute statutory liability has been proved. That, in my judgment, was an untenable proposition.

Reference has already been made to the fact that the learned trial judge stated:

'I am quite satisfied on the evidence that this accident happened for one reason only, namely, that the [first defendant] simply was not looking where he was going.'

Moreover, towards the end of his judgment, when discussing what would be the position if he was wrong in holding that the lorry did not constitute a nuisance, he said:

'It may in the end be a matter of causation, a matter simply of saying that even if this was a common law obstruction, nevertheless as such it was not causative of the present accident. The accident was, as I said in the first part of this judgment, wholly attributable to the fact that the [first defendant] as he rode along was watching the attractive young ladies on the pavement instead of looking ahead of him to see what conditions he was about to encounter.'

That is in effect a finding that the sole cause of the accident was the first defendant's negligence. On the facts, that was, in my judgment, a correct conclusion. It entails a parallel conclusion that the nuisance was not a cause of the plaintiff's injuries. That, indeed, in the vast majority of cases is an inevitable conclusion once negligence on the part of the driver of a stationary vehicle is negatived, for only rarely will that which was found not to be a foreseeable cause of an accident also be found to have been in law the actual cause of it. For that reason, I would dismiss this appeal.

It is thus not necessary to decide a further point inherent in much that was canvassed before us as to the ingredients of nuisance of the category under consideration. What would be the position if, even though the third defendant had not been negligent in leaving the lorry as it was in fact left, yet there had occurred some unexpected supervening happening—such as an onset of heavy weather, sea mist or fog, or, for instance, a sudden rear light failure (potent cause of fatalities)—which had so affected the situation that the lorry became the cause of an accident? Should the risk fall entirely on those using the highway properly? Or should some liability attach to the person at fault in creating a nuisance? It may well be that, as I am inclined to think, he who created the nuisance would be under a liability—despite certain views expressed in *Parish v Judd* (1) (a temporary emergency stop case—correctly decided as such), which I understand are about to be repeated by Edmund Davies LJ and with which, as at present advised, I am unable to concur. If he was thus liable this might be the only class of case in which an action in nuisance by obstruction of the highway could succeed where one in negligence would fail. That, however, on the facts touching causation found by the learned trial judge remains an issue which can be decided on some other occasion.

**EDMUND DAVIES LJ:** I agree in the dismissal of this appeal but desire to add some observations of my own. I think I should first say something about my extempore (and unrevised) judgment in *Parish v Judd* (1) which has been referred to in the course of argument. The facts there dealt with were substantially different from those of the present case. There the lorry and towed car which obstructed the highway had come to rest only a few moments before the car carrying the plaintiff crashed into them. In no sense had they been 'parked' on the carriageway as that

(1) 124 JP 444; [1960] 3 All ER 33.

term is generally understood and as happened in the present case. Again, the lorry and the car were stopped not simply as the result of an act of pure volition and choice on the lorry driver's part, but in an emergency and solely in order that he could ensure that all was well with the towed car and its driver. It was against the background of those facts that the court was called on to adjudicate on the alleged liability of the driver of the stationary car into which that carrying the plaintiff crashed, notwithstanding that the former vehicle was clearly visible 100 yards away. In saying that: 'The mere fact that an unlighted vehicle is found at night on a road is not, in my judgment, sufficient to constitute a nuisance', I hope and believe it is clear from the immediately ensuing passages in the judgment that what I there had in mind was that, although the vehicle was so 'found', its driver might nevertheless be exculpated if, for example, it emerged, that it was only momentarily stationary and that without fault on his part. This emerges from the citation made from *Maitland v Raisbeck* (1). It seems clear from that and other cases that it is the leaving of vehicles on the highway which constitutes the first of the two types of public nuisance dealt with by SIR RAYMOND EVERSHED MR in *Trevett v Lee* (2). Thus, the examples of obstructions of the highway which amount to nuisance given in *Salmond on Torts* include 'leaving horses and carts, or motor-vehicles, standing in it for an unreasonable time or in unreasonable number', several reported cases being cited in support of the examples given. In *Maitland v Raisbeck* LORD GREENE MR said:

'Every person . . . has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it had become an obstruction cannot turn it into a nuisance . . . If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine.'

Where a vehicle has been left parked on the highway for such a length of time or in such other circumstances as constitute it an obstruction amounting to a public nuisance, I remain of the view I expressed in *Parish v Judd* (3) that, in order that a plaintiff who in such proceedings as the present may recover compensation for personal injuries caused by a collision with that obstruction, he must establish that the obstruction constituted a danger. Nothing to the contrary was said by DEVLIN J in *Farrell v John Mowlem & Co Ltd* (4), which was strongly relied on by counsel for the plaintiff. What the learned judge there said of the pipe which the defendants had laid across the pavement was:

'No doubt it is a comparatively harmless sort of nuisance in that most members of the public may be expected to see the pipe, and it will not cause them any grave inconvenience, but that does not prevent it being a nuisance in law.'

all of which connotes that the pipe nevertheless in fact constituted a danger to those less vigilant passers-by who are commonly to be found. Counsel for the plaintiff understandably stresses the further passage in which DEVLIN J observed:

'it is no answer to say, "I laid the pipe across the pavement, but I did it quite carefully and I did not foresee and perhaps a reasonable man would not have

(1) [1944] 2 All ER 272; [1944] 1 KB 689.

(2) [1955] 1 All ER 406.

(3) 124 JP 444; [1960] 3 All ER 33.

(4) (1954), 1 Lloyd's Rep 437.



foreseen that anybody would be likely to trip over it." He has created a nuisance, and consequently he is liable for what follows.'

In *The Wagon Mound (No 2)*, *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* (1), LORD REID said of this decision:

'The only case cited where there is an express statement that liability does not depend on foreseeability is *Farrell v John Mowlem & Co Ltd* (2) [and, regarding the passage just cited, LORD REID added laconically:] He [the learned judge] cites no authority.'

In *Morton v Wheeler* (3) DENNING LJ drew the same distinction between obstructions of and dangers on the highway as that referred to by SIR RAYMOND EVERSHED MR in *Trevett v Lee* (4). But it is by no means always possible to allocate the facts of a particular case to only one or other of these two categories. It is notorious that what obstructs a highway may also create great danger to those who travel along it, while, on the other hand, danger unaccompanied by obstruction or obstruction giving rise to no danger may occur. In the present case counsel for the plaintiff, not surprisingly, contended that the second defendant's parked lorry did in fact constitute a danger. DENNING LJ in *Morton v Wheeler* asked:

'But how are we to determine whether a state of affairs in or near a highway is a danger? [and answered] This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance . . . but if the possibility of injury is so remote that he [the reasonable man] would dismiss it out of hand, saying "Of course, it is possible, but not in the least probable", then it is not a danger.'

It goes without saying, however, that the person creating a highway obstruction must be alert to such sudden and unpredicted weather changes as those to which we are subject in this country at most seasons, to the possibility that the vehicular or highway lighting may fail or be interfered with in these days of rampant vandalism, and to other circumstances which may convert what was originally a danger-free obstruction into a grave traffic hazard. If he fails to exercise ordinary intelligence in those and similar respects, he can make no proper claim reasonably to have anticipated the probable shape of things to come, and he must expect his conduct to be subjected to the most critical scrutiny in the event of an accident occurring.

Claims in nuisance for personal injuries sustained by colliding with vehicles obstructing highways do not affect the general rule that negligence is not a necessary element in nuisance. The tortuous route which has led to an action for nuisance being available in respect of personal injuries was admirably explored by Professor Newark in his article 'The Boundaries of Nuisance' (65 L.Q.R. 480). What he there calls the 'simple' principle, that negligence is not an element in the tort of nuisance, is well illustrated by the many reported cases of unlawful interference with a man's enjoyment of his land, it being no defence to say that no such interference was intended and even that all proper care was taken to avoid it. But in my judgment a different approach is called for where damages are sought to be recovered in respect of personal injuries said to have been caused by nuisance arising from the inexcusable presence of vehicles on highways. If deliberately created and clearly

(1) [1966] 2 All ER 709; [1967] AC 617.

(2) (1954), 1 Lloyd's Rep 437.

(3) (1956), *The Times*, February 1st.

(4) [1955] 1 All ER 406.

giving rise to danger to road users, fault is implicit and liability incontestable. But if an obstruction be created, here too, in my judgment, fault is essential to liability in the sense that it must appear that a reasonable man would be bound to realise the likelihood of risk to highway users resulting from the presence of the obstructing vehicle on the road. In this context it is interesting to recall the words used by FITZHERBERT J in 1535 in *Anon* (1), a case which, in the words of Professor Newark, 'set the law of nuisance on the wrong track'. By way of illustrating that a man who has suffered special injury from a public nuisance may recover compensation therefor, FITZHERBERT J said:

'As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.'

The nature of this illustration is itself significant. The trench being dug 'across' the highway, and the horseman 'riding that way by night' are the typical ingredients of a situation where any reasonable person must have realised that a danger to highway users was being created. That, as I see it, remains today an essential ingredient in cases for personal injuries brought in circumstances such as those existing in the present case. It is true that in the result, as DENNING LJ said in *Morton v Wheeler* (2),

'Inasmuch as the test of danger is what may reasonably be foreseen, it is apparent that cases of public nuisance . . . have an affinity with negligence.'

Nevertheless, as he went on to point out:

'There is a real distinction between negligence and nuisance. In an action for private damage arising out of a public nuisance, the court does not look at the conduct of the defendant and ask whether he was negligent. It looks at the actual state of affairs as it exists in or adjoining the highway, without regard to the merits or demerits of the defendant. If the state of affairs is such as to be a danger to persons using the highway . . . it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse.'

Did this particular lorry, parked as it was in all the circumstances described by SACHS LJ, constitute a danger at any time? I deliberately restrict my question in that way, since I am far from desiring to give the slightest encouragement to the unnecessary and avoidable parking of vehicles for lengthy periods, especially on highways designed, as Wolseley Road was, for (as the trial judge said) 'a substantial volume of traffic'. But, having so limited it, I have come to the clear conclusion that, although it constituted an obstruction, and, therefore, a public nuisance (having been deliberately and inexcusably left parked for several hours), it did not present a danger to those using the highway in the manner in which they could reasonably have been expected to use it.

This question of danger is, of course, inextricably linked up with that of causation. Counsel for the plaintiff boldly submitted that, once it be found that this lorry so obstructed the highway as to amount to a nuisance, this created a situation of strict liability, with the result that the matter of causation is immaterial and the plaintiff must necessarily succeed. He was, therefore, driven to assert that, supposing in the present case the motor cyclist had for some reason lost control of his vehicle

(1) (1535), YB Mich 27 Hen 8, f 10, pl 10.

(2) (1956), *The Times*, February 1st.

some distance back and thereafter in the course of its unchecked progress it happened to strike the parked lorry (when it might equally well have crashed into a house adjoining the highway), the lorry driver would be liable in nuisance for any personal injuries resulting from the collision. Counsel for the plaintiff appeared hesitant even as to whether there can be room for a finding of contributory negligence in such cases as the present, and this despite *Farrell v John Mowlem & Co Ltd* (1) itself, where DEVLIN J dealt with the components of such a defence to a claim based on highway nuisance. But he was unable to explain why, if he is right, his submissions should not apply equally to other cases of strict liability, such as those arising under *Rylands v Fletcher* (2) and the Factories Act 1961. With all respect to learned counsel, I feel I need say no more by way of rejecting his submission that causation is here irrelevant than SACHS LJ has already said. To accede to it would have led to the creation of a new sort of tort, a legal freak. For my part, I am not prepared to act as its midwife. Granted that a highway be obstructed, it is still for the party suing to show that the existence of the obstruction played some part in bringing about the collision. For this purpose it is not enough to say baldly, as counsel for the plaintiff has done: 'There would have been no collision in the Wolseley Road that night had there been no parked lorry to collide with'. To submit that is to adduce in the most blatant form *causa sine qua non*, as an all-sufficient basis for a finding of liability.

The learned judge held, on ample evidence, that the lorry

'was not causative of the present accident. The accident was... wholly attributable to the fact that the [first defendant] as he rode along was watching the attractive young ladies on the pavement instead of looking ahead of him to see what conditions he was about to encounter.'

That was a conclusion to which he was fully entitled to come, and it was, of itself and regardless of all other points canvassed, fatal to the plaintiff's case. Accordingly, despite the attractively presented and valiant attempt of counsel for the plaintiff to persuade us to the contrary, I would concur in dismissing this appeal.

**STEPHENSON LJ:** I agree that this appeal must be dismissed. In a clear and careful judgment the learned judge found that the accident which occurred to the plaintiff was wholly attributable to the negligence of the first defendant. How then can this plaintiff's appeal succeed? Only, in my judgment, by our holding that the third defendant created a nuisance by parking the second defendant's lorry on this road and that the happening of the collision between the lorry and the first defendant's motor cycle thereby entitles the plaintiff to recover from these defendants at least some damages for the injuries which he suffered as a result of that collision. For I agree with the learned judge, for the reasons that he gave and those given by SACHS LJ, that the plaintiff wholly fails to establish any negligence on the part of the third defendant in the manner in which the lorry was parked or in failing to foresee the form of folly which the first defendant's driving of his motor cycle took.

On nuisance, I am, like SACHS LJ, unwilling to go as far as the learned judge in holding that the parking of this lorry, although careful and reasonable from the third defendant's point of view, was in the light of the realities of life today, as the learned judge puts it, inoffensive from the public point of view and could not possibly have inconvenienced or endangered anybody who looked where he was going. Although the risk of danger was not such as to make the third defendant negligent in parking it when and where and as he did, there might have been a worsening of traffic conditions of the kind indicated by SACHS LJ; and even if the risk of such

(1) (1954), 1 Lloyd's Rep 437.

(2) (1868), 33 JP 70; LR 3 HL 330; [1861-73] All ER Rep 1.

worsening was remote, the parking of a lorry 7½ ft wide on a main highway for something like nine hours seems to be to constitute an unauthorised obstruction which in the present state of the authorities was *prima facie* a nuisance actionable at the suit of a person injured by it (whether foreseeably dangerous or not at the time when it was created), because it was not justified by any right to park it there in the third defendant as a user of the highway or as an occupier of adjoining premises or in any other capacity. I agree with SACHS LJ that there may still be rare cases when an injured plaintiff's claim in nuisance may succeed although his claim in negligence fails. However, I agree also that we do not have to decide that question, because I agree with the learned judge that even if the parking was tortious it was not causative of the plaintiff's accident. Counsel for the plaintiff boldly contended that that does not matter, and that once a public nuisance on a highway was created the creator was in the uniquely unfortunate position of being unable to say that a collision with the obstruction constituting the nuisance was wholly the fault of another, such as the first defendant who drove the plaintiff into it. He conceded that, although worse off in this respect than defendants labouring under any other form of strict liability, such as an absolute statutory duty, the creators of such a nuisance were like other defendants able to avail themselves of a plea of contributory negligence. But, for some reason which even he did not make clear to me, or support by any authority, they could not, he submitted, escape liability altogether by proving the person who collided with the obstruction 99 per cent or 100 per cent to blame.

Like SACHS and EDMUND DAVIES LJ, I reject the attempt to confer this privilege on those who collide with an unauthorised obstruction in the highway, and I agree that the learned judge was right in dismissing the plaintiff's claim in nuisance against the second and third defendants and in finding that the first defendant was wholly to blame for the accident.

*Appeal dismissed.*

Solicitors: *Davies, Arnold & Cooper*, for *Geoffrey H Stevens & Sabel*, Plymouth; *Bond, Pearce & Co*, Plymouth.

Reported by T R Fitzwalter Butler, Esq, Barrister.

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COURT OF APPEAL, CIVIL DIVISION

(DAVIES, MEGAW AND STAMP, LJ)

18th, 19th January, 8th February, 1972

ATTORNEY-GENERAL v SHONLEIGH NOMINEES LTD

*Right of Way—Land sold by Secretary for Air—Conveyance of land 'freed from rights'—*

*Application to rights of way—Defence Act, 1842, s 14.*

By s 14 of the Defence Act, 1842, a purchaser from a Defence Ministry of property previously compulsorily purchased by the Ministry is deemed to stand seised and possessed of the property freed and absolutely discharged of and from all 'manner of ... rights ... which can or may be ... set up ... in respect of the' purchased property.

Before 1939 a right of way crossed land at TM farm. In September, 1939, war was declared between Great Britain and Germany. Early in the war the defence authorities took possession of TM farm and constructed an aerodrome there, the right of way being stopped up in 1942. In 1943 the Secretary of State for Air bought the farm from the then owner to be held by him in fee simple on behalf of the Crown. In 1959 the Secretary for Air sold the greater part of the farm to the predecessors in title of the defendant company, the right of way being over part of the land then conveyed.

**HELD:** the provision in s 14 that the purchaser of land from the defence authorities should be deemed to stand seised of it freed from all 'rights' did not extend to a right of way, and the Attorney-General was entitled to a declaration that the right of way in the present case had not been extinguished, but enured for the benefit of the public.

**APPEAL** by the defendants, Shonleigh Nominees Ltd, against a decision reported, 135 JP 551, granting a declaration to the plaintiff, the Attorney-General, at the relation of Hampshire County Council, that 'the public right of way, if any, formerly exercisable over a roadway or track crossing the land of the [defendants] in Thruxton in Hampshire known or formerly known as Thruxton Airfield was not extinguished by the provisions of the Defence Act 1842 and of a conveyance dated 2nd September 1959 and made between the Secretary of State for Air of the one part and Thruxton Investments Ltd of the other part'.

*Michael Fox QC and Michael Miller for the defendants.*

*Jeremiah Harman QC and John Bradburn for the plaintiff.*

*Cur adv vult*

8th February. **MEGAW LJ** read this judgment of the court: This is an appeal from the judgment of GOULDING J in favour of the plaintiff in what was, in effect, the trial of a preliminary issue.

Thruxton Airfield lies to the north of the A30 road in Hampshire where the road runs between Andover and Amesbury. Before the 1939-1945 war the land in question was, or was part of, Thruxton Manor Farm. Nothing in this issue turns on any question of precise boundaries, so that it is not necessary further to define the area. Early in the war the Crown took possession of the land by requisition under the then existing Defence Regulations. In 1941 an airfield was opened there. It was used first by the Royal Air Force and later by the United States Air Force. By a conveyance of 9th October 1943 the Secretary of State for Air bought the land which he was already occupying. By a conveyance in 1959 he sold it to the defendants' predecessors in title.

For the purposes of the determination of the issue now before the court it must be assumed that immediately prior to the sale to the defendants' predecessors in title there was a public right of way across the land. It is not in dispute that that public right of way, if, as is for present purposes to be assumed, it did exist, was

stopped up by an order made in 1942 under the Defence Regulations, although apparently the relevant order cannot be traced. It would indeed have been most surprising if a public right of way across a wartime airfield had not been stopped up under the powers available for that purpose in the Defence Regulations. It is common ground that the stopping-up order would have come to an end on 31st December 1960 by virtue of certain Acts. It is not contended that the stopping-up of the assumed right of way is relevant to the present issue, otherwise than as a matter of history.

Since 1946, we are told, the land has been in use as a civil airfield and its perimeter track has also been used for motor-racing. The land remained in the ownership of the Crown until September 1959. By a conveyance of 2nd September 1959 the land was sold by the Secretary of State for Air to a company known as Thruxton Investments Ltd. There was no relevant reference in that conveyance to any right of way over the land. The defendants in this action, Shonleigh Nominees Ltd, subsequently, in April 1966, agreed to buy the land from Thruxton Investments Ltd, and they have entered into possession of it. While the defendants still have only an equitable interest in, as distinct from the legal title to, the land, it is not disputed that their interest is such as to make them the proper defendants in the action.

As a matter of history it would appear, from what we have been told, that the people who live in the neighbourhood of Thruxton airfield, or some of them, do not like the motor-racing activities. One of them, in 1968, sought to exercise what he claimed was his right as a member of the public—namely to use the claimed public right of way across the land. The defendants resisted the claim and obtained an interlocutory injunction. Those proceedings have not been further pursued. No doubt it was as a result of those events that the Hampshire County Council, as the highway authority, took steps which led to the present action being brought.

The action was originally brought by the Hampshire County Council as plaintiff (1). It claimed a declaration that

'upon the true construction of the Defence Act 1842 or otherwise in the events that have happened all or any rights of the public to use as a highway a roadway or track formerly crossing the land of the defendant company at Thruxton in Hampshire known or formerly known as Thruxton Airfield are still exercisable.'

The defendants denied that there had ever been a public right of way over the land. They took preliminary objections on that ground—that is, that the action was hypothetical, and, as the defendants claimed, the hypothesis was false—and also on the ground that the county council, although it was a highway authority, could not lawfully assert a public right of way except through the Attorney-General. PLOWMAN J rejected the first objection. Presumably he took the view that, there being here an issue of fact and also an issue of law, on both of which the plaintiff had to succeed in order to succeed in the action, the balance of convenience favoured the course of dividing the action into two parts and requiring the issue of law to be decided first. If the plaintiff were to fail on the question of law, the issue of fact (which might perhaps involve greater trouble and expense) would not have to be decided. The defendants did not appeal against that order of PLOWMAN J. Hence the issue of law has been treated as a preliminary issue, based on the hypothesis which has already been stated, namely, that immediately before the Crown sold the land in 1959 there was a public right of way across it. If the plaintiff succeeds on the preliminary issue of law, the defendants are in no way prejudiced in thereafter asserting their factual defence, that there was then no such public right of way. The second objection

(1) 134 JP 432; [1970] 2 All ER 144.

taken by the defendants before *FLOWMAN J* was sustained, but that defect in the proceedings was rectified by the Attorney-General giving his fiat and by the addition of the Attorney-General as plaintiff at the relation of the Hampshire County Council.

The question of law which arises as the preliminary issue is a question as to the meaning of s 14 of the Defence Act 1842. As it was argued before *GOULDING J* and as it was decided by him, the issue can be expressed in a few words, as it was put by counsel for the defendants in opening the appeal. The question is: Does the word 'rights' in s 14 include or exclude public rights? Before this court, counsel for the plaintiff widened the field of argument by submitting, as an additional argument which had not been presented in the court below, that s 14 does not apply to any right of way, public or private. However, whether or not that wider submission was right, he contended that at any rate a public right of way did not come within s 14.

Before setting out the wording of s 14, we shall summarise briefly the effect of the Act as far as it is relevant. In the sections preceding s 12 there is a provision for the purchase of 'messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments' for the public service and in particular for the defence of the realm. The purchasers, purchasing in trust for the Crown, were persons described as 'principal officers of the ordnance'. Sections 12 to 15, including s 14 which is primarily relevant on the present issue, are concerned with the sale by the principal officers of lands etc which, having been thus acquired by them, are thereafter no longer required for defence purposes. Section 16 deals, amongst other things, with the stopping-up of rights of way, public or private, and s 17 deals exclusively with that subject. The remainder of the Act deals with a number of matters which, for the most part, are not relevant to this issue. However an important part of its provisions relates to the requirement of payment of compensation to persons whose property is taken by virtue of the powers of purchase conferred on the principal officers by the earlier sections of the Act. There are elaborate provisions for the assessment of compensation by jurymen summoned for the purpose. As was stressed by the House of Lords in *A-G v De Keyser's Royal Hotel Ltd* (1), those provisions for compensation in respect of purchase under the Act were comprehensive. Thus *LORD ATKINSON* said that under the 1842 Act

'Whether the land or its use were presumed to be acquired by voluntary purchase . . . or compulsorily . . . the owner in each case was to be paid or compensated for what he parted with.'

*LORD MOULTON* said: 'In all cases compensation was given to the owners for the land taken.'

The terms of s 14, as originally enacted, were:

'And be it enacted, that immediately from and after the payment of such purchase money, and the execution of every such conveyance, surrender, and assignment as aforesaid, the purchaser or purchasers therein named, or the person or persons making such exchange as aforesaid, shall be deemed and adjudged to stand seised and possessed of the messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments, which shall be so purchased or taken in exchange by, and conveyed, surrendered, assigned, or made over to him, her, or them respectively, and notwithstanding any defect in the title of the said principal officers thereto, freed and absolutely discharged of and from all and all manner of prior estates, leases, rights, titles, interests, charges, incumbrances claims and demands whatsoever which can

(1) [1920] AC 508; [1920] All ER Rep 80.

or may be had, made, or set up in, to, out of, or upon or in respect of the same messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, or hereditaments, by any persons or person whomsoever, on any account whatever (save and except such estates, leases, rights, titles, interests, charges, incumbrances, claims, and demands whatsoever as in any such conveyance, surrender, deed of exchange, or assignment shall be excepted).'

The section has since been amended, but the amendments are immaterial for present purposes. It is agreed by counsel that they cannot affect the question with which we are concerned. The same applies to the other sections to which we shall refer hereafter.

It is common ground, as the learned judge said, that the conveyance of 1959, by the Secretary of State for Air to the defendants' predecessors in title is one to which s 14 applies. It is common ground that the public right of way which we assume for present purposes to have existed is not, to quote part of the words of the parentheses at the end of the section, 'in . . . such conveyance . . . excepted'. It is not referred to in the conveyance. It is clear that the object of the section was to enable the Crown, through the principal officers, to pass title to the purchaser clear of, to use a very general word in a very general sense, the incumbrances, whatever they are, which are properly to be regarded as being comprised in the words of the section following the phrase 'notwithstanding any defect in the title . . .'

The defendants contend that the assumed public right of way is included in the word 'rights' which occupies third place in the string of nine nouns following the words 'all manner of'. The plaintiff says that while, of course, 'rights' can, in a proper context, include a public right of way, it does not include it in this context, either when one looks at s 14 by itself or when one looks at that section in the light of the words and provisions of other sections of the Act. That contention of the plaintiff, if it be right, as GOULDING J has held that it is right, is sufficient for the decision of this issue. But the plaintiff, as has already been indicated, also now submits, as an additional argument, that s 14 has no application to any right of way, private or public. To that submission the defendants reply that the section undoubtedly includes private rights of way; the particular word, in the string of nine nouns, on which the defendants rely as bringing private rights of way within the scope of the section is, if we understood counsel correctly, the word 'interests'.

We propose to consider, first, the issue as it was presented to the learned judge. We thus assume for the moment that a private right of way is, or may be, within the purview of the nine nouns, and we direct our attention to the question whether 'rights', in the context, includes a public right of way.

The conclusion reached by GOULDING J on that question was expressed thus:

'In my judgment if one reads s 14 in isolation, it is probable that the draftsman intended to refer only to proprietary rights and not to rights of the general public. Certainly I am of opinion that the natural meaning of s 14 considered alone does not plainly extend to public rights.'

The learned judge then went on to consider other sections of the Act on which the plaintiff relied as supporting that view, and he found at least some support for it in the provisions of ss 15, 16 and 17. We shall approach the matter in the same way. That course is, we think, certainly permissible here, since the defendants, as we understood it, do not seek to derive any positive support from any other section for their attack on the learned judge's conclusion. They merely seek, so far as the other sections are concerned, to negative the support which the judge found in them for his construction of s 14.



The defendants begin with a proposition which we accept. Parliament has power to legislate to destroy a public right, including a public right of way, and express words are not necessary for that purpose. It is sufficient if the destruction of the public right is a necessary inference from the words used: see *Yarmouth Corp'n v Simmons* (1). The defendants say that in s 14 there is an express provision for the destruction of a public right of way in any conveyance to which s 14 is applicable, unless such right 'in such Conveyance . . . shall be excepted', because the noun 'rights' includes 'public rights'. They say that if it is not express, it is a necessary implication. Where the question is, as here, what is included in the word 'rights' on its true construction in the context in which it appears, the distinction between 'express' and 'by necessary implication' is not, perhaps, significant. The question is: how should the word be construed, in the context?

The defendants submit that the draftsman, whose choice of words has been endorsed by Parliament, showed by the words used—their number and their nature—that he was seeking to include everything in the form of, or giving rise to, a legal right in the most general and comprehensive sense of the word, the continuing existence of which, if not dealt with by the terms of the conveyance, would prevent a clear title being given or would adversely affect the purchaser by limiting his full rights as owner of the property.

In putting forward this submission, counsel refers first to the words which, as he puts it, introduce the operative part of the section, namely, the phrase 'notwithstanding any defect in the title of the said principal officers . . .'. If the existence of a public right of way over property sold, the right of way not being expressly referred to in the conveyance, is properly to be regarded as 'a defect in the title', clearly the defendants have, at the least, a powerful argument. But is it properly so to be regarded? Or rather, strictly, was it so to be regarded in 1842? We have not received any guidance as to conveyancing practice in that respect in 1842. So far as current conveyancing practice is concerned, we do not think, from what we have been told by counsel, that it should be so regarded. Often, of course, the existence of the public right of way would be apparent; although the extent of its obviousness would be a matter of degree. But we do not think that the propriety of its description as a 'defect of title' can depend on a question of degree.

Counsel for the defendants then refers to the string of nine nouns, introduced by the comprehensive words 'all and all manner of . . .' and ending with the word 'whatsoever'; the comprehensive collocation of 'can or may be had, made, or set up in, to, out of, or upon or in respect of . . .', with its four verbs and five prepositional phrases; and, finally, the generality of 'by any Person or Persons whomsoever on any Account whatever . . .'.<sup>1</sup>

There can be no doubt that the draftsman was intending to cast his net wide. But how far is that undoubted fact really helpful in leading to a conclusion whether the intention was to include or exclude rights of a public nature—the rights of the world at large, as contrasted with rights (in the widest sense) of individuals? One consideration which may be of importance in answering that question is whether there are, or rather whether there were in 1842, any other public rights than public rights of way which would or could be covered, assuming that the section was intended to be capable of abrogating public rights. The only suggestions which counsel for the defendants put forward in answer to this question—rights of common and rights of oyster fisheries—are not, in our judgment, properly classified as public rights. If the only relevant public right be rights of way, it seems probable that, if the section had been intended to apply to that unique type of right, it would have been clearly and expressly mentioned, and its inclusion would not have been left to

(1) (1878), 10 Ch D 518.

be inferred from words which, in every other respect, apply to rights which are not public rights.

Further, in our judgment, the very nature of a public right of way, a right belonging to the world at large, in contrast with the rights of individual persons, is such that, in 1842 as at the present day, Parliament should not be treated as having intended to abrogate it unless the intention to do so is very clearly shown.

Counsel for the defendants sought support for his submission that 'rights', among the nine nouns, includes public rights of way by a further argument. The vendor, to whom power is given, on this construction of the word, to destroy public rights of way, is, in effect, the Crown. Parliament, it is suggested, would have assumed that the Crown, because of its interest in the preservation of, and its duty to the public to safeguard, highways and other public rights of way, would not use this power unreasonably; it would use it only in those probably rare cases where the public right of way had, in effect, ceased to be used or its existence could sensibly and reasonably be overlooked and forgotten. Indeed, junior counsel for the defendants went further, and suggested that Parliament might have regarded it as desirable that the Crown should have such a power, because of its duty to obtain the best price for the land sold. We do not find these submissions convincing.

It is to be observed that, for a 'right' to come within the purview of the section, it 'can or may be . . . set up . . . by any person or persons whomsoever, on any account whatever.' Those are wide words. But are they apt words to describe a right which does not belong to any individual person or persons, but is a right of the public at large; a right which cannot be enforced by any member of the public in his own name or on his own account? True, it can (and presumably could in 1842) be 'set up' by the Attorney-General, who, without disrespect to him or his office, can indeed be described as 'any Person . . . whomsoever'; and his 'setting up' of the right of way on behalf of the public could, indeed, be described as 'on any account whatever'. But in our judgment those words are not words which would normally or satisfactorily be used as a part of the description of a public right of way.

There is another consideration which in our judgment is of considerable weight in support of the view that Parliament did not have public rights of way (or, indeed, any rights of way, public or private) in contemplation in enacting s 14. The normal and natural manner of describing a right of way, in 1842 as today, would be a right 'over' the land in question. The absence of the preposition 'over' in a less verbose enactment might be of smaller significance. But in s 14, by the industry of the draftsman, no less than five prepositional words or phrases are used: 'in', 'to', 'out of', 'upon' and 'in respect of'; but not 'over'. Why not, if the legislature had in mind rights of way? Why omit from the catalogue the one appropriate word? Presumably because it was not intended that 'rights' should include rights of way.

Viewing s 14 as a whole, and giving, we hope, all due weight to the expansiveness of the language, we agree with the view of the learned judge that on balance the section, considered alone, does not plainly extend to public rights of way. In our judgment, it does not so extend. That is sufficient to decide this appeal.

GOULDING J was of opinion that the plaintiff's contention as to the exclusion from s 14 of public rights of way gained some measure of support from s 15 and ss 16 and 17. For our part, we do not think that anything in those sections provides any substantial assistance to the plaintiff's argument on this part of the case. It is not suggested that they assist the defendants. Those sections must, however, be considered in relation to the plaintiff's further submission, which we now go on to discuss; that is, that even private rights of way are not within the purview of s 14.

Do any rights of way, public or private, fall within s 14? If private rights of way are not within it, it could not be suggested that public rights of way fall within it. The

arguments adduced before us on behalf of the plaintiff for the exclusion even of private rights of way, despite the undoubted fact that the section may operate to abrogate many kinds of private rights, are based on the provisions of those further sections, s 15 and ss 16 and 17, the texts of which are set out in GOULDING J's judgment.

We shall consider first ss 16 and 17. Section 16 contains a provision giving the principal officers power 'to stop up or divert any public or private footpaths or bridle-roads'. Section 17 provides that whenever any footpath or bridle-road shall be stopped up another path or road shall be provided in lieu of it. The plaintiff's argument founded on these sections is summarised in GOULDING J's judgment as follows:

'... in the Defence Act 1842 Parliament dealt carefully and tenderly with public rights of way which may be stopped up during the time of military occupation. It may be thought unlikely that by a side wind, and without express language, Parliament would have authorised their destruction without any provision of an alternative way by conveyance to a private owner when the military lands were found superfluous.'

The judge thought that the point was a valid one.

The principal ground on which counsel for the defendants criticises that view is that ss 16 and 17 were newly introduced by the 1842 Act, whereas s 14 was in substance a re-enactment of provisions which had already been enacted in s 6 of the Act relating to ordnance property passed in 1821. The only material difference is that s 6 of the 1821 Act did not include the words 'notwithstanding any defect in the title of the said principal officers thereto' which appear in s 14 of the 1842 Act. That is obviously a consideration which has substantial weight.

The argument for the plaintiff based on s 15 of the 1842 Act is, in our view, of greater substance. There is not, we think, any doubt that Parliament intended, by s 15, that compensation should be available, subject to the claim being made within the stipulated time, to all persons who sustained any loss by reason of the operation of s 14. That, as we have previously said, was the view of the House of Lords in *De Keyser's* case (1) in respect of compensation for losses when the Crown acquired land under this Act. Accordingly, if the provisions of s 15 are such as to fail to provide compensation, or are such as to provide compensation which would on the face of it be likely to be derisory or absurd, in respect of the loss of any particular 'interest' (to use the word, out of the nine nouns of s 14, which the defendants submit covers private rights of way), there may be a strong inference that s 14 was not intended to operate to create such a loss. The latter part of s 15 appears to provide just such a result in respect of a private right of way over land which has been sold by the Crown without express reservation of the right. The compensation is limited to

'the amount of the purchase money . . . which shall have been paid . . . for the . . . lands . . . in respect whereof such right or claim shall be so made out . . . or a proportional part thereof . . .'

That limitation of compensation, while no doubt it makes sense in relation to other private 'rights or claims', seems quite inapt in relation to a private right of way. What is 'the proportional part thereof'? Is it the sum arrived at by taking the arithmetical proportion which the surface area of the right of way bears to the surface area of the whole of the land conveyed? That would be absurd. Unless there were compelling reasons, we do not think that Parliament in 1842, any more than at the present day, should be regarded as having intended to destroy a particular kind of private right, if the compensation provisions are wholly inadequate or inappropriate to that type of private right.

(1) [1920] AC 508; [1920] All ER Rep 80.

We have already referred, in discussing public rights of way, to the omission of the word 'over'. As we there suggested, the omission is significant in relation to all rights of way, private as well as public. Another similar consideration applies in respect of private rights of way. A private right of way would normally be described as an 'easement'. In 1842 the word 'easement' may have been less familiar and less well defined. But that it was not then unknown or unfamiliar is apparent from the fact that it is used in s 16. The nine nouns in s 14 do not include 'easements'. Why not, if the legislature had in mind private rights of way? In our judgment no rights of way, private or public, are within the purview of s 14. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Beer, Timothy Jones & Webb; Theodore Goddard & Co*, for *A H M Smyth*, Winchester.

Reported by *G F L Bridgman, Esq*, Barrister.

#### HOUSE OF LORDS

(*LORD HAILSHAM OF ST MARYLEBONE, LC, VISCOUNT DILHORNE, LORD PEARSON, LORD CROSS OF CHELSEA AND LORD SALMON*)

28th, 29th February, 19th April 1972

#### SAKHUJA v ALLEN

*Road Traffic—Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit—Breath test—Requirement to provide specimen—Person driving or attempting to drive—Pursuit by constable after suspicion—Requirement when person no longer driving or attempting to drive—Road Safety Act, 1967, s 2 (1).*

By s 2 (1) of the Road Safety Act, 1967: 'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or to suspect him of having committed a traffic offence while the vehicle was in motion'.

Per *LORD HAILSHAM, L.C.*, and *VISCOUNT DILHORNE*: The words in the above subsection 'driving or attempting to drive' describe the class of person affected by the subsection and do not bear the literal and impracticable meaning that the requirement to provide a specimen of breath must be made while the suspected person is actually driving or attempting to drive.

Per *LORD PEARSON* and *LORD SALMON*: The words are satisfied if the suspicion by the constable, the commission of a traffic offence where one has been committed, the pursuit by him of the suspected person, and the overtaking of that person by the constable are all part of the same transaction or chain of events.

Per *LORD CROSS*: Common sense would tell any one that Parliament cannot have intended that a constable could only lawfully require a motorist to take a breath test if he made the request while the car was moving or had been brought to a halt by, e.g., traffic lights.

*HELD*, accordingly: where a suspicion arises with respect to a person driving while his vehicle is in motion, that person, if immediately pursued by a constable in uniform, may be required to provide a specimen of breath for a breath test notwithstanding that at the conclusion of the pursuit he is no longer a person driving or attempting to drive a motor vehicle on a road or other public place.

**APPEAL** by *Surendra Kumar Sakhuja* against a decision of the Court of Appeal dismissing his appeal against his conviction at East Sussex Quarter Sessions of driving

a motor vehicle on a road at a time when the proportion of alcohol in his blood exceeded the prescribed limit contrary to s 1 (1) of the Road Safety Act, 1967.

*R J Seabrook* for the appellant.

*D N R Latham* for the respondent.

Their Lordships took time for consideration.

19th April. The following opinions were delivered.

**LORD HAILSHAM OF ST MARYLEBONE LC:** Like many appeals under the Road Safety Act 1967, this appeal is wholly without merits, and, like many appeals wholly without merits, it has been conducted almost entirely at the public expense, since the appellant is legally aided. However, the point is a contentious and arguable one, and if the case serves to reduce the confusion which seems to surround the first three sections of the Act and to clarify some of the authorities, these proceedings will have served a useful purpose.

The admitted facts are that the appellant was driving in the streets of Hove with more than twice the permitted proportion of alcohol running through his veins. He was driving greatly in excess of the speed limit and this attracted the attention of a police car. When the police car drew up in front of him in order to cause him to stop, the appellant escaped by driving away on the nearside between the police car and the kerb. He evidently knew that he was being followed, but drove off home partly at speeds in excess of 50 m p h, partly on the offside of the road and partly on the kerb. When he reached his home the police car also stopped. The appellant got out and, on being approached by a police officer, was offensive and obstructive. His breath was redolent of alcohol. The police officer asked him to take a breath test. He refused and was again offensive, although he later agreed to the test, which was made and proved positive. He was arrested and, after the prescribed ritual had been accomplished, the blood test also proved positive (163 milligrammes per 100 millilitres). In consequence he was charged and elected to go for trial by jury. He gave evidence and called witnesses to give an account of the facts, some at least of which were evidently rejected by the jury. He was fined £75 and his licence was suspended for the minimum period of one year. He may well be thought to have got off lightly. I say nothing about the amount of the fine. But drivers who behave in this manner might well expect longer periods of disqualification than the minimum, since it is apparent that not merely have they drunk too much, but that their drink has affected their driving and behaviour to an extent which makes them a danger to the public, and to the police, whose business it is to apply and enforce the law, both a nuisance and a serious additional potential danger since their driving can lead, as in this case, to a chase. It is just this kind of driver that the Road Safety Act 1967 was intended to keep off the roads and it may well be that circuit judges and recorders will do well to bear in mind that they have a discretion to impose longer periods of disqualification when bad driving and bad behaviour follow the drink. In this way they can differentiate between drivers whose excessive drinking is substantial and has led to actual danger and those where the drinking is only slightly above the limit and has not been accompanied by bad driving or bad behaviour. The judge certified for appeal and the Court of Appeal dismissed the appeal without calling on the Crown, but certified for a point of law of general interest and gave leave to appeal to your Lordships' House.

At the trial, the deputy chairman had directed the jury that, if they accepted the prosecution evidence and believed that the requirement of a breath test had been made so soon as practicable after the suspected commission of a moving traffic offence, they should convict, even if they thought that technically the appellant



had ceased to be driving (a question of fact and degree) when the constable in uniform first approached him. The question of general public importance certified by the Court of Appeal was:

'Whether, on the true construction of section 2 (1) of the Road Safety Act, 1967, in cases where a suspicion arises with respect to a person driving while his vehicle is in motion, that person, if immediately pursued by a constable in uniform, may be required to provide a specimen of breath for a breath test notwithstanding that at the conclusion of the pursuit he is no longer a person driving or attempting to drive a motor vehicle on a road or other public place.'

To this question I give the answer, Yes.

Before I actually approach the point under discussion, I wish to say a few words on the structure and policy of the Road Safety Act 1967 and the way in which its construction should be approached. Once the main scheme of the Act and the mischiefs it was intended to prevent are understood, many of the misunderstandings which have arisen will disappear.

The Act was designed to create two new offences, in both of which the prime ingredient was having in the blood more than a prescribed proportion of alcohol. The offences are respectively driving or attempting to drive a motor vehicle on a road or other public place (s 1 (1)), and being in charge of a motor vehicle on a road or other public place (s 1 (2)), in each case after the consumption of alcohol in a quantity producing the excess of alcohol in the blood. It was part of the policy of the Act to differentiate sharply between the two offences. Not only are the penalties different, but, in contrast to the mandatory suspension for an offence under s 1 (1), the suspension under s 1 (2) is discretionary. In all proceedings under the Act it is important for the prosecution to establish whether the accused is alleged to have been driving or attempting to drive, or of having been in charge of a motor vehicle at the time of the offence. Owing to the curious way in which the first three sections of the Act have been drafted it would seem that in cases under s 1 (2) no breath test, and no arrest, under s 2 is possible, and that the only circumstances in which a conviction can be obtained are where there has been an arrest under s 6 (4) of the Road Traffic Act 1960, when a conviction under s 1 (2) can be obtained if the subsequent blood or urine test is positive, or, when the defendant has, without reasonable excuse, failed to provide a sample of blood or urine, a conviction may be obtained under s 3 (3).

But under s 1 (1) the offence, which is committed at a point of time when the defendant is 'driving or attempting to drive' (s 1 (1)) the motor vehicle on the road or other public place, can only be proved by reference to a state of affairs which can only exist, or be ascertained, at a much later period of time, and then only by reference to a particular type of test, a blood or urine test in a laboratory, applied to samples of blood or urine taken at a police station after an arrest. In other words, the offence under s 1 (1) is committed at the moment of driving or attempting to drive, but can only be proved by evidence of a particular kind relating to a state of the blood at a later moment, and ascertained by a test applied at a later moment still (see ss 1 (1) and 3). The definition of the offence and the penalty are contained in s 1 (1). The prescribed method of proof is set out in s 3.

Intermediate between the two points of time, namely, the commission of the offence on the road or other public place, and the obtaining of the evidence of its commission at the police station and the laboratory, are interposed the requirements of s 2. These provide for the first of two breath tests (s 2 (1) and (2)) and, if this proves positive, an arrest under s 2 (4). The breath tests and the limitations on the circumstances in which they may be required are for the protection of the motorist from undue harassment even though he be driving or attempting to drive on a road or

other public place. See, for instance, the observations of LORD DIPLOCK in *Director of Public Prosecutions v Carey* (1). The arrest which follows a positive test is partly to ensure that the ritual prescribed under s 3 is properly carried out, and partly to keep the motorist off the road. A lawful arrest under s 2 is a condition precedent to the carrying out of the procedure under s 3 (see *Scott v Baker* (2)), and from the language of s 2 it is clear that a lawful arrest can only be made where there has been a lawful requirement to take the breath test under s 2 (1) or (2). Indeed, although for this purpose it is irrelevant, as an additional safeguard, a second requirement for a further breath test must be made under s 3 (1) before the final requirement may be made for the all important blood or urine test under the later provisions of s 3. Thus a conviction under s 1 (1) can only be obtained if (a) a defendant has been driving or attempting to drive on a road or other public place, (b) the ritual prescribed in s 2 is correctly followed, (c) thereafter the procedure prescribed under s 3 is correctly followed and (d) the test made thereafter at the laboratory produces a positive result. I now approach the crucial words to be construed in the instant case. In doing so I bear in mind the timely reminder of LORD DIPLOCK in *Director of Public Prosecutions v Carey* when he said:

'While Parliament no doubt intended that these safeguards should be observed it can hardly have been intended that it should be so impracticable to observe them that the main purpose of the Act should be defeated because of the obstacles imposed on the obtaining of a specimen of blood for the blood test. Yet a series of recent decisions of the courts have construed the requirements of the Act about the taking of a "breath test" so as to produce this result.'

The point in *Director of Public Prosecutions v Cary* was a very different one. But I regard the moral of LORD DIPLOCK's admirable rubric as very much in point in the present case.

In the present case, the appellant was convicted under s 1 (1), and the only point in the appeal revolves around the question whether the ritual prescribed by s 2 (1) and in particular para (b) of that subsection has been correctly followed. The constable may have been proceeding equally under s 2 (1) (a), but no separate point arises on this.

The breath test prescribed by s 2 may only be required in three sets of circumstances. The first two are set out in s 2 (1) and the third in s 2 (2). In the present appeal we are concerned with the second set of circumstances. In construing the Act, however, all three should be borne in mind. The circumstances, in the order in which they are mentioned in the section, are: (i) that the constable has 'reasonable cause to suspect' the motorist 'of having alcohol in his body' (s 2 (1) (a)); (ii) that the constable has 'reasonable cause to suspect' him of 'having committed a traffic offence when his vehicle was in motion' (referred to hereafter as a moving traffic offence) (s 2 (1) (b)); (iii) that there has been an accident in which his vehicle has been involved and the constable has 'reasonable cause to believe' that the motorist was 'driving or attempting to drive the vehicle at the time of the accident' (s 2 (2)). In the case of the first two sets of circumstances the motorist must actually have been 'driving or attempting to drive'. The suspicion in the mind of the constable which gives him the right to require a test must then be either that he has alcohol in his body, or that he has already committed a moving traffic offence. In the third case motorists need not be driving or attempting to drive in order to give rise to the requirement of a test, but there must have been an actual accident involving a vehicle, and what gives the constable the right to require a test is the reasonable belief in the constable's mind

(1) 134 JP 59; [1963] 3 All ER 1662; [1970] AC 1072.  
 (2) 132 JP 422; [1968] 2 All ER 993; [1969] 1 QB 659.

that the motorist 'was driving or attempting to drive at the time when the accident occurred'. It is clear, I think, from this analysis that there are four moments of time to be considered for the purpose of s 2. These are in order of their occurrence: (i) The moment of the actual alleged offence under s 1 (1) when the motorist must have been driving or attempting to drive; (ii) the moment when suspicion or belief first arises in the mind of the police constable, which may or may not be the same as the moment which he is entitled to require of the motorist to take a test under any one of the three sets of circumstances. In cases under s 2 (1) (b) the motorist must, of course, still have been actually driving when the moving traffic offence was committed. It is clear, of course, that the only relevant moment at which reasonable grounds for suspicion must exist in the mind of the constable is the moment at which the requirement is made. It may have first arisen some time earlier. But if it has not persisted until the moment of requirement, the requirement will not be lawful; (iii) the moment at which the requirement is made; (iv) the moment at which the breath test actually takes place. This must necessarily be, and in some cases significantly, later than (i) and (ii) and at least momentarily later than (iii), and, in the case of a s 2 (2) case, must be significantly later than (i), may be significantly later than (ii) and must be at least a moment later than (iii).

It is clear, of course, that in cases under s 2 (1) the Act intends the constable to act with the greatest possible promptitude. This is obvious from the fact that tests taken under the provisions of s 2 (1) must take place at the road or public place where the driving, or attempt to drive has taken place or 'nearby' (s 2 (1)) and in cases under s 2 (1) (b) that no requirement may be made unless made as soon as practicable after the commission of the moving traffic offence. But, as will be made clear, this is also apparent from the repetition from s 1 (1) in s 2 (1) of the participial form 'driving or attempting to drive'. In the case of tests under s 2 (2), however, the test may take place at a considerable time later if not made on the spot (which is obviously the most desirable). It may take place at a hospital or at a convenient police station. On the other hand, that it is not contemplated that the test should be absolutely contemporaneous with the commission of the offence or the first reasonable suspicion in the mind of the constable even under s 2 (1) is clear from the proviso in s 2 (1) (b) which limits the constable who suspects a moving traffic offence to a requirement made 'as soon as reasonably practicable' after the suspected commission of the alleged moving traffic offence. No such limitation is placed on a constable who makes a requirement on a reasonable suspicion under s 2 (1) (a). This may be because the requirement that the test must take place at or near the road or public place when the offence is being committed is sufficient for the protection of the motorist. It is quite clear on any construction, that, in a requirement under s 2 (1) (a) or (b), the Act contemplates a continuous sequence of events beginning with the moment when it is alleged that the offence under s 1 (1) is committed, when admittedly the motorist must be 'driving or attempting to drive', and ending with the requirement to take the test, and the test itself which, in the ordinary use of words, must take place after the motorist has ceased actually driving or attempting to drive. In the case of s 2 (2) where an accident has happened, the test may come later in hospital or a convenient police station.

The problem which has given rise to the difficulty in the present appeal is the use of the present participle 'driving or attempting to drive' in connection with the requirement under s 2 (1) to take the breath test. Put quite simply the appellant contends that not merely must the motorist be 'driving or attempting to drive' when the offence is committed (and, of course, when a moving traffic offence is suspected, at that time also) but that he must also still be 'driving or attempting to drive' when the requirement to take the test is made. The respondent, however,

contends that this, exceedingly literal, interpretation of s 2 leads to results so bizarre as to be wholly impossible. Each party has certain authorities on which it can legitimately rely, including one decision, on which the appellant mainly relies, in the House of Lords. It is to be hoped that your Lordships' opinions in the present appeal may succeed in reducing these to a single, systematic exposition.

It was apparent from the first that it is not possible to construe s 2 (1) perfectly literally, because, to quote LORD PARKER CJ in *R v Price* (1),

'read literally, it would mean that the constable could only require the breath test if the person was actually driving or attempting to drive, something which is obviously impossible and not intended.'

This rejection of this purely fundamentalist interpretation was expressly endorsed by the House of Lords in *Pinner v Everett* (2): see especially per LORD MORRIS OF BORTH-Y-GEST, per LORD GUEST and per LORD UPJOHN. In *R v Price*, however, LORD PARKER seems to have sought to substitute

'what one might call generally "the driver", somebody who is not only at the steering wheel while the vehicle is in motion but somebody who is in the driving seat while the vehicle is stationary; and what is more, somebody who has got out of the driving seat albeit temporarily and can still be termed, in general terms, "the driver".'

This view was equally decisively rejected as too wide by the House of Lords in *Pinner v Everett*, principally on the ground that the words in s 2 (1) are not 'the driver' but 'driving or attempting to drive' (see per LORD REID, LORD MORRIS OF BORTH-Y-GEST, although he puts his rejection somewhat differently by explaining the above passage, LORD GUEST and LORD UPJOHN). *Pinner v Everett* had been decided in July 1969. But it had been preceded by *Campbell v Tormey* (3) in December 1968, and *R v Wall* (4) in February 1969. In *Campbell v Tormey* the motorist had completed his journey and locked and left his car and was about to enter the curtilage of a house with the intention of handing the ignition key to the householder, and it was held that he was not 'driving or attempting to drive' and so the requirement was ineffective. ASHWORTH J, while admitting the validity of LORD PARKER CJ's doctrine in *R v Price* (1) (now to be rejected) said that the expression excluded a person who is no longer driving or intending [sic] to drive the vehicle within the plain meaning of that expression'. In *R v Wall* (4) the motorist, who equally escaped, had gone home and gone upstairs and when the police arrived some minutes later came down dressed only in jeans. The Court of Appeal followed the Divisional Court decision in *Campbell v Tormey* between which case and *R v Wall* LORD PARKER said he could find 'no points of distinction'.

It now falls to consider the actual decision in *Pinner v Everett* (2), which was the principal prop of the present appellant's appeal, and in which *Campbell v Tormey* was referred to with approval (see per LORD UPJOHN and LORD MORRIS OF BORTH-Y-GEST), and *R v Wall* was accordingly also approved. It is important to stress that, although the argument largely revolved round s 2 (1) and the fact was not mentioned, the proceedings in that case were not under s 1 (1) of the Act at all. They were under s 3 (3). This is important since s 3 (3) imports a new time factor altogether into the proceedings.

(1) 133 JP 47; [1968] 3 All ER 814.

(2) 113 JP 653; [1969] 3 All ER 257.

(3) 133 JP 267; [1969] 1 All ER 961.

(4) 133 JP 310; [1969] 1 All ER 968.

Section 3 (3) deals with the case where the motorist, who has, by that time, been the subject of an arrest under s 2 (or under s 6 (4) of the Road Traffic Act 1960) fails without reasonable excuse to provide the decisive blood or urine specimen so as to make the final and decisive laboratory test possible. In that case it will be impossible to charge him under s 1, since the essential evidence is not forthcoming. But, says the section, he must then be dealt with as if the offence were an offence under s 1. But then the draftsman has to face another difficulty. Shall it be an offence under s 1 (1) or under s 1 (2), the results of which are so very different for the motorist? The answer given by the section is that it is to be under s 1 (1) if he was 'driving or attempting to drive at the relevant time', but in any other case under s 1 (2). But what is the 'relevant time'? The draftsman escapes from this difficulty by taking an arbitrary point of time, and that, by s 3 (4), is in respect to a person required to take the test under s 2 (1), 'when he was so required'. With respect to the submission to the contrary by counsel, I am not prepared to take this arbitrary point of time as decisive of the meaning of 'driving or attempting to drive' under s 2 (1).

Viewed simply as a decision under s 3 (3) *Pinner v Everett* (1) seems to me to be unexceptionable. The motorist had been stopped for a defective light. There was no suspicion in the constable's mind at this time. A long conversation followed about extraneous matters. During the latter part of this conversation the constable smelt the alcohol in the defendant's breath, required a test which proved positive and resulted in an arrest under s 2 (4), but, after the arrest, the defendant refused to provide a specimen for the blood or urine test. The moment when reasonable grounds for suspicion first entered the mind of the constable and the moment when the requirement for a breath specimen was made, were for all practical purposes identical, and the only relevant moment of time for the purposes of the decision was the moment when the requirement for a breath specimen was made. The House clearly regarded the case as marginal and the question at best as one of fact and degree (see per LORD REID, LORD GUEST and LORD UPJOHN) and must have decided that 'at the relevant time' the defendant was not in fact driving or attempting to drive'. That is what LORD REID says in terms. LORD MORRIS OF BORTH-Y-GEST, also regarding the case as on the borderline, dissented.

However, the decision did not stop there, and the basis of the decision in some at least of the expressions by members of the appellate committee appears to be based on a construction of s 2 (1) which is very close to the nerve of the present case. All their Lordships seemed to be of the opinion that the mere fact that the defendant was not in his car during the conversation was not in itself decisive in his favour. Their divers views, however, on the meaning of the words 'driving or attempting to drive' give rise to some remarkable pieces of casuistry. LORD REID, for instance, said (*italics are mine throughout*):

I must therefore consider in what circumstances a person can, by the ordinary usage of the English language, properly be said to be driving a car. Clearly the term cannot be limited to periods during which the car is in motion. Suppose the car is held up in a traffic jam and is stationary for five or ten minutes. No one would say that the driver is not driving the car during that period. He may have switched off the engine and be reading a book or a map; or he may have got out to clean his windscreen; and I do not think that it would make any difference if he got out to buy a paper from a news vendor on the pavement. But, on the other hand, suppose the driver pulls up at the kerb and leaves his car to go shopping. I do not think that it could be said that he is driving the car while he is buying groceries. And I do not think that it would make any difference if he remained in the



car while his passenger was doing the shopping; he would then not be driving but waiting for his passenger. Can it, then, be said that to give this ordinary meaning to these words would defeat the manifest intention of Parliament? I do not think so. *If a man stopped in a traffic jam is still driving so also he is still driving if stopped by a policeman, and it must then be a question of degree and of circumstances for how long thereafter he can properly be said to be still driving. The mere fact that he has got out of the car would not be enough.*

In passing, I must say, although I accept the distinction drawn by LORD REID between 'the driver' and 'driving', I do not derive the same assistance from his insistence on the same page on a difference between 'driving' and 'actually driving'. LORD GUEST said (the italics throughout again are mine):

*'Driving a motor vehicle on a road or public place connotes a physical act. It is true that the section must be given a reasonable interpretation and cannot be interpreted literally because a request for a breath test cannot be made while a vehicle is in motion. Nor is there any reason to confine the act of driving to driving while the vehicle is in motion. Among the normal incidents of driving a motor vehicle is stopping at traffic lights, in traffic congestion or at a railway crossing. A person might be still said to be driving when he leaves the vehicle for a purpose connected with the driving of the vehicle, such as filling up with petrol or changing a wheel. Different considerations might arise if the vehicle had broken down. But when the person dismounts from the driving seat he ceases to be driving the vehicle, and if he dismounts for a purpose unconnected with the driving of the vehicle such as to talk to police constables in response to their enquiry unconnected with his driving that is not a normal incident of driving the motor vehicle. Counsel for the respondent submitted that the question of when a person can be said to be driving a motor vehicle although not in the driver's seat is a question of degree. If this view is correct, it seems to me to be difficult to know where to draw the line. Is it to be a question of time or is it to be a question of distance?'*

I find it difficult to reconcile this insistence on driving as a physical act which ceases on dismounting either with the passages from LORD REID's opinion above or from the rest of the paragraph. But what is clear is that the matter is clearly regarded as a question of degree.

In a passage also somewhat inconsistent with the cases supposed by LORD REID, LORD UPJOHN also said that the matter was largely a matter of fact and degree, but, applying the same test as other noble and learned Lords, considered that at the time that the appellant was 'driving or attempting to drive' the police had not established that 'they had reasonable grounds for supposing that [the appellant] had alcohol in his body; the suspicion arose after he had ceased to drive'.

Not unnaturally, counsel for the appellant relied strongly on these passages in the present case and argued that here the appellant had finished his journey and could not therefore be 'driving or attempting to drive' at the time when the police constable who suspected that he had committed a moving traffic offence, required him to provide the breath specimen, even though the period which elapsed was a matter of two or three seconds, and even though the whole sequence of events from the first sighting of the appellant to the moment of the requirement and arrest was continuous from first to last.

Speaking for myself, I do not think that the House, which so obviously treated the facts in *Pinner v Everett* (1) as marginal, borderline, and a question of degree, would have found much difficulty in distinguishing the present facts and dismissing

this appeal consistently with their own decision, but, since their speeches are to some extent based on a construction of s 2 (1) with which I do not wholly agree, and which, so far as I can judge, was the only construction put before them in argument, I propose to specify an alternative view which, if it be accepted, forms a much simpler and more satisfactory method of determining these cases in future. Although I am quite prepared to accept that, by the time the suspicion had entered into the constable's mind in *Pinner v Everett* or, what was the same thing in that case, at the moment the requirement was made the motorist was neither driving nor attempting to drive, I find it impossible to say with LORD REID that a man is driving or attempting to drive when he is buying a newspaper on the pavement, or with LORD GUEST that he is driving or attempting to drive when he is changing a wheel, or with LORD UPJOHN to suggest that he might be still driving when he is 'nipping in' to a shop to buy a packet of cigarettes. In my view, a construction of the section must be sought which does not put such a strain on the ordinary uses of the English tongue, but which nonetheless, indeed better, gives effect to the manifest intention of the legislature.

In my view, the words 'driving or attempting to drive', where they occur in s 2 (1), do not refer to what the defendant is doing necessarily at the precise moment of the suspicion or of the requirement but describe in effect who he is or to what class of person he belongs, and relate back to the words 'drives or attempts to drive' in s 1 (1), namely, the only relevant factor for the purpose of establishing an offence under s 1 (1) and the present participle is used as the 'continuing present' known to some grammarians, because one transaction or a single sequence of events of precisely the kind which took place here was envisaged by Parliament when it enacted the section and the driving or attempting to drive is a continuous factor within it either for the whole, or, as the case may be, at least a significant part, of the time. This seems to me to emerge decisively from the following considerations, namely: (i) The words cannot be interpreted absolutely literally. This is universally conceded. (ii) The fact that the breath test can be taken 'there or nearby' clearly indicates that, at least for the purpose of the actual test, the defendant at least may be off the road. (iii) The proviso in s 2 (1) (b) shows quite clearly that the requirement at least in that case, may be 'as soon as practicable' after the relevant suspicion of a moving traffic offence arose, and it is not sensible to suggest that a new decisive condition is intended whereby it must not only be as soon as practicable after the suspected commission of the moving traffic offence, but whilst the defendant continues to be 'driving or attempting to drive', when the requirement is made. If that were the true construction, the motorist must not merely be driving (a) when the alleged offence under s 1 is committed and (b) when the suspected moving traffic offence is committed but also (c) still when, as soon as practicable thereafter, the requirement is made. (iv) The results of rejecting this construction are really too bizarre to be borne unless one is absolutely constrained to do so. As it was accepted in argument, to suggest that the test whether the requirement is lawfully made fails if the driving has actually come to an end leads to the following ridiculous conclusion. A motorist as drunk as may be, having committed a series of moving traffic offences, is chased by a police car over five miles, and is then at last overtaken and stopped. He is approached by the constable, when, abandoning all thought of driving any further, he runs out of his car across country, flinging his ignition keys into a nearby lake as he flees, and is ultimately caught by the constable and stopped at a distance from the road in a nearby copse where a breath test is required. His one motive, as he candidly admits, is to save his licence and to escape from the police. His motor car and his journey are abandoned, so that he cannot be said at the moment of capture to be 'driving or attempting to drive'. Does he thereby escape the test? The answer is Yes if some of the passages in *Pinner v Everett* are assumed to be literally correct. But, if the true construction

of the section be that the phrase is describing, and relates back to, the moment when the offence is committed (admittedly in most cases a continuing one) throughout the single transaction or sequence of events, no such difficulty can arise and no strained or bizarre interpretation of the phrase 'driving or attempting to drive' is really involved. In my view, this is the correct construction of the section, and this view is borne out to some extent by two important cases which succeeded *Pinner v Everett*, and were decided in the light of it.

These are *R v Jones* (1), a decision of the Court of Appeal in December 1969, and *Sasson v Taverner* (2) decided immediately after *R v Jones*. Counsel for the appellant candidly conceded that, if his argument was to succeed, both these cases were wrong and in conflict with the decision of this House in *Pinner v Everett*. In my opinion, they were rightly decided, and although there is considerable difficulty in reconciling them with some of the expressions in *Pinner v Everett*, all three actual decisions can be justified on their facts.

*R v Jones* was a case in which a conviction on indictment was quashed by the Court of Appeal, the sole question raised by the defence being that, at the relevant time the appellant was no longer driving. The conviction was quashed on the ground that, in contrast to the instant case, the matter was not left to the jury at all, the deputy chairman having ruled as a matter of law that the appellant was driving. But, in the course of his judgment, which was that of the courts, SACHS LJ brought out for the first time in this series of cases what he described as

'a powerful argument on the basis of other statutory provisions and authorities not previously brought to the attention of any court dealing with this point.'

All the cases referred to related to powers of arrest, to which, I think, SACHS LJ rightly indicated the power of requirement to take a breath test under s 2 (1) is a fortiori from the point of view of the construction to be given to the section. I agree with SACHS LJ that the point does not seem to have been previously argued, and in particular had not been argued in *Pinner v Everett*. The cases cited included *Hanway v Boultee* (3), and *Griffith v Taylor* (4), both of which related to statutory powers conferred on a constable to arrest a person 'found committing' the relevant offence. In each case, the court allowed for a reasonable but continuous pursuit after the 'finding' by the constable, and in an earlier case (*R v Howarth* (5)) the judge made use of the phrase that the material matters formed part of 'one transaction', which conveys approximately the same meaning as I have intended in the phrase 'one sequence of events' which I have used above. I agree with SACHS LJ that the above line of cases provides at least a useful analogy for providing a 'reasonable construction' of the statute here in order to prevent 'the obvious intention of the legislature being largely, and wrongly, frustrated'. I think he was also right in drawing attention, as did LORD MORRIS OF BORTH-Y-GEST during his dissenting opinion in *Pinner v Everett*, to the direct relevance of the power given to a constable under s 30 of the Road Safety Act 1967, itself, to arrest without warrant

'any person driving or attempting to drive a motor vehicle on a road whom he has reasonable cause to suspect of being disqualified for holding or obtaining a licence ...'

I agree with SACHS LJ's comment that it would be impossible to believe that 'if the driver dodges off the road when pursued, he cannot be arrested nor could it be so held

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 134 JP 244; [1970] 1 All ER 215.

(3) (1830), 4 C & P 350; 2 Man & Ry MC 481.

(4) (1876), 41 JP 340; 2 CPD 194.

(5) (1828), 1 Mood CC 207.

without producing absurd results.' I also agree with LORD MORRIS OF BORTH-Y-GEST in saying of the same section in *Pinner v Everett*:

'Just as under s. 2 it would seem irrational to suppose that a specimen of breath for a breath test had to be given by someone driving a car which was in actual motion, so it would be irrational to suppose that an arrest (under s. 30) of a person driving had to be an arrest in a car in motion. In my view, the words "person driving" in s. 2 at least cover and include someone who has been driving but who has temporarily interrupted his driving and who is about to resume driving.'

I would, however, add to LORD MORRIS's list, although it is beyond the scope of this passage, 'one who has stopped driving immediately prior to the arrest and who has been continuously pursued since the act of driving referred to'. I agree with SACHS LJ in claiming that:

'The contrary view would result in absurdities if the requirement is made in some shelter on private property in foul weather or on some such property into which the police have moved the relevant car to avoid a traffic jam, and it would pave the way to an even more astonishing state of affairs. For it would entail that any driver who sees himself followed by the police has only to drive fast enough to get off the road and on to the nearest piece of private property . . . to escape the consequences which the Act intended. This, of course, would open up the chances of a new form of "cops and robbers" chase which it seems impossible to contemplate was within the intentions of Parliament.'

The actual point in *R v Jones* (1) was the presence of the car off the road in a private drive, but the point of construction is identical. Is it fatal to a requirement under s 2 (1) that at the exact point of time when the requirement is made the defendant is not 'driving or attempting to drive a motor vehicle on a road or other public place'? My answer is No for the above reasons, whether the point taken is that the car be off the road, or that the motorist was no longer driving, or both, although, for the reasons given, I am content to do so on the simpler basis of the construction of the words as well as on the valuable analogy of the earlier cases and statutes cited by SACHS LJ

It really only remains to consider the remaining case of *Sasson v Taverner* (2), also decided after *Pinner v Everett* (3) and following *R v Jones*. The Divisional Court certified under s 1 (2) of the Administration of Justice Act 1960, in virtually the same terms as the Court of Appeal in the present case, the only difference being that it does not appear that in that case the defendant was legally aided. Counsel for the appellant conceded that, if his argument was correct here, *Sasson v Taverner* would need to be overruled with *R v Jones*. In my view, the facts are quite indistinguishable. The judgment of the court was given by BRIDGE J in the course of which he said:

'Counsel for the [defendant] has submitted that there is a crucial significance in the appearance in s 2 (1) of the words "any person driving", etc, as the immediate object of the verb "require". One may test this by considering how the statutory language would read if the grammatical structure of the sentence were inverted in the following form: "If a constable in uniform has reasonable cause to suspect any person driving or attempting to drive a motor vehicle on a road or other public place—(a) of having alcohol in his body; or (b) of having committed a traffic offence while the vehicle was in motion—the constable may

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 134 JP 244; [1970] 1 All ER 215.

(3) 113 JP 653; [1969] 3 All ER 257.

require him to provide a specimen of breath for a test there or nearby." This inversion, we think, effects no change in the meaning of the language but serves only to emphasise what is already logically inherent in the statutory form of the sentence, viz that the suspicion must precede the requirement.'

I agree with this train of reasoning, although I find it simpler to express myself in the terms of the construction of the statute I have set out above, and, whilst I am not enamoured of the phrase 'fresh pursuit' in this context, I find myself in agreement with BRIDGE J and the Divisional Court that the point is that 'the whole sequence of events was so closely related as to form a single transaction'. It is, of course, important in this case, as in *Sasson v Taverner*, that the requirement of the proviso in s 2 (1) (b) was completely satisfied.

In the present case, FENTON ATKINSON LJ expressly followed SACHS LJ in *R v Jones* (1) and quoted the headnote in that case:

'A "requirement" for a breath test under section 2 (1) of the Road Safety Act 1967 may be made off the road so long as it is made in the course of a chain of action following sufficiently closely upon an observed driving on the road. It is not the law that a motorist merely by turning a few feet off a highway can stultify police action and escape being required to give a breath test, when that action would otherwise be proper under the subsection.'

I agree with BRIDGE J in *Sasson v Taverner* that the precise point here falls to be decided on identical considerations. It follows, therefore, that, in the present case, FENTON ATKINSON LJ was exactly right when he said:

'it is not the law that a motorist, by managing to keep ahead of the police car until he reaches his own front door and then getting out of his car, can escape being required to give a breath test.'

I have, of course, considered carefully the construction placed on s 2 (1) of the 1967 Act by my noble and learned friend, LORD PEARSON, and my noble and learned friend, LORD SALMON. According to this construction, the participial phrase 'driving or attempting to drive' refers in time not to the moment of the requirement, but to the moment at which the suspicion arises. I concede, of course, that logically, although not grammatically, this must be so in relation to s 2 (1) (b) since a moving traffic offence can only be committed by a person actually driving a moving vehicle. I also concede without question that it is sufficient for the purposes of this appeal to decide that the phrase 'driving or attempting to drive' does not refer in point of time to the moment of requirement. But for at least two reasons I am most reluctant to accept as correct the second part of this proposition. In the first place, I do not think that *Pinner v Everett* (2) decided this, although the first question certified as of general public interest purported to raise the point. If it had decided the point in this sense I would have felt real difficulty in endorsing it. But I do not think that *Pinner v Everett* did decide this. On the facts of that case the moment of requirement, and the moment of suspicion were the same. LORD REID says (*italics mine*):

'In my view the crucial question is whether the appellant was "driving or attempting to drive" when the constable requested him to provide a specimen of his breath.'

Indeed, that was the crucial question as the case was brought under s 3 (3) and not under s 1 (1). But LORD REID answers it in the same language (*italics again mine*):

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 113 JP 653; [1969] 3 All ER 257.



'So the question is whether *at the time when the breath test was required* the appellant could still be said to be driving his car. I find this case to be very near the border-line but with some hesitation I am prepared to agree with the majority of your Lordships that the appellant was *then* no longer driving his car within the ordinary meaning of the words.'

LORD UPJOHN refers at the end of his judgment to the moment of suspicion as distinct from the moment of requirement. But as in that case the moment of suspicion and the moment of requirement were for all practical purposes the same, nothing turns on this. LORD MORRIS dissented, and at the critical point is at least ambivalent where he says:

'In my view, the words "person driving" in s. 2 *at least* [italics mine] cover and include someone who has been driving but who has temporarily interrupted his driving and who is about to resume driving.'

The operative words in that sentence are 'at least'. LORD GUEST says:

'There is no extension of time in relation to s. 2 (1) (a) . . . thus emphasising the necessity of the *close relationship* [italics mine] between the driving and the suspicion of alcohol.'

Again, with respect, 'close relationship' and 'simultaneity' are not synonyms. The fact is that in *Pinner v Everett* the point, although it may have been assumed, never seems to have been distinctly argued.

My second reason for respectfully differing from my noble and learned friends is that it is not really consistent with either the language or the sense of the section. The only way of reading literally the words 'driving or attempting to drive' as simultaneous with any other point of time is in relation to the word 'require' and not in relation to the word 'suspect'. Obviously, read in relation to the word 'suspect' it makes less nonsense of the section than if it is read literally in relation to the word 'require'. But as I have already pointed out, the only relevant point of time at which suspicion is material is the moment at which the requirement is made. It may have arisen earlier, or it may not, but unless it persists until the requirement, the requirement is unlawful. That is what the section says, and that, I have no doubt, is what it means. The moment at which suspicion first arises has no significance whatever provided reasonable grounds of suspicion exist at the moment of requirement. My noble and learned friends' construction, which I am satisfied is not the ratio decidendi in *Pinner v Everett*, is to erect this totally insignificant point of time into a *conditio sine qua non* of a lawful requirement. The consequences are or may be serious, and involve putting the same series of problematical questions of degree involving the same strain on the word 'driving' as does the more literal reading, whilst at the same time doing violence to the words of the section. The ordinary way in which a constable has 'reasonable cause to suspect' the presence of alcohol in a motorist's body is by smelling his breath. This suspicion cannot ordinarily arise when the motorist is in fact driving his car unless he displays irregularities in his driving, and the cases when he is attempting, but failing, to drive are relatively rare. It is, of course, true, and it is generally recognised, that random tests are not completely eliminated by the words of the section. But on the construction I have given they are in fact limited by them. There seems to be no logical reason why a motorist who has only just stopped driving and has taken no drink in the interval should not be asked to take a breath test if a constable reasonably believes he has alcohol in his body. Once one abandons the view that the requirement must be absolutely contemporaneous with an act of driving there seems no particular reason

to make the act of driving contemporaneous with anything else except the commission of the offence under s 1 (1) provided, of course, the act of commission, the suspicion and the requirement form part of a continuous chain of events forming a single transaction so as to come within the scope of *R v Jones* (1) and *Sasson v Taverner* (2).

I can see serious practical disadvantages in any other view. If a constable notices erratic driving not amounting to a moving traffic offence (not an infrequent case), questions may easily arise whether at that stage a suspicion of alcohol is reasonable unless it is fortified later by the unmistakeable smell. But, if the latter is noticed only after the motorist has left his car to enter his front door, it is too late, if the view of my noble and learned friends be correct. In my view, *Pinner v Everett*, and the cases succeeding it, established a need for a continuous chain of events amounting to a single transaction between the act alleged to constitute the offence and the requirement under s 2 (1). Once that chain is broken, which is a question of fact and degree, a requirement under s 2 (1) is no longer lawful. Given this need of continuity most, although not all, cases of random testing are eliminated. It has always been recognised they cannot be entirely prevented by statute. For instance, on any view of the law, motorists can be systematically stopped as they drive away from a public house and before they get home. This can only be prevented by administrative means. It would be a paradoxical result if this could continue, but a motorist could be safe the moment he reaches his front door. In my view, therefore, *Pinner v Everett* has been widely misunderstood and stands on its own peculiar facts as the borderline case which all the members of your Lordships' House then present conceived it to be. I doubt whether on the facts of the instant case, and on a charge under s 1 (1), the decision, or the observations, in *Pinner v Everett* would have been the same as they properly were on the facts of that case. But, in so far as the dicta made in the course of opinions there expressed can be read as differing from the above, I would not myself be disposed to apply them. They were made without there being placed before the House any argument addressed to the construction I have tried to set forth above, and without considering their application to the very different set of circumstances which I have indicated. In my view, the words 'driving or attempting to drive' in s 2 (1) do not refer to the precise point of time of the requirement, but are a continuous present participle relating back to the time of the alleged offence under s 1 (1) and covering all or part of a single sequence of events beginning with the facts constituting the offence (if any) under that section and carrying on continuously as part of a single transaction until, at the latest, a requirement is made under the proviso to s 2 (1) (b).

In my view, therefore, this appeal should be dismissed. I further desire to add that, in the light of my foregoing remarks, I doubt if the judgment in *Campbell v Tormey* (3) can any longer be considered wholly authoritative, and although *R v Wall* (4) may marginally be correct on the facts, it cannot be right in so far as it simply follows *Campbell v Tormey*. *Stevens v Thornborrow* (5), which follows *Pinner v Everett* may well have been correctly decided both on its facts and on its reasoning. But these are far removed from the facts and reasoning of the present case. The purpose of s 2 is intended to prevent harassment and to limit random sampling by the police, and to prevent arrest or subsection of motorists to the vital blood or urine tests on mere suspicion without a positive breath test. Notwithstanding its really remarkably

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 134 JP 244; [1970] 1 All ER 215.

(3) 133 JP 267; [1969] 1 All ER 961.

(4) 133 JP 310; [1969] 1 All ER 968.

(5) 134 JP 99; [1969] 3 All ER 1487.

loose draftsmanship, it is not intended, although unfortunately it has been too often understood, to provide for guilty motorists numerous ingenious escape routes based on narrow interpretations of the Act thought out by their legal advisers. If this appeal serves to close some of these it will have served some useful purpose after all.

I should add that I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, **VISCOUNT DILHORNE**, and agree with it. For the above reasons I would dismiss this appeal.

**VISCOUNT DILHORNE:** On 3rd July 1970, the appellant was convicted at the East Sussex Quarter Sessions of driving on 22nd February 1970 a motor vehicle on a road called Welbeck Avenue in Hove, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded the prescribed limit at the time he provided a specimen, contrary to s 1 (1) of the Road Safety Act 1967. The laboratory test on the specimen showed that the proportion of alcohol in his blood was 163 milligrammes of alcohol in 100 millilitres of blood.

He now appeals to this House with the leave of the Court of Appeal (Criminal Division) and contends that his conviction should be quashed on the ground that the police constable who asked him to submit to a breath test was not at that time entitled under the Act to require him to do so. Consequently he contends that he should not have been arrested under the Act, taken to a police station and asked to provide a specimen for a laboratory test and that the analysis of the specimen could not, therefore, be used in evidence against him. It was not disputed that on the day in question he had driven a car down Welbeck Avenue and that the specimen taken showed that he had more than double the maximum permitted quantity of alcohol in his blood.

At about 4.45 p.m. on that day Pc Ellis was sitting in a patrol car when he saw a car, that driven by the appellant, coming towards him flashing its headlights although it was still daylight. He estimated its speed at more than 30 m.p.h. He saw the headlights flash about half a dozen times. The appellant's car overtook a mini car, which was also coming towards the police constable, in the 30 mph zone. Pc Ellis estimated its speed at not less than 60 mph. He turned his car round and followed the appellant's for a distance of a quarter to half a mile. The appellant's car stopped. Pc Ellis pulled up in front of it, stopping about eight feet away from his nearside kerb. The appellant's car moved off again, passing the patrol car on its nearside. The appellant in evidence denied that this had happened and also denied that he had exceeded the 30 mph limit. Pc Ellis again followed the appellant's car which turned into Welbeck Avenue, pulled on to the offside of the road and after travelling about 30 yards along the offside kerb, stopped outside the appellant's house. Pc Ellis stopped his car in front of the appellant's, got out and walked back to speak to the appellant who had also got out of his car. Pc Ellis noticed that the appellant's breath smelt of alcohol and asked the appellant to take a breath test.

Section 2 (1) of the Road Safety Act is in the following terms:

'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion: Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

On Pc Ellis's evidence, the jury were entitled to conclude, if they accepted it, that he had reasonable cause to suspect that, at the time he spoke to him, the appellant had

alcohol in his body, and also that he had committed a traffic offence while the vehicle was in motion, and that the requirement to take a test had been made as soon as reasonably practicable thereafter. The appellant, however, contends that the language of s 2 (1) is such that the requirement to submit to a breath test must, if the subsection is to be complied with, if the motorist is suspected of having alcohol in his body or of having committed a traffic offence, be made while the person suspected is driving or attempting to drive and not at any moment thereafter.

Reading s 2 (1) by itself, its language seems to me susceptible of three interpretations: first, that it enacts that the request must be made while the person is driving or attempting to drive and has not ceased to do so; secondly, that the words 'driving or attempting to drive' are used in a descriptive sense and not to introduce a time factor; and, thirdly, that the subsection should be read as if the word 'seen' was interpolated between 'person' and 'driving' so that it would read 'any person seen driving or attempting to drive'.

The first of these interpretations is that which has been accepted in all the reported cases on the subsection. No other interpretation appears to have been put forward or considered. It is that for which the appellant contends and, if it is the correct interpretation, then it is clear that the requirement to submit to a breath test, whether on suspicion of having alcohol in the body or of having committed a traffic offence, must be made while the person suspected is driving or attempting to drive. In *R v Price* (1) LORD PARKER CJ said that read, literally, the subsection

'would mean that the constable could only require the breath test if the person was actually driving or attempting to drive, something which is obviously impossible and not intended.'

ASHWORTH J in *Campbell v Tormey* (2) said that 'strict and literal reading of the provision makes nonsense of the Act', and in *Pinner v Everett* (3) LORD GUEST said:

'the section must be given a reasonable interpretation and cannot be interpreted literally because a request for a breath test cannot be made while a vehicle is in motion',

and LORD UPJOHN expressed the same opinion.

Recognition of the fact that Parliament cannot have intended that, and that the first of the three possible interpretations makes nonsense of the Act has not, however, led to consideration being given to the question whether construing 'any person driving or attempting to drive' as introducing a time factor is wrong and whether other interpretations are possible and more likely to have been intended by Parliament but to efforts being made so to construe the word 'driving' as to make the first of the three interpretations workable. In *R v Price* LORD PARKER CJ said that the phrase 'any person driving' applied to what one might call generally 'the driver' and that 'somebody who has got out of the driving seat albeit temporarily . . . can still be termed, in general terms, "the driver"'. This view was rejected by this House in *Pinner v Everett* (LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST and LORD UPJOHN). In that case LORD REID said:

'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the

(1) 133 JP 47; [1968] 3 All ER 814.

(2) 133 JP 267; [1969] 1 All ER 961.

(3) 113 JP 653; [1969] 3 All ER 257.

legislature, that it is proper to look for some other possible meaning of the word or phrase.'

It is not the content of the word 'driving' that has led to the difficulty of construing s 2 (1) but interpreting the words 'any person driving or attempting to drive' as meaning that the requirement for a breath test must be made while a person is engaging in that activity. If that is right, then one is entitled to consider, as one meaning given to those words leads to a result which cannot reasonably be supposed to have been the intention of the legislature, other possible meanings.

What is the natural and ordinary meaning of the words 'any person driving'? I think they mean a person who is in a position to steer and control the movements of the vehicle. Ordinarily that means the person in the driving seat. While it is true that a person can properly be described as driving a vehicle when it is not in motion, as, for instance, when it is stopped in a traffic jam or at traffic lights, can it be said that a person is driving a car when he is outside it and away from it? I think not and I do not think that it makes any difference whether the motorist is out of his car and away from it in the course of his journey or at the end of it.

Views were expressed in *Pinner v Everett* to the effect that the words 'any person driving' would in certain circumstances cover a person outside and away from his car. It was said that a man who got out of his car to fill it with petrol, to clean his windscreen, to change a tyre or to buy a newspaper from a newsvendor on the pavement might still be regarded as driving but not so if he had got out of his car to go shopping or because his car had broken down. I do not see why any distinction should be drawn between a man who gets out of his car to buy a paper from a news-vendor on the pavement and one who goes into a shop for the same purpose, or between a man changing a wheel, when his car cannot be put in motion, and a man out of his car in consequence of a breakdown. But if such a subtle line is to be drawn between driving and not driving, it means that despite the fact that it is proved that a man was driving with an excess of alcohol in his body, he will escape conviction for doing that which Parliament sought to make a serious criminal offence if he was out of and away from his car at the moment he was asked for a breath test unless the circumstances were such that he could still be treated as driving the car. I do not think that Parliament intended any such result or to provide for an acquittal if it was not proved beyond reasonable doubt that although out of his car he was still driving.

It was said in *Pinner v Everett* (1) that the question whether a person was driving or attempting to drive was one of fact and degree. Certainly the decision of a jury on that is a decision on a question of fact, but where the trial is before a jury, the judge will have to direct them as to the meaning to be given to 'driving' and on whether on the evidence it is open to them to find that the accused was driving. The meaning to be given to driving is a question of law (see *R v Kelly* (2)) and the law will indeed be in an unsatisfactory state if such an indefinite line has to be drawn between driving and not driving.

It is these considerations which lead me to the conclusion that one is entitled to look for some other possible meaning to be given to the words in question. But before doing so, I propose first to examine other provisions in the Act to see whether their terms compel the adoption of the first of the three interpretations to which I have referred.

The distinction between motorists unfit to drive through drink driving or attempting to drive and such motorists in charge of vehicles drawn in the Road Traffic Act 1960, has been repeated in s 1 (1) of the 1967 Act relating to persons driving

(1) 113 JP 653; [1969] 3 All ER 257.

(2) 134 JP 482; [1970] 2 All ER 198.



or attempting to drive and s 1 (2) to persons in charge of vehicles. And it is this distinction which made the use of the word 'driver' in s 2 (1) impossible. Under that provision the test can be demanded of a person driving or attempting to drive, but the Act does not provide that a person in charge of a vehicle can be asked to submit to one. The use of the word 'driver' in s 2 (1) would cover both categories of drivers, those driving or attempting to drive and those in charge.

Section 2 (2) authorises a police constable to require a breath test where the vehicle has been in an accident, by the person whom he has reasonable cause to believe 'was driving or attempting to drive at the time of the accident'. The inference is that the accident has brought the driving to an end. I do not think that the change of tense suffices to justify reading s 2 (1) as if it said: 'A constable in uniform may require any person while he is driving or attempting to drive' etc, bearing in mind the results that flow from such an interpretation.

Section 3 (3) makes it an offence for any person without reasonable excuse to fail to provide a specimen for a laboratory test required in pursuance of the Act. Again, a distinction is drawn between those in charge and those driving or attempting to drive. If it is shown that at the relevant time (which is defined by s 3 (4) as meaning, where there was no accident, the time when he was asked to submit to a breath test, and, where there has been an accident, the time of the accident) he was driving or attempting to drive a motor vehicle, the motorist is liable to be proceeded against and punished as if the offence charged was that created by s 1 (1), and in any other case, if he was in charge of the vehicle, as if the offence charged was that created by s 1 (2).

While I recognise that Parliament cannot have meant the words 'at the relevant time he was driving' in s 3 (3) (a) to have a different meaning from the words in s 2 (1), the same difficulties follow from a strict interpretation of s 3 (3) (a) as follow from the first of the three possible interpretations of s 2 (1). And I do not think Parliament can have intended that. In my opinion, to give s 3 (3) (a) a reasonable interpretation in its context, the words 'at the time' he was required to take a breath test must be given a broad interpretation as signifying the occasion rather than the moment of time when the request was made. I do not think that s 2 (2) and s 3 (3) compel the adoption of the first of the three interpretations suggested of s 2 (1).

If either the second or the third interpretation is the correct one, then all the difficulties which flow from the adoption of the first one disappear. If the question is posed: Who are the persons who can by virtue of that subsection be asked to take a breath test? The answer is persons driving or attempting to drive. For the reasons I have stated, the draftsman could not use the word 'driver' to describe such persons. Instead he used the words 'driving or attempting to drive'. I think that they were used in a descriptive sense and not to require that the request should be made while the driving was going on or the attempt to drive continuing. I see no logical reason for any such requirement. If the subsection is so construed, it means that the request can be made of any person who comes within that category and not that the request has to be made at the precise moment of time when he is within it. But it does not mean that the request can be made after a long interval has elapsed between the cessation of driving and the request for the test. It is, I think, implicit in the section that the request should be made as soon as practicable after alcohol in the body is suspected, just as, where there is suspicion of having committed a traffic offence, it has to be made as soon as practicable after the commission of the traffic offence. It is true that the latter is expressly stated and that the former is not, but I think that the context requires the driving and suspicion of alcohol to be what may be called one transaction.

The third suggested interpretation of s 2 (1) also makes sense of the subsection and, if that is the correct one, then again in my opinion the seeing of the person driving, the

suspicion whether it be of alcohol in the body or of having committed a traffic offence and the request for a test must be one transaction or, if one prefers so to describe it, one sequence of events.

I now turn to the question whether the House is now precluded from adopting either the second or the third interpretation by the decision of this House in *Pinner v Everett* (1), a decision on which the appellant strongly relied. If that decision does so, then the respondent contends it should not now be followed. There the motorist had been stopped in the course of his journey by the police as his rear number plate was not illuminated. The police first spoke to him after he had got out of his car. He had not completed his journey. After some conversation about the number plate—the Case Stated does not say how long that took—it was noticed that his breath smelt of alcohol and he was asked to take a breath test. The request was thus made immediately after suspicion that he had alcohol in his body arose, and the suspicion arose and the request was made when he had been for some time, one does not know how long, out of his car. At first the motorist refused to provide a specimen of his breath but after some 20 minutes he did so. Having failed the test he was arrested and taken to a police station. He there refused to provide a specimen for a laboratory test and that led to his being prosecuted for the offence created by s 3 (3). At the hearing before the justices, the appellant contended that the police were not entitled to require a breath test because, when he was driving his car, they had no reasonable cause to suspect him of having alcohol in his body or of having committed a traffic offence and no accident had occurred. The justices held that he had not completed his driving when he was stopped; that he was still a person driving within s 2 notwithstanding the vehicle was stationary; and that he had dismounted before suspicion arose that he had alcohol in his body. They convicted the appellant. The Divisional Court dismissed his appeal and certified that there were two points of law of general importance involved in the decision, namely: (i) whether in the case of a requirement under s 2 (1) (a) of the Road Safety Act 1967, the suspicion must arise during the time of actual driving; (ii) whether the requirement can only be made of a person who although no longer actually driving can in general terms be described as the driver. So although the conviction was for the offence created by s 3 (3), the interpretation to be placed on s 2 (1) had to be considered in this House.

I have not found it easy to determine the precise ratio decidendi in *Pinner v Everett*. My noble and learned friend, LORD REID, did not refer to the first point certified by the Divisional Court. In his speech he never referred to the question when suspicion of having alcohol in the body must arise. He never mentioned suspicion at all. In his view 'the crucial question' was 'whether the appellant was "driving or attempting to drive" when the constable requested him to provide a specimen of his breath'. He concluded his speech by saying:

'So the question is whether at the time when the breath test was required the appellant could still be said to be driving his car. I find this case to be very near the border-line but with some hesitation I am prepared to agree with the majority of your Lordships that the appellant was then no longer driving his car within the ordinary meaning of the words.'

'Then' in this passage must refer to the time when the request was made and not to when the suspicion arose. His speech certainly lends no support to the view that the ratio decidendi of the case was that the suspicion of having alcohol in the body must arise before the driving ceased. Indeed, the passage I have cited shows that he thought, and in my view rightly, that it was the view of the majority of their Lordships that the appellant was no longer driving when the request for a breath test was made.

(1) 113 JP 653; [1969] 3 All ER 257.

<b>FOOD AND DRUGS</b> - Samples for analysis - Unwrapped meat pies - Purchase of six pies by sampling officer - Division into three lots each consisting of two pies - Submission of one lot to public analyst - Aggregate of meat in those two pies smaller percentage of their total content than that required under regulations - Liability of seller - Food and Drugs Act, 1955, s 93 (1), Sch VII, Part I, paras 1, 2. <i>Skate v Moore</i> .. .. .	QBD	82
<b>FORCIBLE ENTRY.</b> See <b>CRIMINAL LAW</b> .		
<b>GAME</b> - Killing without licence - Exceptions and exemptions - Deer - Killing on enclosed lands - 'Enclosed lands' - Farmland as distinct from moorland - Deer hit on land with permission running to and dying on neighbouring land - Game Licences Act, 1860, s 4, s 5. <i>Jemison v Priddle</i> .. .. .	QBD	230
<b>GAMING</b> - Betting office - Licence - Application - Notice advertising application - Inclusion of matter additional to that required by statute - Effect on validity of notice - Betting, Gaming and Lotteries Act, 1963, Sch 1, para 6. <i>R v Inner London Area (West Central Division) Betting Licensing Committee. Ex parte Percy</i> .. .. .	QBD	273
<b>GAMING</b> - Club - Licensing - Application - Notice - Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2). <i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	CA	71
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Appeal to quarter sessions - Finality of decision - Gaming Act, 1968, sched 7, para 4. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Grounds - Discretion of licensing authority - Gaming Act, 1968, sched 7, paras 8, 18. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Right of proprietary club to be registered - Gaming Act, 1968, Part III, sched 7. <i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Lottery - Distribution of money by chance - Chain letter scheme - No identifiable prize fund - Betting, Gaming and Lotteries Act, 1963, s 42 (1) (f) <i>Atkinson v. Murrell</i> .. .. .	QBD	379
<b>HIGHWAY</b> - Obstruction - Nuisance - Parking of vehicle for long period - Removal of part of highway from public use - Collision between motor cycle and parked vehicle - Injury to pillion passenger - Collision due wholly to negligence of motor cyclist - Obstruction not a source of danger. <i>Dymond v. Pearce</i> .. .. .	CA	397
<b>HOUSING</b> - Obtaining possession of council property from trespassers - Competency of proceedings - Proceedings instituted by authorised committee - 'Management of housing accommodation' - Cost of proceedings - 'Blanket' decision to institute. <i>London Borough of Southwark v Peters</i> .. .. .	CA	187
<b>HUSBAND AND WIFE</b> - Maintenance of wife - Provisional maintenance order - Jurisdiction - Husband resident and matrimonial offences alleged to have been committed outside United Kingdom - Wife ordinarily resident in England - Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1) - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a). <i>Collister v Collister</i> .. .. .	Fam Div	163
<b>HUSBAND AND WIFE</b> - Summary proceedings - Maintenance of child - 'Child of the family' - Acceptance - Objective test - Circumstances constituting acceptance - Time of acceptance - Withdrawal - Liability of another person - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <i>Snow v Snow</i> .. .. .	CA	54
<b>INDECENT EXPOSURE.</b> See <b>CRIMINAL LAW</b> .		
<b>INDECENT PHOTOGRAPHS.</b> See <b>CUSTOMS &amp; EXCISE</b> .		
<b>INFANT</b> - Adoption. See <b>ADOPTION</b> .		
<b>INFANT</b> - Care - Assumption by local authority of parental rights - Objection by parent - Allegation that objection out of time - Estoppel of authority - Need to appreciate ability of mother to care for child. <i>Re L (A C) (an infant)</i> .. .. .	ChD	19
<b>INSANITY</b> - See <b>CRIMINAL LAW</b> .		
<b>LANDLORD AND TENANT</b> - Small tenement - Recovery - Application to justices for warrant - Notice of application - Service - Substituted service - Need to prove due diligence by landlord in seeking tenant - Small Tenements Recovery Act, 1838, s 2. <i>Stoker v Stansfield</i> .. .. .	QBD	281
<b>LICENSING</b> - Club - Special hours certificate - Premises adapted for providing substantial refreshment for members - Licensing Act, 1964, s 78 (b). <i>Porter v Aberystwyth Justices</i> .. .. .	QBD	285
<b>LICENSING</b> - Gaming licence. See <b>GAMING</b> .		

<b>LICENSING</b> - Permitted hours - Exemption order - Special occasion - Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions - Function to be held by outside local organisation - Licensing Act, 1964, s 74 (4). <i>R v Metropolitan Police Commissioner Ex parte Ruxton</i> .. .. .	<b>QBD</b>	<b>175</b>
<b>LICENSING</b> - Permitted hours - Exemption order - Special occasion - Local football match - Match occurring nearly every week - Discretion of justices - Licensing Act 1964 (c 26), s 74 (4). <i>R v Llandiloes (Lower) Justices. Ex parte Thorogood</i> .. .. .	<b>QBD</b>	<b>67</b>
<b>LOCAL AUTHORITY</b> - Declaration - Registration by defendant of claims to properties under Commons Registration Act, 1965 - Declarations sought by authority that defendants' claims not valid - Jurisdiction of court. <i>Thorne Rural District Council v. Bunting</i> .. .. .	<b>Ch D</b>	<b>355</b>
<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner. <i>Dutton v Bognor Regis United Building Co Ltd</i> .. .. .	<b>CA</b>	<b>201</b>
<b>LOCAL GOVERNMENT</b> - Elections. See <b>ELECTIONS</b> .		
<b>LOTTERY</b> . See <b>GAMING</b> .		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <i>R v Coleshill Justices. Ex parte Davies</i> .. .. .	<b>QBD</b>	<b>51</b>
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine. <i>R v Southampton Justices. Ex parte Briggs</i> .. .. .	<b>QBD</b>	<b>237</b>
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<b>TOWN AND COUNTRY PLANNING - Enforcement - Notice - Notice to be served within four years from carrying out of development - Mining operations - Initial working of area more than four years prior to notice - Subsequent working of area within four-year period - Whether new development or continuation of original development - Validity of notice - Town and Country Planning Act, 1962, s 12 (1), s 45 (2). Thomas David (Porthcawl) Ltd v Penybont Rural District Council.. . . .</b>	<b>QBD</b>	<b>276</b>
<b>TOWN AND COUNTRY PLANNING - Enforcement - Notice - Service on occupier of land affected - 'Occupier' - Licensee of caravan site - Right to be served with notice - Control over site - Duration of enjoyment - Town and Country Planning Act, 1962, s 45 (3). Stevens v London Borough of Bromley .. . . .</b>	<b>CA</b>	<b>261</b>
<b>TRADE DESCRIPTIONS - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). Naish v Gore .. . . .</b>	<b>QBD</b>	<b>1</b>
<b>YOUTHFUL OFFENDER, See CRIMINAL LAW; MAGISTRATES.</b>		

My noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, dissented, as he thought that the appellant had not ceased to drive. He said that the question to be decided was

'whether the police, when they had reasonable cause to suspect the appellant of having alcohol in his body . . . were so suspecting someone who came within the words "any person driving or attempting to drive a motor vehicle on a road or other public place."'

He thought that there were the clearest possible indications that the 'person driving' might still be the person driving even after the motor vehicle is not in motion. He did not think that the suspicion must arise during the time of actual driving. It was in consequence of the extended meaning he gave to 'driving' that he dissented. He did not seek to differentiate between the moment when suspicion arose and the time when the breath test was required. In that case there was no need to do so.

My noble and learned friend, LORD GUEST, made a number of observations on the meaning to be given to the word 'driving' but did not say whether he thought that the appellant was driving either at the time suspicion arose or when the request was made. He said that there must be a close relationship between the driving and the suspicion of alcohol. I agree. As I read his speech, he based his conclusion that the appeal should be allowed on the ground that, in his view, the constables were not entitled to require a breath test as there was 'nothing in the driving of the vehicle to cause the constables to have reasonable cause to suspect that the appellant had alcohol in his body'.

If I am right as to that, I regret that I cannot agree with him. I cannot read s 2 (1), read literally or in any other way, as imposing a requirement that the driving must give rise to suspicion that the driver has alcohol in his body. It is a condition precedent to the requirement that a constable should have reasonable cause to suspect, but the subsection does not stipulate that the driving must be the cause of the suspicion. If a police constable saw a man in an obviously intoxicated condition get into a car and drive it away, he would have reasonable cause to suspect that he had alcohol in his body when he was driving, and would, in my view, be entitled under the subsection to ask the person he had seen drive it away to submit to a breath test.

If it were the case that a breath test could only be required, where there was no traffic offence and no accident, if the driving itself gave rise to a reasonable suspicion that the driver had alcohol in his body, then the provision that Parliament has thought fit to make in an endeavour to prevent motorists driving with too much alcohol in their bodies is singularly ineffective. Only in a few cases could it be said that the driving gave reasonable cause to suspect that, and a great number of motorists must have been wrongly convicted.

It can, of course, be argued that only if the section is so interpreted are random tests prohibited. While that may be true, I am not prepared to assume that the overriding intention of Parliament was not to permit random tests, even though that meant that many who drove with an excess of alcohol would escape prosecution and conviction. Without recourse to *Hansard*, which would not be permissible, I cannot say whether what was said in relation to the Road Safety Bill supports or does not support such a conclusion. I can find nothing in the Act to warrant it and, that being so, I do not think it right to seek to construe the subsection on the assumption that at all costs random tests were to be prevented. It may well be that Parliament came to the conclusion that it was not possible to draw the subsection wide enough to bring within its scope the cases which should lead to a prosecution without running the risk that there would be random tests and that assurances were obtained from the police that they would not make such tests.

No agreement with the view expressed by LORD GUEST is to be found in the speeches of their Lordships who formed the majority in *Pinner v Everett* (1) and so that view cannot be said to be the ratio decidendi. LORD UPJOHN said that the justices and the Court of Appeal—he must have meant the Divisional Court—were on an erroneous basis and that therefore this House had to decide the matter afresh. Making that fresh approach he said:

‘the appellant did not leave the driver’s seat as a normal incident in the course of driving, nor was it immediately apparent as he left the driver’s seat that there was any reason to suppose he had alcohol in his body. This only emerged during the course of a long conversation after he had been stopped by the police. In mentioning these circumstances I am not saying that they are decisive of other cases, for every case depends so much on fact and degree, but, in my opinion, on the facts of this case, the police fail to prove their case that at the time that the appellant was driving or attempting to drive they had reasonable grounds for supposing that he had alcohol in his body; the suspicion arose after he had ceased to drive.’

LORD UPJOHN thus held that the appellant was not driving at the time he was suspected of having alcohol in his body. He gave no support to the view that the driving must give rise to the suspicion. But suspicion which has arisen after the driving has ceased may lead to there being reasonable cause for suspecting that the driver had alcohol in his body while he was driving. If a man is seen to get out of the driving seat of his car after it has stopped and is then reasonably suspected of having alcohol in his body, is there not reasonable cause to suspect that he had alcohol in his body while he was driving if he drank nothing when he got out of his car and before the suspicion arose? I cannot believe that LORD UPJOHN would not have thought that this was so.

In *Pinner v Everett* the suspicion arose and the request was made immediately thereafter. To determine whether the appeal should be allowed it was not necessary to distinguish between the time when the suspicion arose and the time of the request. Applying the meaning given to the subsection in the earlier cases, which I refer to as the first interpretation, all that had to be decided was whether the appellant was driving at the time of the request. I do not think that when LORD UPJOHN said ‘the suspicion arose after he had ceased to drive’ he intended that to be interpreted as meaning that, in his view, the suspicion must arise while the driving was continuing. If the suspicion arose after driving had ceased, the request was also made after it had ceased, and that I feel is what LORD UPJOHN meant. My noble and learned friend, LORD WILBERFORCE, agreed without giving reasons with the majority that the appeal should be allowed.

In their speeches I do not see that either LORD REID, LORD GUEST, or LORD UPJOHN sought to answer the questions raised by the points of law certified by the Divisional Court. It is not necessary that this House should do so. The certificate shows why the leave to appeal was given, but, just as the appellant is not restricted to arguing the points certified, so this House when deciding whether or not an appeal should be allowed in a criminal case is not restricted to or required to provide an answer to the points certified. LORD REID refused to answer one of the questions and did not refer to the other. LORD UPJOHN said that an entirely fresh approach had to be made, and so I think it would be wrong to interpret his speech as if he was seeking to decide the points raised in the certificate.

What, then, was the ratio decidendi of the majority? I see no reason to conclude that my noble and learned friend, LORD REID, was wrong when he indicated that it was the view of the majority that the appellant was not driving or attempting to

(1) 113 JP 653; [1969] 3 All ER 257.

drive when required to take the test. I cannot myself regard the ratio decidendi as that suspicion must arise while there is driving when, on a literal construction of the subsection, all that is required is that there should be reasonable cause for suspecting that the motorist had alcohol in his body while he was driving. The case clearly did not decide that a person had ceased to drive when he got out of his car on arrival at his home. It would, indeed, be odd if conviction or acquittal of the s 1 (1) offence were to depend on whether he got out of his car in the course of or at the end of his journey.

The difficulties which have followed from the assumption that s 1 (1) stipulates a time factor so that the request must be made before driving has ceased, are also inherent in the view that the suspicion must arise while driving is continuing. I do not read the subsection as providing that, and I do not think that that can have been Parliament's intention. While the conclusion that the appellant was not driving at the time of the request was, in my view, unquestionably right, I cannot agree with the observations that were made, I think clearly obiter, as to the circumstances in which a driver out of his car and away from it can still be regarded as driving it. I do not think that such a motorist can properly be said to be doing so and I do not think that the Act requires 'driving' to be so extensively interpreted. *Pinner v Everett* appears to me to have been decided on the assumption that the first of the three suggested interpretations was the correct one. On that basis, if the appellant was not driving at the time of the request, he was entitled to secure the quashing of his conviction.

Does that decision mean that it is now not open to this House to say that another interpretation of s 2 (1) is the correct one without declining to follow that decision? I do not find this an easy question. While I think that on that assumption *Pinner v Everett* was rightly decided, I do not think that prevents this House now holding that that assumption was erroneous although such a conclusion might mean that the actual result in *Pinner v Everett* was wrong. I recognise that only in exceptional cases should a decision of this House not be followed in a later appeal and that it can be argued that one should be especially reluctant to depart from a recent decision of the House on a question of construction; although a contrary argument can be advanced, that it is easier to depart from a recent decision which has not led to the growth of a body of case law. If it had been the case that in *Pinner v Everett* the second or third interpretation of s 2 (1) had been considered and rejected, then I would be very reluctant to depart from that decision. But the actual decision in that case did not decide any question of principle, only that the appellant was not driving at the time of the request, and did not decide that there was no other construction to be placed on s 2 (1) than that assumed on which the acquittal was based.

I therefore think that the decision in *Pinner v Everett* is no bar to the House now holding that the second interpretation of the subsection is the correct one, although the practical results would be little different if the third interpretation was accepted. In the vast majority of cases the person who comes within the description of a 'person driving or attempting to drive' will have been seen doing so by the police officer who required the test.

Section 30 of the Road Safety Act 1967 is in the following terms:

'A constable in uniform may arrest without warrant any person driving or attempting to drive a motor vehicle on a road whom he has reasonable cause to suspect of being disqualified for holding or obtaining a licence granted under Part II of the principal Act.'

In the light of the construction hitherto given to s 2 (1) it would seem to follow that an arrest under this section would be unlawful unless made before the driver had

ceased to drive or to attempt to drive. This cannot be right. Parliament cannot have meant the power to arrest to have been so restricted. In this section the words 'driving or attempting to drive' are, in my opinion, clearly used in a descriptive sense and not to impose a time limit on when an arrest under the section can be lawfully made. It would, indeed, be odd if the words in question were to be given a different interpretation in s 2 (1).

In *R v Jones* (1) the conviction was quashed on account of an error in the direction of a jury, but in the course of his judgment SACHS LJ referred to the line of authorities in relation to the powers of arrest given by certain statutes and to the rule referred to as that of fresh pursuit. His observations were clearly obiter but they were followed and applied in *Sasson v Taverner* (2) by BRIDGE J. SACHS LJ pointed out that a liberal interpretation had been given to statutes such as the Larceny Act 1861, s 103, which provided that a person found committing certain offences might be immediately apprehended and that it had been held that the arrest under that section might be made after the commission of the offence (*Griffith v Taylor* (3)) and that an arrest might be made if it formed part of 'one transaction'. There is, I think, little, if any, difference between a person found committing and a person seen committing, and to some extent the language of these sections supports the view that s 2 (1) should be interpreted as if the word 'seen' was interpolated after 'person' in s 2 (1).

In *Sasson v Taverner* the motorist had been followed off the road into the curtilage of some flats. He had reasonably been suspected of having committed a traffic offence and it was held that the police officer was entitled by s 2 (1) to demand a breath test. But still, on the assumption on which *Pinner v Everett* was decided and in the light of that decision, he was only entitled to do so before the driving ceased. BRIDGE J in the course of delivering the judgment of the court considered how s 2 (1) would read if inverted in the following form:

'If a constable in uniform has reasonable cause to suspect any person driving or attempting to drive a motor vehicle on a road or other public place—(a) of having alcohol in his body; or (b) of having committed a traffic offence while the vehicle was in motion—the constable may require him to provide a specimen of his breath for a test there or nearby.'

This inversion, he said, effected no change in the meaning of the language but served only to emphasise what is already logically inherent in the statutory form of the sentence, namely, that the suspicion must precede the requirement. I think that that is clearly so. It is important to note that that inversion does not lead to the conclusion, and BRIDGE J did not suggest that it did, that the suspicion of having alcohol in the body must arise in the course of the driving. The suspicion may arise before the driving commences as where an intoxicated man is seen to get into a car and drive off, or it may arise after the driving has ceased when a man stops his car and gets out and the clear inference is that he was driving with alcohol in his body. Whenever the suspicion arises, for the requirement of a breath test to be legally made, there must be reasonable cause for suspecting that he was driving in that condition. If the inversion was to lead to the conclusion that this was not the case then, in my view, it would mean a change from the meaning of the language used in s 2 (1).

I recognise that if the second or third interpretation I have suggested is accepted, the result in some of the reported cases was wrong, but I do not think that any useful purpose would be served by listing them. In this case the appellant was driving. That is not disputed. *Pc Ellis* had reasonable grounds for suspecting him of having

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 134 JP 244; [1970] 1 All ER 215.

(3) (1876), 41 JP 340; 2 CPD 194.



committed a traffic offence while the car was in motion and also for suspecting him of driving with alcohol in his body for his breath smelt of alcohol when he got out of his car. Therefore, in my view, the conditions prescribed by s 2 (1) (a) and also those prescribed by s 2 (1) (b) were satisfied and the request for a breath test was authorised by the subsection. Consequently, in my opinion, this appeal should be dismissed.

**LORD PEARSON:** The facts have been stated in the speeches of my noble and learned friends. The question in this appeal arises under s 2 (1) of the Road Safety Act 1967, and I think it comes to this: Be it supposed that (i) a person driving a car is, while he is driving, reasonably suspected by a constable of having committed a traffic offence; (ii) by the time when the pursuing constable has caught up with that person and is able to require from him a specimen for the breath test, he has ceased to be driving his car; but (iii) the commission of the traffic offence, the pursuit and the requirement for the breath test were all parts of the same transaction or chain of events. On these facts was there a valid requirement for the breath test (so that, on the test proving positive, there was a valid arrest)? Section 2 (1) provides:

'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause— (a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion: Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

If this subsection is interpreted literally in accordance with its normal grammatical sense, there are three things which have to be contemporaneous with each other, namely, (i) the driving or attempted driving of the vehicle, (ii) the existence of a reasonably-caused suspicion in the mind of the constable, (iii) the making by the constable of a requirement for the motorist to provide a specimen of his breath for the breath test. According to ordinary principles of construction, the literal interpretation of the enactment is to be accepted so long as it gives a reasonable meaning. In *Sweet v Parsley* (1) my noble and learned friends, LORD REID and LORD MORRIS of BORTH-Y-GEST, cited the words of ALDERSON B in *Attorney-General v Lockwood* (2):

'The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act or to some palpable and evident absurdity.'

In my opinion (the reasons for which will be given later) it has been decided by this House in *Pinner v Everett* (3) that the reasonably-caused suspicion must exist contemporaneously with the driving or attempted driving of the car by the motorist, or, in other words, that the suspicion must arise in the mind of the constable before the motorist's driving or attempted driving has ceased. It appears, however, from the wording of para (b) of s 2 (1) and from the speeches in *Pinner v Everett*, where the meaning of the word 'driving' for the purposes of the subsection was much

(1) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

(2) (1842), 9 M & W 378.

(3) 113 JP 653; [1969] 3 All ER 257.

discussed, that the 'driving' does not come to an end immediately on the car ceasing to be in motion. There is a limitation on the powers of the police in the enforcement of the Act. If a constable has not formed a suspicion on reasonable grounds under para (a) or para (b) of the subsection while the motorist is still 'driving' or attempting to drive, he is not authorised to make subsequent enquiries or investigations which might lead to suspicion and a breath test and an arrest. This seems a not unreasonable compromise between efficient enforcement of the law and preservation of the liberty of the subject, and not unlikely to have been intended by Parliament. There is the familiar principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted (*Sweet v Parsley* (1)). Moreover, if my understanding of what was decided in *Pinner v Everett* is correct, there is already on this point—as to the time at which the suspicion on reasonable grounds must be formed—an authoritative decision of this House to be applied in any case to which it is applicable. I have found it necessary to consider the point as a step in the construction of the subsection, but it does not arise for decision in the present case, where undoubtedly while the appellant was still driving the constable on reasonable grounds suspected him of having committed a traffic offence.

The question which does arise for decision in the present case, and has given much difficulty in a number of cases, relates to the timing of the requirement for a breath test in relation to the time of the driving or attempted driving. Must the requirement be made before the driving or attempted driving has ceased? It must in most, if not all, cases be impracticable to make the requirement until the motorist has stopped his car. The motorist may stop his car because the constable has instructed him to do so under s 223 of the Road Traffic Act 1960, or because the motorist has reached his home or other destination. In either case, before the constable is able to come up with the motorist and ask him for a specimen of his breath, the motorist may have done several things, e.g. stepping out of the car, removing the ignition key, locking the car, and starting to walk towards the gate or door of his home or other destination. A passenger in the car may move over into the driving seat and start to drive the car to another destination (or a few feet forwards or backwards if he only wishes to demonstrate that his friend is no longer driving the car). The constable may put a few questions to the motorist and obtain his answers before making the requirement for a specimen of breath. Some such acts would naturally intervene in many cases between the stopping of the car and the making of the request. From a common sense point of view, they have no practical importance in relation to the breath test, and they should not have an artificial importance imputed to them. They should not enable the motorist to say to the constable: 'I am no longer driving the car and therefore your request is invalid and I do not have to comply with it'. It cannot have been the intention of Parliament that its enactments on the subject of the breath test, designed for the protection of the public against drunken motorists, should be so easily frustrated. Therefore, in order to give a reasonable meaning to the subsection it is necessary to introduce latitude into its construction by some method. Several methods can be suggested.

LORD PARKER CJ, in giving the judgment of the Court of Appeal in *R v Price* (2), and again in his judgment in the Divisional Court in *Pinner v Everett*, held it was sufficient if the defendant could be described as the driver of the vehicle. But that view was disapproved by this House in *Pinner v Everett* per LORD REID, per LORD GUEST and per LORD UPJOHN.

Another possible method would be to give a very wide meaning to the phrase

(1) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

(2) 133 JP 47; [1968] 3 All ER 814.

'driving or attempting to drive'. As mentioned above, this phrase was considered in *Pinner v Everett*. It was held that the word 'driving' in the context could not be interpreted so narrowly as to refer only to the driving of a car in motion, and must include at least some instances of temporary stoppage, but the speeches do not indicate that a very wide meaning should be given. At any rate, if the making of a requirement for a specimen of breath had to be contemporaneous with the 'driving or attempting to drive', I do not think the interpretation of that phrase in *Pinner v Everett* would be wide enough to cover all the cases which need to be covered in order to exclude absurd evasions of the Act.

There is a third possible method of introducing the necessary latitude into the construction of the subsection. This was not considered in *Pinner v Everett* but has emerged later in a judgment of the Court of Appeal in *R v Jones* (1) and in a judgment of a Divisional Court in *Sasson v Taverner* (2). In effect this method introduces the necessary latitude not into the meaning of any particular phrase but into the timing. The driving or attempted driving and the making of the requirement for a specimen of breath do not have to be exactly contemporaneous. They do, however, have to be parts of the same chain of events—or one might say the same occasion, or the same incident or the same transaction or the same set of *res gestae*.

In *R v Jones* the defendant had been driving his car at a very high and excessive speed along a winding road, pursued by two police officers in their car. He drove the car into his own drive so that it was two or three feet off the road. The police officers caught up with him, noticed that his breath smelt strongly of alcohol, and required him to take a breath test. On these facts one of the contentions argued on behalf of the defendant was that the requirement was invalid because the defendant was at the time of the requirement off the road—not 'driving or attempting to drive a motor vehicle on a road or other public place'. This contention was rejected. SACHS LJ, giving the judgment of the court, after referring to certain cases that had been cited, said:

'Accordingly, both as a matter of reasonable approach and on well-established authority, this court has concluded that a "requirement" under s 2 (1) of the Act may be made off the road so long as it is made in the course of a chain of action following sufficiently closely on an observed driving on the road. It is thus not, in the view of this court, the law that a motorist merely by turning a few feet off a highway can stultify police action and escape being required to give a breath test, when that action would otherwise be proper under the subsection . . . The contrary view would result in absurdities . . .'

In *Sasson v Taverner* (2) the Divisional Court (LORD PARKER CJ, WILLIS and BRIDGE JJ) applied the principle of the *Jones* case to a case in which the suspicion that the motorist had committed a traffic offence undoubtedly arose at a time when he was still driving the vehicle, but there could be a doubt whether he was still driving at the time when the requirement for a breath test was made. As the principle is a comparatively new one for cases of this kind and, if it is right, is decisive of the present case, I will show the reasoning by setting out substantial extracts from the judgment of the court, delivered by BRIDGE J. He said:

'as the Court of Appeal point out in *R v Jones*, the suspicion under para (b) normally, if not necessarily, arises when the vehicle is in motion. In such a case the suspect must often first be pursued and may well have ceased driving or turned off the road before he can be caught. Their Lordships refer to a number

(1) 134 JP 215; [1970] 1 All ER 209.

(2) 134 JP 244; [1970] 1 All ER 215.

of decisions on statutes conferring a power to arrest without a warrant "any person found committing" certain offences. Such words have received a liberal rather than a literal construction so as to permit a valid arrest after a "fresh pursuit" of the offender caught red-handed where the observed commission of the offence, the pursuit and the arrest can fairly be regarded as one transaction. If this approach, so runs the reasoning, is permissible in construing a statutory power of immediate arrest, how much more so in construing the less draconian power to require a suspect to take a breath test followed by a power of arrest if, but only if, the test proves positive.'

Referring to the views of the Court of Appeal in the *Jones* case he said:

'... we think it is open to this court in the light of those views to regard *Campbell v Tormey* (1), *Trigg v Griffin* (2) and *R v Wall* (3) as having been decided per incuriam and we prefer to follow the reasoning of the court in *R v Jones*.

BRIDGE J then said:

'Counsel for the appellant has submitted that there is a crucial significance in the appearance in s 2 (1) of the words "any person driving", etc, as the immediate object of the verb "require". One may test this by considering how the statutory language would read if the grammatical structure of the sentence were inverted in the following form: "If a constable in uniform has reasonable cause to suspect any person driving or attempting to drive a motor vehicle on a road or other public place—(a) of having alcohol in his body; or (b) of having committed a traffic offence while the vehicle was in motion—the constable may require him to provide a specimen of breath for a test there or nearby". This inversion, we think, effects no change in the meaning of the language but serves only to emphasise what is already logically inherent in the statutory form of the sentence, viz that the suspicion must precede the requirement. This part of counsel for the appellant's argument has failed to persuade us that the collocation of the words "require" and "any person driving" was a subtle artifice of draftsmanship designed to shut out the construction adopted by the court in *R v Jones* (4).'

A little later he said:

'There is no doubt that, in the present case, the suspicion that the appellant had committed a traffic offence while his vehicle was in motion was followed by a fresh pursuit culminating in the requirement to provide a specimen for a breath test. The whole sequence of events was so closely related as to form a single transaction.'

I find the reasoning of that judgment convincing. It gets rid of the absurdities which inevitably result from the assumption that the motorist must be still 'driving or attempting to drive' the vehicle at the time when he is required to provide a specimen for a breath test. The necessary latitude is introduced, not by giving an artificially extended meaning to the phrase 'driving or attempting to drive' but by recognising that the requirement for the breath test does not have to be exactly contemporaneous

(1) 133 JP 267; [1969] 1 All ER 961.

(2) [1970] RTR 53.

(3) 133 JP 310; [1969] 1 All ER 968.

(4) 134 JP 215; [1970] 1 All ER 209.

with the driving or attempting to drive, but only has to be part of the same transaction (or occasion or incident or chain of events or set of *res gestae*). I would apply the same reasoning, the same principle, to the present case.

In my opinion, that can be done without departing from the decision or the prevailing reasoning in *Pinner v Everett* (1). It is important to observe that the reasoning in *Sasson v Taverner* (2) relates only to the time of the requirement for a breath test and not to the time of the suspicion arising. As I read the inverted sentence set out in the judgment in *Sasson v Taverner* the suspicion does have to arise at a time when the motorist is still driving or attempting to drive the vehicle. That is the feature which distinguishes *Sasson v Taverner* from *Pinner v Everett*.

The question at issue, or at any rate the main question at issue, throughout the proceedings in *Pinner v Everett* was whether the defendant was entitled to be acquitted because he was no longer driving or attempting to drive the vehicle at the time when the suspicion that he had alcohol in his body first arose. Paragraph (g) of the statement of facts in the Case Stated by the justices show that:

'The appellant protested that the officers had no right to require him to provide a specimen of breath for a breath test since they had had no cause to suspect him of having alcohol in his body while he was driving and since he had not committed a traffic offence or been involved in an accident.'

There is not in the statement of facts any indication of any protest that the officer had no right to require the motorist to provide a specimen of his breath for a breath test because he was not driving at the time of the requirement. Similarly one of the appellant's contentions set out in the Case Stated was:

'(c) that the officers were not entitled to require him to provide a specimen of breath because when he was driving his car they had no cause to suspect him of having alcohol in his body or of having committed a traffic offence and no accident had occurred owing to the presence of the appellant's car on the road'.

There was no appellant's contention based on the time of the requirement. Then:

'It was contended by the respondent that the appellant was a person driving a motor vehicle . . . notwithstanding the fact that it was not suspected that he had alcohol in his body until after the car had become stationary . . . The justices were of the opinion that the appellant had not completed his journey when he was stopped, and that he was still a person driving within the true construction of section 2 of the Act of 1967 notwithstanding that his vehicle was stationary and that he had dismounted before suspicion arose that he had alcohol in his body, and they accordingly convicted him . . .'

The question for the opinion of the High Court was:

' . . . whether the justices were right in holding that the appellant was still a person driving a motor vehicle . . . notwithstanding the appellant's contentions.'

In the Divisional Court LORD PARKER CJ said:

'The sole question then was whether they were entitled to require a breath test by reason of their suspecting him of having alcohol in his body, although while he was physically driving they had no ground whatever for suspecting him of that.'

(1) 113 JP 653; [1969] 3 All ER 257.

(2) 134 JP 244; [1970] 1 All ER 215.



He followed a previous decision of the Divisional Court in holding that

'this man was the driver, and provided he was the driver, it mattered not at what time the suspicions had arisen.'

The two points of law certified by the Divisional Court were:

'Whether in the case of a requirement under section 2, subsection (1) (a) the suspicion must arise during the time of actual driving. Whether the requirement can only be made of a person who, though no longer actually driving, can in general terms be described as the driver.'

It was therefore open to their Lordships under question 2 to consider the timing of the requirement, and LORD REID did so. LORD MORRIS OF BORTH-Y-GEST also did so to some extent, but predominantly he was considering the time when the suspicion arose. Out of a number of relevant passages in his speech I will quote two. First:

'I think that the word "him" must refer to a "person driving or attempting to drive a motor vehicle on a road or other public place." The question is therefore whether the police, when they had reasonable cause to suspect the appellant of having alcohol in his body (as the justices found that they had), were so suspecting someone who came within the words "any person driving or attempting to drive a motor vehicle on a road or other public place."'

And later:

'In my view, there are the clearest possible indications that the "person driving" may still be the "person driving" even after the motor vehicle is no longer "in motion". The specimen of breath which may be demanded of a "person driving" may be demanded, therefore, of someone who is no longer causing a motor vehicle to be in actual motion on the road. The suspicion which a constable may have will relate to such a person. I think it follows that if a police officer reasonably suspects such a person of having alcohol in his body a specimen of breath may be required.'

LORD GUEST, I think, considered solely the time when the suspicion first arose. His conclusion was:

'There is no extension of time in relation to s. 2 (1) (a) (suspicion of alcohol) thus emphasising the necessity of the close relationship between the driving and the suspicion of alcohol. It may be necessary in future cases to seek further refinements, but where, as here, there is nothing in the driving of the vehicle to cause the constables to have reasonable cause to suspect that the appellant had alcohol in his body, the constables were not, in my view, entitled to require the appellant to take a breath test. He was consequently not legally arrested.'

I think that LORD UPJOHN also considered solely the time when the suspicion first arose. He said:

'What interpretation, then, is to be given to s. 2 (1) (a)? In my opinion, to bring the case within that paragraph the police constable must have reasonable cause to suspect the person of having alcohol in his body at the time when he can properly be said to be driving or attempting to drive the car.'

His conclusion was:

'... the police fail to prove their case that at the time that the appellant was driving or attempting to drive they had reasonable grounds for supposing that he had alcohol in his body; the suspicion arose after he had ceased to drive.'

It is interesting to observe that according to the headnote of the report the ratio decidendi in *Pinner v Everett* (1) was based on the fact that the suspicion arose after the appellant had ceased to drive. In my opinion, the headnote is correct. Also BRIDGE J in *Sasson v Taverner* (2) said that in *Pinner v Everett* 'all their Lordships relate the question whether the defendant was "driving" to the time when the suspicion arose'. I think that is right in substance, although 'all their Lordships' should be amended to 'most of their Lordships'.

I have thought it right to deal somewhat meticulously with the leading authorities, because there have been difficult questions arising under s 2 (1) of the 1967 Act, and the difficulty will be diminished if the principles emerging from the decisions in *Pinner v Everett* and *Sasson v Taverner* can be made clear. In my view, there is no conflict between these two decisions. I will endeavour to summarise shortly: (i) the requirement for a breath test is not valid unless the constable formed a suspicion under para (a) or para (b) while the motorist was still driving; (ii) for determining whether the motorist was still driving guidance is afforded by the speeches in *Pinner v Everett*; (iii) it is not necessary for the validity of the requirement for a breath test that the requirement should be made while the motorist is still driving so long as the requirement forms part of a relevant single transaction or chain of events; (iv) the cases of *Campbell v Tormey* (3), *Trigg v Griffin* (4) and *R v Wall* (5) were wrongly decided.

That is, I think, the existing state of the law, and it is sufficient for the decision of the present case. I see the attractions of the new interpretation which my noble and learned friends, LORD HAILSHAM LC and VISCOUNT DILHORNE, have placed on s 2 (1) of the 1967 Act. I think it involves treating the words 'driving or attempting to drive' not as necessarily indicating any presently continuing activity but as descriptive of the significant or characteristic part played by the motorist at some stage or stages, not necessarily all stages or the final stage, of the relevant sequence of events. On this interpretation not only the requirement for the breath test, but also the formation of the suspicion in the mind of the constable, could come after the cessation of the driving. This might or might not be desirable as a matter of policy, but it is not necessarily what Parliament intended when they passed the 1967 Act, and it conflicts with the ratio decidendi of *Pinner v Everett*. The fact that this interpretation departs from the natural and ordinary meaning of the words of the subsection is not in the circumstances a major objection, because some departure is needed in order to make sense of the subsection. But stare decisis is an important principle, and it seems preferable to maintain the law as it has been developed hitherto.

In my opinion, the decision of the Court of Appeal in the present case should be affirmed and the appeal should be dismissed.

**LORD CROSS OF CHELSEA:** In this case the House is called on to consider for the second time the meaning of s (2) 1 of the Road Safety Act 1967. It runs as follows:

'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion: Provided that no

(1) 113 JP 653; [1969] 3 All ER 257.

(2) 134 JP 244; [1970] 1 All ER 215.

(3) 133 JP 267; [1969] 1 All ER 961.

(4) [1970] RTR 53.

(5) 133 JP 310; [1969] 1 All ER 968.

requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

A man who is driving a car along a road, slows down and comes to halt at traffic lights can fairly be said to be still driving it while he is waiting to be able to start moving again. On the other hand, if he draws into the kerb, stops and engages in a conversation with a police constable, many people would say that he was no longer driving the car even though the conversation related to his manner of driving and even though he remained in the driving seat. But common sense alone would tell one that Parliament cannot have intended that a constable could only lawfully require a motorist to take a breath test if he made the request while the car was moving or had been brought to a halt at traffic lights, and quite apart from considerations of common sense the reference in (b) to the commission of a traffic offence 'while the vehicle was in motion' shows that what is envisaged is that the car will have come to a halt at the side of the road and that the test will take place beside it or nearby. There are two ways out of the difficulty, one is to give an unnaturally wide meaning to the word 'driving', the other to construe the section so as to permit a constable to require a breath test even though the driver is no longer driving. The courts—unfortunately as I think—started off on the first road. In *R v Price* (1) the defendant was committing a traffic offence by driving with defective rear lights. He stopped his car and got out in order to relieve himself at a lavatory. A constable who had been following him in a police car, stopped, got out and went up to him, not because he suspected him of having alcohol in his body but simply to warn him about his lights. He noticed, however, that he smelt of drink and asked him to take a breath test. It was argued for the defendant (i) that sub-para (b) did not apply since the constable had not made the request as soon as possible after he had noticed that a traffic offence was being committed, and (ii) that sub-para (a) did not apply because the constable did not suspect that the defendant had been drinking until after he had ceased to be driving. LORD PARKER CJ, giving the judgment of the Criminal Division of the Court of Appeal, rejected the submission with regard to sub-para (b) and said that whether the case was looked at as a case under sub-para (a) or (b) the defendant was rightly convicted. The words 'any person driving' applied to a person who had got out of the driving seat temporarily and could still be termed in general terms 'the driver'. On the other hand, in *Campbell v Tormey* (2), *R v Price* was distinguished. There the defendant who had been driving parked the car outside his father-in-law's house where he was staying the night. He took out the ignition key, got out of the car, locked the car and was about to go into the house when he was stopped by police officers who had followed him in a police car. It is not clear from the report why he had been followed, but his breath smelt of alcohol when the police spoke to him and he was asked to take a breath test. ASHWORTH J, giving the judgment of the Divisional Court of which LORD PARKER was a member, said that although the defendant might perhaps be said still to have been 'in charge' of the car when the request was made he was certainly not still 'driving' it. In *R v Price* there was simply a temporary pause in a journey which was not yet over but here the journey was over. In *Pinner v Everett* (3) the defendant's car was followed by police officers because his rear number plate was not illuminated—a defect which did not constitute a 'traffic offence' within the meaning of s 2 (1), see sub-s (8). They signalled him to stop, which he did. He got out of his car and a conversation ensued which started with the subject of the rear number plate and went on to the

(1) 133 JP 47; [1968] 3 All ER 814.

(2) 133 JP 267; [1969] 1 All ER 961.

(3) 113 JP 653; [1969] 3 All ER 257.

subject of routine checks by police officers to trace stolen cars. In the course of the conversation—which lasted for some time—the officers came to suspect that the defendant had been drinking and asked him to take a breath test. After some demur he took one which proved positive but at the police station he refused to provide a sample of blood or urine and was charged under s 3 (3) of the Act. He was convicted by the justices and his conviction was upheld by the Divisional Court; but it was quashed by this House. The ratio decidendi—as I read the speeches of the members of the appellate committee—was that although a man may still be driving a car within the meaning of the section after his car has stopped and he is no longer in the driving seat this will only be the case if the reason for the stopping of the car and his absence from the driving seat is connected with the driving. In the case of Mr Pinner the suspicion did not arise and the requirement was not made until a time when his absence from the car could not be said to be for a purpose connected with its driving and so he could not be asked to take a test. It is, I think, clear that all the members of the committee would have thought that a man who had got out of his car at the end of his journey was no longer driving it within the meaning of the Act. LORD UYJOHN indeed expressly approved *Campbell v Tormey*.

In *Stevens v Thornborrow* (1) the decision in *Pinner v Everett* was applied to a case where a driver who had stopped his car late at night by the side of the street and had been talking for about 20 minutes with his passengers was spoken to by a police officer not because he thought that he had excess alcohol in his body but because of the prevalence of crime in the area. On smelling his breath the officer required him to take a test in which he failed but his conviction was quashed by the Divisional Court on the ground that a man who stopped his car for the purpose of carrying on a conversation with his passengers could not be said to be still driving it within the meaning of the Act even though his journey was not yet finished.

*Pinner v Everett* (2) laid down limits beyond which the meaning of 'driving' could not be extended and so it was necessary to find some other means of bringing within this section cases where the 'driving' had ceased before a test was required but yet it was obviously right that the police should be able to require one. For example, where they suspect from the manner of a man's driving that he has either excess alcohol in his blood or has committed a traffic offence, follow him but do not catch up with him until he has reached his destination and maybe got out of his car and locked it. The first sign of the new approach to the construction of the section came in *R v Jones* (3). There the police followed a car which was being driven at high speed down a winding road. The driver turned into the private drive of his house and although still in the car had turned off his engine before the officers spoke to him and after smelling his breath required him to take a breath test. It was argued that the request could not lawfully be made because he was neither driving nor on a road or other public place when he was asked to take the test. The conviction was quashed because the chairman had not directed the jury properly as to the law but the court relying on some old authorities on the subject of 'fresh pursuit' expressed the view that on a proper direction the defendant might have been convicted. In their view a 'requirement' under s 2 (1) could be made off the road and when the man in question was no longer driving, if it was made 'in the course of a chain of action following sufficiently closely on an observed driving on the road'.

In *Sasson v Taverner* (4), where the facts were much the same as those in *R v Jones* save that Mr Taverner had already got out of his car, the Divisional Court, on a case

(1) 134 JP 99; [1969] 3 All ER 1487.

(2) 113 JP 653; [1969] 3 All ER 257.

(3) 134 JP 215; [1970] 1 All ER 209.

(4) 134 JP 244; [1970] 1 All ER 215.

stated by justices, approved the view of the law expressed in that case and held that the defendant had been rightly convicted. BRIDGE J, in giving the judgment of the court, said that there was no crucial significance in the words 'any person driving' appearing as the immediate object of the verb 'require' and that the subsection would mean just the same if it read:

'If a constable in uniform has reasonable cause to suspect any person driving or attempting to drive a motor vehicle on a road or other public place—(a) of having alcohol in his body; or (b) of having committed a traffic offence while the vehicle was in motion—the constable may require him to provide a specimen of breath for a test there or nearby.'

All that was necessary was that the whole sequence of events should be so closely related as to form a single transaction. The court—of which LORD PARKER CJ was a member—recognised that their decision was inconsistent with *Campbell v Tormey* (1) and two other decisions to the like effect but pointed out that the line of reasoning which led to the decision in *R v Jones* (2) had not been suggested in those cases which had been decided per incuriam.

The facts in the case now under appeal are of the same character as those in *R v Jones* and *Sasson v Taverner* (3). A police officer saw the appellant's car being driven at some 50 m p h in a built up area. He pursued it; made an abortive attempt to stop it; and eventually caught up with it just as it stopped opposite the appellant's house after having travelled the last 30 yards or so along the kerb. The appellant got out of the car, but before he could enter his house the officer came up to him and said: 'I have been following you along Church Road and I have attempted to stop you. In my opinion you were driving at a dangerous speed. Why didn't you stop?' To which the appellant replied: 'I did stop. What are you talking about?' The officer then noticed that the appellant was smelling of drink and requested a breath test which proved positive. The specimen of the appellant's blood showed 163 milligrammes of alcohol to 100 millilitres of blood. The appellant's evidence was that he was never driving more than 30 m p h and that he did not know that he was being pursued by a police car. The deputy chairman, applying *Sasson v Taverner*, directed the jury that even if they thought that the appellant was not 'driving' when he was asked to take a breath test, they should nevertheless convict him if they accepted the evidence of the police officer. In the Court of Appeal his counsel argued first that *R v Jones* and *Sasson v Taverner* were inconsistent with *Pinner v Everett* (4), and, secondly, that the law laid down in *R v Jones* could only apply if the driver knew that he was being pursued by the police. The court affirmed the conviction but gave leave to appeal to this House on the first point—the certificate being in the following terms:

'Whether, on the true construction of section 2 (1) of the Road Safety Act, 1967, in cases where a suspicion arises with respect to a person driving while his vehicle is in motion, that person, if immediately pursued by a constable in uniform, may be required to provide a specimen of breath for a breath test, notwithstanding that at the conclusion of the pursuit he is no longer a person driving or attempting to drive a motor vehicle on a road or other public place.'

I propose first to consider the construction put on s 2 (1) in *Sasson v Tarverner* on its own merits and then to consider whether it runs counter to anything decided in

(1) 133 JP 267; [1969] 1 All ER 961.

(2) 134 JP 215; [1970] 1 All ER 209.

(3) 134 JP 244; [1970] 1 All ER 215.

(4) 113 JP 653; [1969] 3 All ER 257.



*Pinner v Everett*. There is not, so far as I can see, the slightest reason why a constable who sees a driver committing a traffic offence while his car is in motion should be entitled to require him to take a breath test if he catches up with him when he stops his car in order to clean his windscreen, but should not be entitled to require him to take a test if he catches up with him on his doorstep after the completion of his journey. If the wording is such as to compel one to draw such an absurd distinction then one must draw it, but to my mind the section is well capable of being read as *BRIDGE J* read it. Indeed the proviso to s 2 (1) (b) suggests that Parliament thought that but for it a constable might be entitled to delay making the request for a test for an indefinite period after the vehicle had come to a halt which could hardly be so if it had to be made while the man was still driving the vehicle. How natural the construction adopted in *Sasson v Taverner* is can be seen if one considers s 30 of the Act which runs as follows:

'A constable in uniform may arrest without warrant any person driving or attempting to drive a motor vehicle on a road whom he has reasonable cause to suspect of being disqualified for holding or obtaining a licence granted under Part II of the principal Act.'

I do not believe that it would occur for a moment to any educated layman reading those words that if a constable saw a man whom he knew to be disqualified driving up to his front door he could only lawfully arrest him if he succeeded in performing the operation before the car came to a halt or at all events before the man switched off the engine and got out of it. As the wording of s 2 (1) is more cumbersome the construction which links the requiring, not the suspicion, with the driving is more plausible, but obviously both sections must be construed in the same way. It is true that in s 2 (2) one finds the words 'was driving' but I do not think that the contrast between those words and the word 'driving' in sub-s (1) tells at all against the construction adopted in *Sasson v Taverner* (1) since the constable will have arrived on the scene after the accident and will not have seen the driving. On the other hand, s 3 (3) and (4), which are not referred to in the judgments in *R v Jones* (2) and *Sasson v Taverner*, may be said with greater reason to support the view that the requirement must be made while the man is still driving. Section 3 makes it an offence to refuse to supply a specimen of blood or urine and so to make it impossible for the police to establish an offence under s 1. But as s 1 creates two offences—one that of driving with excess alcohol in the blood, the other that of merely being in charge of a motor vehicle with excess alcohol in the blood—Parliament had to say of which offence the man refusing to provide a specimen was guilty. What was enacted was that if he was driving the vehicle when he was required to take the test or if he was driving the vehicle at the time of the accident he should be liable to be prosecuted for an offence under s 1 (1) but that otherwise he should be guilty of an offence under s 1 (2) if it was shown that he was in charge of the vehicle when the request was made or the accident happened. But I do not think that we should allow what is, to my mind, the only reasonable construction of s 2 (1) to be controlled by the wording of s 3. It may be that in the latter section the word 'when' he was required to take the test can be given the broad meaning 'on the occasion' of his being so required; but even if that is not permissible all that follows is that if in a *Sasson v Taverner* case a man is required to submit to a breath test when he is not driving and thereafter fails to supply a specimen of his blood or urine the offence with which he is charged can only be an offence under s 1 (2) and not an offence under s 1 (1). Apart, therefore, from the decision in *Pinner v Everett* (3) I would have no hesitation in saying that the

(1) 134 JP 244; [1970] 1 All ER 215.

(2) 134 JP 215; [1970] 1 All ER 209.

(3) 113 JP 653; [1969] 3 All ER 257.

construction of the section adopted in *R v Jones* and *Sasson v Taverner* was right.

It was, however, argued that in *Pinner v Everett* this House has laid it down that a constable can only require a blood test if the person in question is driving the vehicle at the time. I do not so read the decision. It is important to bear in mind that in that case the requirement followed immediately on the suspicion and that it was unnecessary to draw a distinction between the two. This is shown by the form of the points of law submitted to the House, the first of which ran: 'Whether in the case of a requirement under section 2, sub-section (1) (a) the suspicion must arise during the time of actual driving', and the second: 'Whether the requirement can only be made of a person who, though no longer actually driving can in general terms be described as the driver'. It is true that language is used in some of the speeches which suggests that the requirement must be made during the driving. For example, LORD REID said:

'... the crucial question is whether the appellant was "driving or attempting to drive" when the constable requested him to provide a specimen of his breath.'

But in other speeches the question to be decided was stated to be whether the suspicion arose during the driving, e.g. by LORD UPJOHN. I do not suppose that any of their Lordships directed their minds to a case such as this where the suspicion arose during the driving but the requirement was made after it had ceased, and I do not think that the decision is inconsistent with *Sasson v Taverner*. I would, therefore, answer the question put to us in the negative and dismiss this appeal.

It can, of course, be argued that the decision in *Pinner v Everett*—namely, that a breath test cannot be required if the suspicion does not arise until after the driving has come to an end—makes it unlawful for the police to require a test in some cases in which it would seem reasonable that they should be entitled to require one. The suspicion that a traffic offence is being committed will normally arise while the car is in motion. On the other hand, the suspicion that the driver has had too much to drink may often not arise until after the driving has come to an end. Suppose that a constable happens to be standing outside a house when the owner drives up and stops opposite it. He gets out, locks the car, and passes by the constable on his way to his front door. There was nothing in the manner of his driving to arouse any suspicion, but he is unsteady on his feet and smells strongly of drink. It would be doubtful whether the constable could properly arrest him under s 6 (4) of the 1960 Act and if no breath test can be required of him there is no way of proving an offence under s 1 (1) of the 1967 Act. But to bring such a case within s 2 (1) it would be necessary not simply to invert the order of words in the way suggested by BRIDGE J in *Sasson v Taverner* (1) but also to read 'driving' as meaning 'seen driving' as suggested by my noble and learned friend, VISCOUNT DILHORNE. It is, of course, true that what I may call the *Sasson v Taverner* approach to the construction of the section was not suggested in *Pinner v Everett* (2) and it may be that if an appeal which raised the point was brought, the House after hearing full argument might be prepared to say that *Pinner v Everett* was wrongly decided. But this appeal does not raise the point; it was not fully argued before us; and I express no opinion on it.

**LORD SALMON:** The relevant facts which have been fully stated make it obvious that the appellant's case is entirely devoid of merit. Whilst he was driving a motor car along the streets of Hove with a blood-alcohol concentration of more than twice the prescribed limit, he was chased by a uniformed policeman in a patrol car through a 30 mph traffic zone at speeds of 50 mph or more. On one

(1) 134 JP 244; [1970] 1 All ER 215.

(2) 113 JP 653; [1969] 3 All ER 257.

occasion he stopped, the patrol car drew up in front of him but he then accelerated past the patrol car and the chase continued. It ended when the appellant's car pulled over to its offside of the road, travelled some 30 yards along the kerb and stopped just in front of his house. The patrol car pulled up and as the policeman walked back to the appellant's car the appellant got out of it and came towards him. A few sentences were exchanged between them. The policeman noticed that the appellant's breath smelt strongly of alcohol and requested a specimen of his breath. This was at first refused and the appellant was arrested. Eventually he did submit to a breath test which proved positive. Later, a blood specimen taken after all the statutory requirements had been complied with showed 163 milligrammes of alcohol to 100 millilitres of blood.

In the course of a most fair and careful summing-up, the deputy chairman directed the jury that, if they were satisfied that whilst the appellant was driving the constable reasonably suspected him of having committed a traffic offence, they might convict the appellant of driving with a blood-alcohol concentration over the prescribed limit under s 1 (1) of the Road Safety Act 1967, notwithstanding that, at the time the appellant was asked for a specimen of his breath, he was no longer driving. The jury returned a verdict of guilty. Indeed, there was no other possible verdict on the evidence. The appellant then appealed on the ground that the deputy chairman should have directed the jury that if the appellant had ceased driving before he was asked for a specimen of his breath, he was entitled to be acquitted. The Court of Appeal (Criminal Division) dismissed the appeal, and the appellant now appeals to your Lordships' House.

It is important to notice the precise point of law on which he was given leave to appeal:

'Whether, on the true construction of section 2 (1) of the Road Safety Act, 1967, in cases where a suspicion arises with respect to a person driving while his vehicle is in motion, that person, if immediately pursued by a constable in uniform, may be required to provide a specimen of breath for a breath test, notwithstanding that at the conclusion of the pursuit he is no longer a person driving or attempting to drive a motor vehicle on a road or other public place.'

I should be reluctant to find that the facts which I have briefly restated cannot, in law, support the conviction. Such a finding would make the law appear absurd. Nevertheless if, on its true construction, s 2 (1) of the Road Safety Act 1967 makes the conviction invalid, effect must be given to the statute, absurd though the results may be. I am, however, happy to say that, in my view, the true meaning of this not very happily worded statute does not lead to the result for which the appellant contends.

There is no relevant distinction between the facts of the present case and those in *Sasson v Taverner* (1). Although I doubt whether much help can be derived from the older authorities relating to 'fresh pursuit', I otherwise entirely agree with the admirable judgment of the court delivered by BRIDGE J, dismissing the appeal on the ground that providing a constable in uniform has reasonable cause for suspicion under s 2 (1) whilst a defendant is 'driving or attempting to drive' on 'a road or other public place' it does not matter that the request for a specimen of breath is made when the defendant has ceased 'driving' or 'attempting to drive' or is on private property.

As a rule, if the constable's suspicions are aroused, he tries to stop the person driving. Sometimes that person tries to escape. He is then chased by the constable. He may drive so fast that he prevents the constable from catching him until they have both covered a considerable distance. Finally, just before he is overtaken, he may

perhaps have time to stop, lock the car door, and throw away the ignition key thereby convincingly bringing his 'driving' to an end; or he may drive the car off the road on to private property. I do not think that any of these manoeuvres can put him in balk, providing that the specimen of breath is requested 'on the road or nearby' and that in a s 2 (1) (b) case the constable's request for a breath test is made 'as soon as reasonably practicable after the commission of the traffic offence'. This means that the time from when the constable's suspicion is aroused to the time when the request for a specimen of breath is made, will be as short as may be. Everything happening in between will be a continuous series of events constituting one transaction. This makes sense from every point of view, for if the request could be indefinitely postponed the accused might sober up or have a large number of drinks in the interval so that the breath test would then be entirely misleading.

I am satisfied that it is not essential for the request to be made at a moment when the defendant is 'driving' or is 'in a public place'. Such a construction would lead to absurd results and stultify the operation of the Act. The worst offenders would escape punishment. I adopt the language of BRIDGE J in *Sasson v Taverner*:

'One may test this [whether the defendant must be driving when the request is made] by considering how the statutory language would read if the grammatical structure of the sentence were inverted in the following form: "If a constable in uniform has reasonable cause to suspect any person driving or attempting to drive a motor vehicle on a road or other public place—(a) of having alcohol in his body; or (b) of having committed a traffic offence while the vehicle was in motion—the constable may require him to provide a specimen of breath for a test there or nearby." This inversion, we think, effects no change in the meaning of the language but serves only to emphasise what is already logically inherent in the statutory form of the sentence, viz that the suspicion must precede the requirement.'

I am satisfied that the collocation of the words 'require' and 'any person driving' was not chosen by the legislature with the intention of shutting out the construction which I favour and leading to a construction from which absurd results must follow.

Counsel for the appellant sought to rely on s 3 (3) and (4) in support of his contention that the request for a specimen of breath under s 2 (1) must be made before the person concerned has ceased driving or attempting to drive. I agree that an offence under s 3 (3) cannot be established unless it is shown that at the time the specimen was required the defendant was driving or attempting to drive a motor vehicle on a road or other public place. The question is should 'at the time' be given the strict meaning of 'at the very moment' or the more liberal meaning of 'at about the time' or 'on the occasion when' the defendant was driving or attempting to drive. No doubt in certain circumstances as alluded to in *Pinner v Everett* (1) (to which I shall presently refer) the defendant may perhaps be said to be driving even after he has left the driving seat. Suppose, however, that a constable in uniform observes a man sitting in the driving seat whom the constable suspects of having alcohol in his body because he is trying without any success to get the ignition key into place apparently for the purpose of starting the engine or because whilst stationary with the engine running he is trying noisily and unsuccessfully to engage the gears. The constable asks the man to get out of the car. He does so unsteadily and reeking of alcohol. This confirms the constable's suspicion. The constable then asks him for a specimen of his breath. At the moment when the man is reeling on the pavement he cannot, in my view, reasonably be said to be attempting to drive the car but the request is made so soon after the attempt that it is obviously made at about the time or on the

(1) 113 JP 653; [1969] 3 All ER 257.

occasion of the attempt; and this, in my opinion, is sufficient to satisfy the section both as regards driving and attempting to drive. I cannot read into the section an intention that the man can only be asked for a specimen of his breath when he is sitting in the driving seat fumbling with the ignition key or grinding his gears, i.e. at the very moment he is attempting to drive the car, but not a few seconds later. Thus, s 3 (3) is reconcilable with s 2 (1). It follows, on my construction of s 2 (1), that in so far as *Campbell v Tormey* (1) and *R v Wall* (2) purported to decide that the request must be made before the driving has ceased, they should be overruled. That part of the decision in those two cases to which I have referred was not approved in *Pinner v Everett* (3) by my noble and learned friends, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST. All that they approved was the observations as to when a person could be said to have ceased to be 'driving' within the meaning of that word in s 2 (1), i.e. when his journey was concluded.

It has been argued on behalf of the appellant that the construction of s 2 (1) which I favour is contrary to the decision of this House in *Pinner v Everett*. I do not agree. It is important to notice the point of law being considered by this House in that case. It was:

'Whether in the case of a requirement under section 2 sub-section (1) (a) the suspicion must arise during the time of actual driving.'

The second point, on which leave to appeal was given, was whether the requirement can only be made of a person who although no longer actually driving can in general be described as the driver. The second point, however, was not dealt with. This House considered that it was inept and my noble and learned friend, LORD REID, expressly declined to answer it. If the first point is compared with the point of law in the present case which I have already set out, it will be seen that it is strikingly different. Moreover, the facts of the two cases are equally different. In the present case the constable, whilst the appellant was driving, suspected him of having committed a traffic offence. At the time the constable in *Pinner v Everett* was following the motorist, he did not suspect him of having committed a traffic offence or of having alcohol in his body. The constable followed the motorist and stopped him because he saw that the rear number plate was not illuminated, and this did not constitute a traffic offence. It was not until a substantial time after the constable had been talking to the motorist that he suspected him of having been drinking alcohol. That case decided that in order to satisfy s 2 (1) the constable's suspicion that the motorist had alcohol in his body must arise when the person concerned is still driving. This House came to the conclusion that, although it was a borderline case, so long had elapsed between the motorist being stopped and the suspicion first being aroused that it was not open to the justices to find that at that moment the motorist was still driving. Accordingly, the appeal was allowed. I would stress that this House did not decide whether it would be necessary for the person concerned to be driving when he was requested to give a specimen of his breath. Nor, in my view, are there any dicta in that case which, properly understood, mean that the request for a specimen must be made before the driving has ceased. There is, however, one passage in the speech of my noble and learned friend, LORD REID, which, if taken out of context, at first sight appears to support such a view. I refer to where LORD REID says:

'... the crucial question is whether the appellant was "driving or attempting to drive" when the constable requested him to provide a specimen of his breath.'

(1) 134 JP 267; [1969] 1 All ER 961.

(2) 133 JP 310; [1969] 1 All ER 968.

(3) 113 JP 653; [1969] 3 All ER 257.



I must emphasise (a) that LORD REID said this when, as he made plain, he was considering the only point of law which, in his view, arose, namely, whether under s 2 (1) the suspicion must arise during the time of 'driving' and (b) that the request for a specimen of the appellant's breath was made immediately the constable's suspicion was aroused. Accordingly, the request pinpointed the moment when the suspicion arose and LORD REID was, in my view, saying no more than that the crucial question was whether at that moment the appellant was still driving or attempting to drive. I am convinced that he did not purport or intend to express any opinion on the point of law arising in the present appeal. This House decided that as the constable's suspicion did not arise until after the driving had ceased the conviction had to be quashed. Having regard to that decision it was unnecessary to go on and consider at what time the request for a specimen should be made for ex hypothesi no request could have properly been made at any time. I am convinced that none of the noble and learned members of this House who decided *Pinner v Everett* intended or even contemplated that what they then laid down could be understood as supporting the appellant's contentions in the present case.

In my view, my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, dissented because he concluded that at the time the constable's suspicion was aroused the appellant could properly be held to be still driving and therefore the request for a specimen was properly made and the arrest warranted. I do not find anything in the speech of my noble and learned friend, LORD GUEST, which is inconsistent with what I consider was the only point decided in *Pinner v Everett*. LORD UPJOHN stated the point with characteristic lucidity:

'... the police fail to prove their case that at the time that the appellant was driving or attempting to drive they had reasonable grounds for supposing that he had alcohol in his body; the suspicion arose after he had ceased to drive.'

I recognise that if the point arose for decision in the present case and if the matter were *res integra*, there might be cogent reasons, alluded to by my noble and learned friend on the Woolsack and my noble and learned friend, VISCOUNT DILHORNE, for holding that it is not necessary under s 2 (1) for the suspicion to arise whilst the motorist is still driving or attempting to drive.

The decision in *Pinner v Everett* is only three years old. It lays down plainly, in my view, that the suspicion that the motorist has alcohol in his body must arise whilst he is driving or attempting to drive, before any request can be made under s 2 (1). The decision gives some protection to the public against random checks and does not seriously hamper the police if the word 'driving' is given a reasonably liberal construction. I would deprecate that decision being questioned, even if I disagreed with it, in a case such as the present in which the point does not arise. At the time this appellant was driving, the constable admittedly suspected that he had committed a traffic offence.

The law for present purposes should, in my view, be regarded as settled by *Pinner v Everett*. It does not conflict with any decision of this House. Indeed, it was the first occasion on which this House considered the point. It is most important, especially in this field, that the law should be clear and certain. To seek, in the present case, to overthrow such a recent decision by what, I think, could, of necessity, only be obiter dicta might well lead to chaos.

Before parting with *Pinner v Everett* I would point out that the illustrations given by the noble and learned members of this House of circumstances which they suggested might or might not lead to a finding of fact that an accused was 'driving' were clearly not decisions on points of law nor were they intended to be binding. The fact that I feel bound to accept the decision in *Pinner v Everett* does not mean that if

I were a jurymen I should necessarily accept all those suggestions, e.g. the suggestion made by my noble and learned friend, LORD GUEST, that a person changing a wheel may be regarded as still 'driving' a motor vehicle, rather than as being merely in charge of it. The fact that all the illustrations given in *Pinner v Everett* may not be entirely acceptable in no way weakens its authority on the point of law which it decided.

Just as *Pinner v Everett* lays down that the constable's suspicion must arise whilst the accused is driving, so I hope that the present case finally lays down that, providing that that requirement is complied with, it is of no consequence that the 'driving' may just have come to an end or the motor vehicle and driver may be on private property at the moment when a request for a specimen of breath is made. Whilst accepting the decision in *Pinner v Everett* I am in favour of setting the seal of this House's approval on the decision of the Divisional Court in *Sasson v Taverner* (1). I would accordingly dismiss the appeal.

*Appeal dismissed.*

Solicitors: Row & Maw, for Woolly, Bevis & Diplock, Brighton; Sharpe, Pritchard & Co, for John E Stevens, Hove.

Reported by G F L Bridgman, Esq, Barrister.

(1) 134 JP 244; [1970] 1 All ER 215.

### COURT OF APPEAL (CRIMINAL DIVISION)

(ROSKILL, LJ, MACKENNA AND WALLER, JJ)

25th, 26th January, 1972

R v ARDALAN AND OTHERS

*Customs and Excise—Goods prohibited from importation—Conspiracy to require possession knowingly and with intent to evade prohibition—Time and place of acquisition—Place and time distant from importation—Not relevant as a defence—No distinction between uncustomed goods and goods prohibited from importation—Customs and Excise Act, 1952, s 304 (a).*

By s 304 of the Customs and Excise Act 1952 '... if any person—(a) knowingly and with intent ... to evade any prohibition or restriction for the time being in force under or by virtue of any enactment with respect thereto, acquires possession of ... any goods ... in respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid', he shall be guilty of an offence.

In the construction of this section no distinction is to be drawn between uncustomed goods and goods the importation of which is prohibited or restricted. Accordingly, in either case a person may be guilty of an offence against the section or of conspiracy to commit such an offence at any time and in any place, and it is no defence to a charge of conspiring to commit such an offence that the goods were found and the acts complained of done a long distance both in point of time and place from the importation of the goods into the United Kingdom.

*Criminal Law—Conspiracy—Charge of single conspiracy—Two or more conspiracies not to be wrapped up in charge—Ingredients of offence—Direction to jury—Use of particular words or phrases.*

It is essential, where the prosecution have brought one, and only one, charge of conspiracy against several alleged conspirators, that the judge should direct the jury that, before they can convict any defendant, they must be convinced that that defendant has conspired

with another guilty person in relation to that single conspiracy. There must not be wrapped up in a charge of conspiracy something which is, in fact, a charge involving two or more conspiracies. Care must be taken that such words or phrases as the 'cartwheel type of conspiracy', 'sub-conspiracies', and the 'chain type of conspiracy' are used only to clarify the general principles mentioned and for no other purpose.

APPEALS by Siamak Ardalan, Lloyd Robert Babet, Alfred George Nicholson, Basil John Sands, and Patricia Royde against their convictions at Middlesex Area Quarter Sessions of having conspired together and with Abdul Karim Chemade, Omar Badr El Sajadi, and other persons unknown to acquire possession of a quantity of cannabis the importation of which was prohibited by the Dangerous Drugs Act 1965, knowingly and with intent to evade that prohibition, contrary to s 304 of the Customs and Excise Act 1952.

*John Lloyd-Eley QC and P F Singer for the appellant Ardalan.*

*J M Cope for the appellant Babet.*

*Beryl Cooper for the appellant Nicholson.*

*F P Shier for the appellant Sands.*

*Robert Southan for the appellant Royde.*

*J G Marriage QC and Michael Neligan for the Crown.*

**ROSKILL LJ** delivered this judgment of the court: On 20th July 1971 at what were then Middlesex Area Quarter Sessions these five appellants, Ardalan, Babet, Nicholson, Sands and Royde, were indicted on a charge of conspiring to acquire possession of goods prohibited from importation. Each, after a trial lasting over six weeks, was convicted of such a conspiracy and they were sentenced, respectively, Ardalan to three years' imprisonment (he was also recommended for deportation), Babet to three years' imprisonment, Nicholson to 12 months' imprisonment, Sands to seven years' imprisonment, and Miss Royde to 12 months' imprisonment. Each of them has raised a point of law in this court; each of the five also seeks leave to appeal against sentence in the event of their appeals against conviction failing.

It is necessary in order to make clear the point of law which is raised to read the particulars of the offence charged in count 1 of the indictment. After setting out their names the counts alleged that between 1st October 1970 and 6th March 1971 in the Middlesex area of Greater London and elsewhere they conspired together and with Abdul Karim Chemade and with Omar Badr El Sajadi and other persons unknown to acquire possession of a quantity of cannabis, the importation of which is prohibited, with intent to evade that prohibition. The point of law turns on the true construction of s 304 of the customs and Excise Act 1952. Section 304 provides:

'Without prejudice to any other provision of this Act, if any person—(a) knowingly and with intent to defraud Her Majesty of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of any enactment with respect thereto, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or Queen's warehouse, or which are chargeable with a duty which has not been paid, or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid; or (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods [he is guilty of an offence].'

I have read that provision in full, but it may perhaps be helpful to select and re-read such parts of it as are material to the count of which complaint is made:

'... if any person—(a) knowingly and with intent . . . to evade any prohibition or restriction for the time being in force under or by virtue of any enactment with respect thereto, acquires possession of . . . any goods . . . with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid [he shall be guilty of an offence].'

What is said, to put counsel for Ardalan's principal point in a sentence, is that on the true construction of that section nothing happened sufficiently near to the actual moment of the importation of the cannabis with which this case is concerned on 6th February 1971 either in time or in place to render any of these appellants liable to conviction for an offence against that section, and therefore a fortiori to conviction for conspiracy to acquire possession of the goods with intent to evade the prohibition on their importation.

The facts of this case were, as the length of the trial showed, extremely complex, but in essence those which it is necessary to state in order to deal with this point of law can be shortly stated. The relevant dates are as follows. On 3rd February 1971 a consignment 182/11061 consisting of two cases described as containing 'oriental goods' was addressed by a Mr Haggi Boukawi from Beirut to a Mr Royed Thompson at 39A The Broadway, Greenford, Middlesex. That address was the address of Nicholson. The carriers were a Hungarian airline. The consignment arrived at Heathrow Airport on 6th February 1971 but the addressee, the so-called Mr Royed Thompson, was not notified because of the postal strike. On 24th February Nicholson, using the name of Thompson, made enquiries from the Hungarian Travel Agency about the consignment bearing the number which I have just mentioned and it was said by the Crown that Miss Royde helped. On the same day customs officials at Heathrow examined the consignment and they found in the consignment over 10 kilos, 10,430 grams, of cannabis concealed in the cases. The customs officials repacked the cases and re-sealed them, having carefully first removed the cannabis. It seems plain from what was related at the trial that thereafter a watch was set to see precisely who became interested in these two cases of 'oriental goods', who would appear to claim them, what steps would be taken to remove them and where they would ultimately then go. To that end a watch was set in more places than one. That all happened on 24th February.

On 4th March at about 4.30 pm Nicholson, using the name of Thompson, appears to have telephoned the airport to give directions that these two packages should be sent to a hotel called the Melba House Hotel in Philbeach Gardens near Earls Court. That same evening about five hours later the appellant Babet called at the Melba House Hotel and took a room in that hotel in the name of Thompson, a name which seems to have been remarkably popular in this case. Babet was given a hotel card and a receipt.

At about midday on the next day, 5th March, Babet telephoned to the Melba House Hotel and warned them about the delivery of the consignment. At 1.00 pm that day a customs officer began a watch on the hotel. At 1.30 pm Ardalan called at the hotel with some £27 in order to cover the delivery charge. At 4.20 pm the consignment was delivered to the hotel. At about 6.15 pm to 6.25 pm that same evening Miss Royde drove Sands to Earls Court and at Earls Court Sands spoke to Detective Chief Inspector Kelaher of the New Scotland Yard drugs squad, a senior officer at Scotland Yard. Kelaher, it seems, then went to the Melba House Hotel.

At about 7.00 pm a woman telephoned to another hotel the other side of London, the Rhine Hotel, and then booked a room, again using the name of Thompson.

At 7.20 pm a taxi was ordered by a woman to take the consignment from the Melba House Hotel and deliver it to the Rhine Hotel. That woman, whoever she may have been, gave the driver a part of the Melba House Hotel card which had been given to Babet on 4th March. Five minutes later, that is at 7.25 pm, the taxi collected the consignment from the Melba House Hotel in Philbeach Gardens and as the taxi left the watching customs officers emerged and arrested Nicholson and Babet who were driving along Philbeach Gardens at the time. Kelaher at that moment left the hotel.

It is right to say, and this was accepted at the trial, that the prosecution did not seek to suggest that Nicholson had been a participant in any conspiracy that there may have been at any time before that afternoon of 5th March. Later Nicholson and Babet were both interviewed by customs officers and, as was admitted at the trial, told a number of lies. Later still in the month of March Ardalan, Sands and Miss Royde were severally interviewed by customs officers and also admittedly told a number of lies. Ardalan was arrested on 22nd March, Sands on 7th April and Miss Royde on 13th April.

I have set out those dates and places in some detail because those are the basic facts on which counsel for Ardalan relied in support of his submission that even though the jury did accept the prosecution evidence and rejected the defence evidence, nothing had happened which was capable of amounting to the conspiracy charged in that whatever was done by each of the appellants as part and parcel of the alleged conspiracy, if such it was, was done at a place so physically remote from Heathrow and at a time so long after the importation on 6th February that no offence could possibly be said to be committed contrary to s 304 of the Customs and Excise Act 1952 (a section which, in effect, re-enacted the earlier corresponding s 186 of the Customs Consolidation Act 1876. Accordingly there could be no conspiracy to commit such an offence.

I turn, therefore, to look at the section and see whether the construction put forward by counsel for Ardalan can be supported. I should say that the same argument was advanced before the learned judge, Judge Trapnell, and was rejected by him. That happened, it seems, at the close of the case for the prosecution. There was then a submission that the learned judge should withdraw the case from the jury.

Two things should be noted about this section. First, in the forefront of para (a) are the words 'knowingly and with intent to evade any prohibition or restriction for the time being in force'. There can be no doubt that those words set out the requisite state of mind to be possessed by the person charged before he can be convicted of an offence against the section. Secondly, the person charged must be shown to have acquired possession of the goods with the intent of which I have spoken, being goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force.

It is clear that this section deals with a number of different matters. It not only covers acquiring goods the import or export of which is prohibited or restricted, but it also covers 'depositing, harbouring, keeping or concealing . . . goods' with intent to defraud Her Majesty of duty. Counsel for Ardalan was constrained to accept as a both matter of principle and authority—I need not stop to read the authorities—that in the case of what he called 'uncustomed goods' brought into this country with intent to evade liability for duty a person could be guilty of an offence against this section even though the goods were found and the acts complained of done a long time both in point of time and place after their importation into this country. But he sought to argue, basing himself in particular on the provisions of the 1952 Act which deal with the time of importation, that, however that might be in the case of 'uncustomed goods', it was not the position in respect of goods the import of which was prohibited under some relevant Act, in the present case the Dangerous Drugs Act 1965.



It was pointed out to counsel during the argument by MacKenna J that if his suggested construction of the section were right, it produced a very curious result. If nothing that happened after the import of the prohibited goods could ever be an offence, the question naturally arises—what is the point of putting the crucial words into the section and making the acquisition of possession an offence, if acquiring possession at any time after importation cannot on the true construction of the section be an offence? I venture to think that that question has only got to be asked for the answer to become manifest. If once, as counsel was ultimately constrained to accept under some pressure from the court, there can be an offence committed at some point of time and at some place after importation (for example, acquisition at or near the airport), it is difficult to see why there should be any limit to that point of time or place provided always, of course, that the goods the subject-matter of the charge are goods which are the subject of a prohibition or restriction on importation and the acquisition is done knowingly and with intent to evade that prohibition or restriction. But subject to those two matters, this court sees no reason to think that on the true construction of s 304 any distinction can be drawn between the case of uncustomed goods on the one hand and goods the importation of which is prohibited or restricted on the other. Therefore, the principal submission, which counsel for Ardalan made and which has been adopted by learned counsel for all the other appellants must, in the view of this court, clearly fail.

Counsel's next ground of appeal was that the learned judge had not sufficiently or clearly dealt with the question of intention. [His Lordship then considered the relevant passages from the judge's summing-up and concluded:] I have read the passages from the summing-up at some length because this point was pressed on us by counsel at the outset of his submission this morning, but, in the view of this court the submission is without foundation. The learned chairman stated the law impeccably, clearly and with precision, and there is no ground whatever for saying that he was guilty in any respect of misdirection.

That brings me to the third of counsel's main grounds. He criticised the learned judge by reference to the fact that at two places in the summing-up he is said not to have drawn the jury's attention sufficiently clearly to what it was of which they had to be sure before they could convict any of the appellants of conspiracy. He made particular complaint that the judge talked about 'the cartwheel type of conspiracy'; that he talked about 'sub-conspiracies' and that later on he talked about 'the chain type of conspiracy'. It is said that the learned judge never made plain to the jury to what it was that they had to direct their attention.

It is right to say that these epithets, or labels, such as 'cartwheels' and 'chains' have a certain respectable ancestry and have been used in a number of conspiracy cases that from time to time have come before the courts. Metaphors are invaluable for the purpose of illustrating a particular point or a particular concept to a jury, but there is a limit to the utility of a metaphor and there is sometimes a danger, if metaphors are used excessively, that a point of time arises at which the metaphor tends to obscure rather than to clarify. The essential point in dealing with this type of conspiracy charge, where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury that before they can convict anybody on that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that single conspiracy. As has been said again and again, there must not be wrapped up in one conspiracy charge what is, in fact, a charge involving two or more conspiracies.

What was alleged here was a single conspiracy in which all five appellants were alleged to have taken part. It is true the learned judge used the word 'cartwheel'. He used the word 'sub-conspiracy' and he used the word 'chain' later on, but he used

those words, in the view of this court, perfectly properly in the context in which he used them. Indeed the very phrase 'sub-conspiracy', at least in the ordinary case, must indicate that the sub-conspiracy is part of, although subordinate to, a larger and wider conspiracy. It was in that sense quite plainly that the learned judge used the phrase. Again and again throughout this passage in the summing-up and again later in the summing-up the judge made as plain as he could that the essential point was what I have already described, namely, that the charge was of a single conspiracy. He talked about 'they are all in the same plan together'; 'they are all in the same conspiracy'; 'they may say that those people are all in the same conspiracy' and 'However, so long as there is a central core going along to effect the same purpose there is one conspiracy'. So there, right at the beginning of the summing-up, the learned judge is making as plain as plain could be to the jury that they must not convict any of the appellants unless they were convinced that each one of them was a party to that single conspiracy charge in the indictment. Accordingly, with all respect to the argument, there is, in the view of this court, nothing in it.

Before leaving this point about 'cartwheel' or 'chain' conspiracies, this court thinks it necessary to deal with one point to which its attention has been drawn. In the well-known case of *R v Griffiths* (1), which came before the former Court of Criminal Appeal in 1965, that court quashed a number of convictions on the ground that what was charged there was not a single conspiracy but was in truth a number of separate conspiracies. The headnote of that report reads:

'The kind of conspiracy known as a "wheel conspiracy", where each conspirator is alleged to conspire with a central villain but not with the other named conspirators, is not known to the criminal law.'

With all respect to whoever wrote that headnote in the Criminal Appeal Reports, there is nothing in the text of the judgment in that report given by Paull J (the court consisting of himself, Phillimore and Fenton Atkinson JJ) which justifies that passage. The court has, therefore, sent for the transcript of the judgment. This is described as a revised transcript. It is quite plain from reading it that there is also nothing in that transcript which justifies that passage. As I have already said, the principle is plain. Care must be taken that the use of words or phrases such as 'wheels', 'cartwheels', 'chains', 'sub-conspiracies' and so on are used only to illustrate and to clarify the principle and for no other purpose.

[His Lordship then considered and rejected further submissions of counsel for each of the appellants Ardalan, Babet, Nicholson and Sands that the judge's summing-up was defective in various respects and continued:] There is one other matter to which this court would refer before parting with this case. Much time has been spent today criticising the summing-up of the learned judge. This court has had the advantage not only of reading the summing-up again and again but also of perusing certain parts of the transcript of the evidence for it happens to have a full transcript. This court desires to express its admiration of the conduct of this intricate and difficult case by the learned judge. It was a case in which it would have been very easy to err, so great was its complexity. So far as this court can see, the learned judge not only never erred but delivered himself over a period of three days of a summing-up which is quite faultless in its statement of the law. The challenges to its accuracy on matters of fact have been minimal. It is right in the circumstances that that should be clearly said. For those reasons, which I have given at some length in deference to the arguments of counsel, all the appeals and applications for leave to appeal against conviction fail and are dismissed.

(1) 129 JP 380; [1965] 2 All ER 448; [1966] 1 QB 589.

The applications for leave to appeal against sentence by the appellants Ardalan, Babet, Nicholson and were dismissed; Royde's sentence was reduced to one of seven months' imprisonment.

*Orders accordingly.*

Solicitors: *Bard & Keith Joseph; Montague, Gardner & Howard; Sampson & Co; Solicitor, Customs and Excise.*

Reported by T R Fitzwalter Butler Esq, Barrister.

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### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, KARMINSKI AND ORR, LJJ)

27th, 28th January 1972

R. v BIRMINGHAM LICENSING PLANNING COMMITTEE.

Ex parte KENNEDY

*Licensing—Licensing planning area—Certificate of non-objection—Application for grant—'Equation of barrelage' policy adopted by committee—Need for applicant to acquire licence in suspense—Purchase from current owner—Refusal of certificate on ground that applicant had not purchased licence—Validity—Licensing Act, 1964, s 119 (2).*

By s 119 (2) of the Licensing Act, 1964: 'It shall be the duty of every licensing planning committee to review the sites of its area and to try to secure . . . that the number, nature and distribution of licensed premises in the area . . . accord with local requirements, regard being had in particular to any redevelopment or proposed redevelopment of the area'.

A licensing planning committee was set up in the Birmingham area as a result of the extensive war damage, and the area was declared a licensing planning area. The result of the damage was that many licensed premises in the area were destroyed; others had since been demolished or were planned to be demolished as being in slum areas. The licences of these destroyed or demolished houses were put in suspense. The applicant applied to the committee for the grant of a certificate of non-objection to the grant of a justices' on-licence for a proposed hotel under construction in the area. The committee had adopted in dealing with such applications an 'equation of barrelage' policy, which meant that, unless an applicant for a new on-licence had obtained a licence or licences in suspense covering a barrelage equal to that which was estimated to be needed for the new premise, objection would almost always be taken under s 123 of the Act. At all material times it had been possible to obtain a license or licenses in suspense from the current holder, but only by paying for it, and the price which the applicant would have had to pay, on an agreed estimated barrelage of 1450 barrels, would have been £14,500. The principle of equating barrelage had to be accepted by all applicants if the local authority were not to be left to pay considerable sums for compensation in respect of licences which would never be re-sited, and it was admitted that one of the objects of the policy was to relieve the local authority of this liability. The committee refused to grant the applicant's application on the ground that he had not obtained the appropriate license in suspense, and the applicant applied for an order of mandamus directing the committee to hear and determine his application according to law, it being argued that the committee were acting ultra vires in requiring the applicant to purchase a licence before they would grant him the certificate.

**Held:** the condition imposed by the committee was bad because it was unreasonable and the committee had gone beyond their province; although the system imposed by the committee had gone on for many years the court would grant an order of mandamus requiring them to determine the applicant's application in accordance with this decision.

**APPEAL** by the Birmingham Licensing Planning Committee from a decision of the Queen's Bench Divisional Court granting an application by one Stephen Kennedy for an order of mandamus directing the committee to hear and determine according to law his application for a certificate of non-objection to the grant of a justices' on-licence in respect of a hotel under construction in Birmingham.

*R A W Sears* for the committee.

*D W Tudor Price* for the applicant.

**LORD DENNING MR:** In Birmingham the licensing planning committee have adopted a system which is called 'equation of barrelage'. It has been applied for nearly 20 years. Now we have to consider whether it is valid or not.

Before stating the facts, I must describe the system. One aspect of it is the existence of licences 'in suspense'. This arises out of the extensive redevelopment taking place in Birmingham. Most of the licensed premises in Birmingham are owned by one or other of two big brewery companies. Many of these licensed premises were destroyed during the war. Others were in slum clearance areas and have been demolished, or are soon to be demolished. The licences have not been extinguished, but have been put 'into suspense'. When one or other of these brewery companies wish to acquire a new licence on a new site, they produce these licences 'in suspense' and surrender them in exchange for the new licence. It gives them a good leverage in aid of their application. It helps the authorities, too, in deciding priorities between the applicants. The other aspect of the system is the existence of 'licensing planning areas'. These are areas which suffered devastation during the war. Birmingham is one such area. By statute there is established for each such area a 'licensing planning committee'. The function of this committee is to control the number, nature and distribution of licensed premises in the area. The licensing planning committee consists, as to one half, of licensing justices for the area, and, as to the other half, of representatives of the corporation (which is the planning authority). In order to get a new licence, an applicant has to go before the committee and see if they object or not. If they object, he can go no further. If they do not object, they give him a 'certificate of non-objection', and he can go ahead and apply to the licensing justices. The result is that, in Birmingham, in order to get a new licence, an applicant has to get (i) planning approval from the planning authority; (ii) a certificate of non-objection from the licensing planning committee; (iii) a new on-licence from the licensing justices.

This brings me to the system of 'equation of barrelage'. It was adopted in the 1950's by the licensing planning committee for Birmingham. It was this. If an applicant wanted a new licence for new premises, he was required to estimate the amount of trade which he was likely to do, expressed in terms of a number of barrels ('barrelage' as it is called). The licensing planning committee then required him to surrender licences 'in suspense', representing a trade equal to that of the projected new licence—so he had to surrender barrelage equal to that which he was requiring. As I have said, the two big brewery companies in Birmingham held nearly all the licences 'in suspense'. If one of these two brewery companies applied for a new licence, they would surrender a sufficient number of licences to make up the same barrelage as that estimated for the new licence. But, if the applicant was a newcomer, he would be expected to acquire sufficient licences 'in suspense' to make up

the barrelage. To do this, he would have to go to a brewery company and buy them. He would have to pay what they asked. Then, armed with the licences 'in suspense' so bought, he would surrender them; and in return he would receive the 'certificate of non-objection'.

This system benefited the corporation of Birmingham and the two brewery companies for this reason. If there were no such system of 'equation of barrelage', the corporation of Birmingham (on compulsorily acquiring the old licensed premises) would have to pay to the brewery company the full value of the licensed premises, including the value of the licence in suspense. But, under the system of 'equation of barrelage' the corporation would not have to pay out any money for the licences in suspense. They would be surrendered by the brewery companies, or by the newcomer who had bought them. The corporation frankly recognised the financial advantage to them. In a memorandum submitted to a Departmental Committee, they said:

'... the principle of equating barrelage must be accepted by all applicants if the local authority is not to be left to pay out considerable sums for compensation in respect of licences which will never be re-sited.'

The corporation of Birmingham adopted this policy in the utmost good faith. They consulted the Home Office about it and got their approval. But Birmingham was the only area, apart from Coventry, which adopted this policy. The policy came up for consideration in 1965 by a committee over which Mr J Ramsey Willis QC presided. The committee said:

'We believe that in those few areas where the equation of barrelage was practised and the licensing planning committees were faced with the necessity for a drastic overall reduction in the number of licences, the system was not unreasonable in relation to on-licences.'

So much for the system adopted in Birmingham. I will now turn to the facts in the present case. Mr Kennedy is the managing director of Magnum Hotels Ltd, which is an hotel company with a Birmingham subsidiary. They wish to erect a fine new hotel opposite New Street Station in Birmingham. It is to be more luxurious than anything at present in Birmingham. It is to have 200 bedrooms, a restaurant for 280 people, and a banqueting hall for 300. Every bedroom is to have a bathroom and colour television. There is to be air conditioning throughout. It is to cost over £1,000,000. The company say that this new hotel will greatly help in the development of Birmingham. On 6th May 1970 they applied to the planning authorities and obtained planning permission for the hotel. But they now want a justices' on-licence so as to be able to sell intoxicating liquor to all-comers. Inasmuch as this is a licensing planning area, before going to the licensing justices, the company have first to go to the licensing planning committee and obtain a certificate of non-objection. On making enquiries, the company were told that they would not be likely to get such a certificate unless they surrendered licences in suspense. The estimated barrelage required for this new hotel was 1,450 barrels. So the company had to try to buy licences in suspense for that barrelage. They found that they could buy them from one of the two brewery companies in Birmingham. Each brewery company asked £10 a barrel. So, in order to get 1,450 barrelage, the company would have to pay £14,500 to a brewer. Each of the brewers offered, however, a concession. If the new hotel company would 'tie' themselves so as to take their beer from one brewer only, the price would be reduced from £10 to £7 a barrel. In other words £10,150 for 1,450 barrelage.



Mr Kennedy, the managing director of the hotel company, took strong objection to this system. He said he was not prepared to buy barrelage. He treated it as a matter of principle. On 15th November 1971 he went before the licensing planning committee. The committee heard this objection courteously, but rejected it. The chairman said that they would not grant a certificate of non-objection until the barrelage was equated. In other words, Mr Kennedy would not get the certificate unless he bought up from the brewers these licences in suspense. The committee issued a formal certificate objecting to the grant of a new justices' on-licence 'until barrelage has been agreed and paid in respect of the premises'. Mr Kennedy says that that stipulation is unlawful. He applied to the Divisional Court for an order for mandamus to order the planning committee to grant the certificate without imposing such a condition. The Divisional Court issued the mandamus. The local planning committee appeal to this court.

The question is of considerable importance. Let me say at once that under the Act the licensing planning committee have a great deal of discretion entrusted to them. There is no appeal from their decision. The only control over them is that exercised by the courts of law. Even though they are an administrative body, the courts will ensure that they do not go beyond their province. Thus the courts will see to it that they do not usurp the function of the licensing justices: see *R v London (Metropolis) Licensing Planning Committee, ex parte Baker* (1). The courts will also see that they are not influenced by extraneous considerations. The duties of the licensing planning committee were defined by s 4 (1) of the Licensing Planning (Temporary Provisions) Act 1945, now replaced by s 119 (2) of the Licensing Act 1964:

'It shall be the duty of every licensing planning committee to review the circumstances of its area and to try to secure, after such consultation and negotiation as it may think desirable, and by the exercise of the powers conferred on it by this Part of this Act, that the number, nature and distribution of licensed premises in the area, the accommodation provided in them and the facilities given in them for obtaining food, accord with local requirements, regard being had in particular to any redevelopment or proposed redevelopment of the area.'

The Divisional Court appear to have held that, under that section, the licensing planning committee could only consider 'licensed premises' and not 'licences in suspense'. This view is supported by the definition in s 200 which defines 'licensed premises' as 'premises for which a justices' licence is in force'. On this account, the Divisional Court appear to have held that, in considering a proposed new licence, the licensing planning committee could take into account the licensed premises which then existed in the area and also those which they expected to be licensed in the future, but they could not take into account the licences in suspense. It was, therefore, wrong for them to insist on the surrender of licences in suspense; and on that account the system of 'equation of barrelage' was invalid.

Counsel for the committee criticised this reasoning. He pointed out the definition of 'licensed premises' in s 200 is only 'unless the context otherwise requires'. He said that here the context does otherwise require, for it may be that the holder of a licence in suspense may himself apply for a new licence for a new site. In that case the committee would surely be able to take into account the fact that he was already the holder of a licence in suspense, and entitled to consideration on that account. I think that there is a good deal in counsel's argument. But even if it is accepted, there is another reason which the Divisional Court gave for their decision. They said that the committee was seeking to relieve the corporation of Birmingham from

(1) 134 JP 662; [1970] 3 All ER 269, [1971] 2 QB 226.

the liability to compensate the holders of licences in suspense. On that account they held that the committee was taking into account an extraneous consideration which they should have ignored and that they were thus going outside their province.

The Divisional Court relied on *R v Bowman* (1). In that case a man, who had three existing licences, wanted a new licence for new premises he was erecting. The justices granted him the new licence on two conditions—(i) that he surrendered his three existing licences; (ii) that he paid £1,000 to the justices, which they would apply in reduction of the rates of the borough. The court held that it might be lawful to ask him to surrender his existing licences, but that it was quite unlawful to ask him to pay £1,000 in reduction of the rates. WILLIS J said:

‘If the attachment of such a condition were allowed to pass without objection there would soon grow up a system of putting licences up to auction—a system which would be eminently mischievous and would open the door to the gravest abuses.’

Likewise here the system of ‘equation of barrelage’ is capable of abuse. Take a new-comer. He goes to the licensing planning committee. They tell him: ‘We will not give you a certificate of non-objection unless you surrender licences in suspense covering the barrelage.’ He has perforce then to go to one or other of the two brewers and seek to buy from them some of their licences in suspense. Suppose the brewers say to him: ‘We are not going to sell to you.’ That would mean that they could keep him out of Birmingham altogether. Or, suppose the brewers were to demand an extortionate sum. That would be entirely wrong. Counsel for the committee says that, if the brewers were to do any such thing, the applicant would be able to go back to the licensing planning committee and ask them to withdraw the condition. But who knows what the committee would do then? Would they uphold the demand of the brewers, or not? Rather than embark on enquiries of that sort, I would hold the condition to be bad, just as the condition was held bad in *R v Bowman*. It is bad because it is unreasonable. I know that Mr Willis’s committee said it was ‘not unreasonable’. But, in saying so, that committee must have been looking at it from a different point of view. I think it is unreasonable for a licensing planning committee to tell an applicant: ‘We know that your hotel is needed in Birmingham and that it is well-placed to have an on-licence, but we will not allow you to have a licence unless you buy out the brewers.’ They are taking into account a payment to the brewers which is a thing they ought not to take into account.

Even though the committee has gone beyond its province, the question arises: Ought the courts to interfere now? This system has gone on for many years now. It has never been challenged before. Ought it now to be held invalid? We are told that at least three new hotels have submitted to it. They have bought up licences in suspense and surrendered them in order to get a ‘certificate of non-objection’. Are all of these transactions invalid?

I do not think that those past transactions can be reopened in any way. They are gone and done with. But for the future I think we must hold that the system is invalid. It is, of course, quite open to the licensing planning committee to ask the brewers (when they apply for a new licence) to surrender some of their licences in suspense, for that prevents them being removed to other sites. It is also open to the licensing planning committee to refuse a new applicant on the ground that there is no room for an additional licence, having regard to the number of existing licences and those in suspense which may be moved to new sites. But there are a number of

(1) 62 JP 374; [1898] 1 QB 663.

licences in suspense which will never be re-sited. I do not think the licensing planning committee are entitled to stipulate that the applicant must buy from the brewers—for that is what it comes to—some of those licences in suspense and surrender them.

It was said by counsel for the committee that this ruling will make it expensive for the corporation because they may have to compensate the brewers for their licences in suspense. He suggested the figure of £10 a barrel. But I should think that, as a result of our decision today, the value of licences in suspense will fall greatly. Their value may have been artificially inflated by the system of 'equation of barrelage'. Now that it is held to be invalid, it may be that their value is comparatively low and the compensation not so much as is feared. I would, therefore, dismiss this appeal.

**KARMINSKI LJ:** I agree, and although the matter is one of some difficulty and of considerable public importance, I can find nothing to add to the judgment of LORD DENNING.

**ORR LJ:** I agree. In this case I recognise the difficulties with which the licensing planning committee and the corporation have been faced, but in my judgment the committee were not entitled to impose the equation of barrelage requirement. The Divisional Court, as I read their judgment, came to a decision adverse to the committee on two grounds—first, that the matters which the committee were entitled to consider when performing their functions under s 119 (2) of the Licensing Act 1964 did not embrace licences in suspense; and, secondly, that, in accordance with the decision of the Divisional Court in *R v Bowman* (1), the committee were not entitled, as a condition of granting a certificate of non-objection, to require the applicants to incur on the acquisition of a licence or licences in suspense an expenditure which would enure for the benefit of the corporation. In my judgment the Divisional Court were right in arriving at both these conclusions. As regards the first of them, I would prefer, like LORD DENNING, to rest my conclusion not on the particular definition of 'licensed premises' but on the whole wording of the subsection.

As regards the second ground, the effect of a licence being put in suspense is that the compulsory purchase price payable by the corporation is reduced by the value of the licence, but that, if the owner of the licence in suspense fails to dispose of it or have it transferred to other premises, compensation becomes payable by the corporation on its extinguishment. The effect, therefore, of a barrelage equation requirement imposed by the committee undoubtedly is that when an applicant for a non-objection certificate, on whom such a requirement is imposed, purchases a licence in suspense, he thereby relieves the corporation of the potential liability which would arise on extinction of the licence; and it is common ground that this was both the result and one of the important objects of what was done by the committee.

For the reasons I have given, and for the reasons given by LORD DENNING, I cannot accept that it was proper for the committee to take into account matters such as this in deciding whether or not to give a non-objection certificate, and I too would dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co*, for *F J Mountford*, Birmingham; *Beckman & Beckman*.

Reported by *T R Fitzwalter Butler, Esq*, Barrister

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, C.J., MELFORD STEVENSON AND FORBES, JJ)

10th February 1972

HALSTEAD v PATEL

*Criminal Law—Obtaining property by deception—Intention permanently to deprive owner—Dishonesty—Post office employee—Post office giro account—Knowledge of no right to overdraw—Cheque drawn when account known to be exhausted—No prospect of account being put in funds before presentation of cheques—Genuine intention to repay when funds became available—Theft Act, 1968, s 15.*

The defendant, a Post Office employee, opened a Post Office giro account into which his wages, but no other sums, were paid. He knew that overdrafts were not provided and that he had no permission to overdraw. A strike of Post Office workers occurred, and during the strike the defendant received no wages, but he drew several cheques on the giro account when he knew that there were no funds in the account to meet them and that there would be no funds in the account when the cheques were presented for payment. In respect of each cheque he received notes or cash. Informations were preferred charging him with dishonestly obtaining these sums by deception, contrary to s. 15 of the Theft Act, 1968. Justices found that at the time when he drew the cheques he honestly intended to repay the money when the strike was over and he was again receiving wages, and they held that he had no intention permanently to deprive the Post Office of the various sums. They accordingly dismissed the informations. On appeal by the prosecutors,

**HELD:** when the actual coins or notes were handed to the defendant on the cashing of the cheques they were leaving the control of the Post Office for ever, and the defendant, therefore, intended permanently to deprive the Post Office of those actual coins or notes; though a person who drew a cheque on an account in which there were no immediate funds to meet it did not necessarily act dishonestly if he genuinely believed on reasonable grounds that when the cheque came to be presented there would be funds to meet it, an honest intention to repay the money with equivalent currency at some future date when funds became available was not a defence to a charge of obtaining money by deception; such an intention could at most amount to mitigation of the offence; and, therefore the case must, be remitted to the justices with a direction to convict.

**CASE STATED** by justices sitting at North London Magistrates' Court.

The respondent, Kishor Lalbhai Patel, was charged on informations preferred by the appellant, Jack Halstead, alleging (i) that he on 30th January 1971, within the Metropolitan Police District, by deception dishonestly obtained £10 from the Post Office with the intention of permanently depriving it thereof, that is to say, by a false representation that he was then entitled to be paid that sum from the giro account no 58 079 8003, contrary to s 15 of the Theft Act 1968; (ii) a similar charge of obtaining £20 on 4th February 1971; and (iii) a similar charge of obtaining £20 on 17th February 1971.

*D W Tudor Price* for the appellant.

The respondent did not appear.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the Inner Area of Greater London in respect of their adjudication as a magistrates' court on 30th July 1971. On that occasion the respondent was before the court on informations alleging three offences. The first was that—

‘he on the 30th day of January 1971 within the Metropolitan Police District, dishonestly obtained £10 from the Post Office with the intention of permanently

depriving it thereof by deception, that is to say by a false representation that he was then entitled to be paid the said sum from the Giro account No. 58 079 8003 contrary to s. 15 of the Theft Act 1968.'

Two other charges related to similar offences in respect of other amounts on other days.

We are told by counsel for the appellant that the facts of this case are facts which commonly arise, and that a direction in regard to the law applicable to those facts will be of value perhaps in many others as well. Before we come to the law, I will deal with the facts. The respondent was employed by the post office for some time, and on 30th October 1970 he opened a national giro account, the national giro headquarters being at Bootle which was not where he was serving at that time. The account was duly opened; he arranged to have his wages paid into the account; and they were so paid until unhappily for him there was a strike of Post Office employees, which meant that he received no wages for a substantial period and the money being fed into the account was cut off for that reason. He knew that he was not allowed to overdraw. The justices find that he read and understood a booklet issued to him when the account was opened, which told him that he could not overdraw. He operated the account in this simple way—as I have said the money coming into the account consisted of his wages when they were paid, and the money going out of the account was always withdrawn by the respondent in the form of cheques payable to cash which he presented at a post office, the giro system allowing the account holder to withdraw a sum not exceeding £20 in cash on demand at any post office.

On 14th January 1971 his account was overdrawn by a small sum, £7 6s 11d, and he was sent a letter which the justices find he received, pointing out this overdraft, and asking him to clear the account immediately. However, despite the receipt of that letter, he went on drawing cheques. There was a credit in respect of wages which momentarily brought his account into credit to the amount of about £21, but during January and early February, when no further credits were coming into the account, he proceeded to draw cheques. By 30th January his account was overdrawn to the extent of £48; on 4th February he cashed a further cheque, raising the overdraft to £68. The same thing happened again on 17th February. In due course the respondent was interviewed by representatives of the giro office, if I may so describe it, and his explanation of what happened became perfectly clear. It was that he needed the money to live, and he intended to make good the amount which he had overdrawn to the national giro as soon as the Post Office strike was over and he was in funds to achieve that.

The justices, who clearly took a sympathetic view of the case, said:

'We were of the opinion that although the respondent knew that there were insufficient funds to meet the cheques which were the subject of the charges, nevertheless he intended to repay the National Giro at the time he drew the cheques. We considered, therefore, that there was no intention permanently to deprive the Post Office of the sums charged.'

On returning to court, the chairman of the magistrates put it a little differently. He said:

'We have come to the conclusion that you intended to repay the money and that you have a defence under s. 6.'

One comes back to the Act. The charge was laid under s 15 which provides:

'(1) A person who by any deception dishonestly obtains property belonging to



another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years . . .'

Taking the essentials of that section separately, it is necessary to show that the obtaining was by deception. One goes back to authority on the earlier law to remind oneself of what representation is made by someone who presents a cheque for payment at a bank other than the bank or branch on which the cheque is drawn, the representations made by a person who draws a cheque which is to be paid by a third party and not the banker on whom it is drawn. We find that conveniently in the case of *R v Page* (1), where the extract from Kenny's *Outlines of Criminal Law* (19th edn., p 359), adopted by the court on that occasion, is set out. The extract is this:

'Similarly, the familiar act of drawing a cheque (a document which on the face of it is only a command of a future act) has been held to imply at least three statements about the present: (1) that the drawer has an account with that bank; (2) that he has authority to draw on it for that amount; (3) that the cheque, as drawn, is a valid order for the payment of that amount (i.e. that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured).'

There was here clearly a deception within the meaning of that definition. When the respondent drew these cheques he knew there was no money in the account; he knew he had no business to draw them, yet he made what on Kenny's interpretation of the law was a false representation to the effect that the cheque would be duly honoured in the ordinary course of events. So much for the deception.

The next question is whether it was done with the intention of permanently depriving the Post Office of the money. It is here, I think, with deference to the justices, that they went wrong. There can be no doubt in this case that the actual notes or coins which were handed over the counter to the respondent were leaving the control of the Post Office for ever. There was no doubt at all of an intention permanently to deprive the Post Office of the actual coins or notes which were transferred. Accordingly, the only remaining feature of the offence which justified consideration is the requirement of dishonesty.

So far as dishonesty is concerned it is quite clearly established on authority that a man who passes a cheque in respect of an account in which there are no immediate funds to meet the cheque does not necessarily act dishonestly if he genuinely believes on reasonable grounds that when the cheque is presented to the paying bank there will be funds to meet it. For example the man who, overdrawn on Saturday, draws a cheque in favour of a third party in the honest and well-founded belief that funds will be put into his bank on a Monday, is a man who many juries would undoubtedly acquit of dishonesty, because there he has a genuine and honest belief that the cheque will be met in the ordinary course of events. But that is not this case. This case is the more common case in which there is no suggestion that the drawer of the cheque thought that funds would be available when the cheque in the ordinary course reached Bootle for payment. This is a case of a man who knows perfectly well that there are no funds and there will not be funds to meet the cheque on presentation, but who has the hope and, as the justices find, the honest intention of repaying the money another day when he acquires funds for the purpose.

What is the situation in regard to that defence in the context of the requirement of s 15 that the action shall be dishonest? For this I go to *R v Cockburn* (2), where the headnote says:

(1) 135 JP 376; [1971] 2 All ER 870.

(2) 132 JP 166; [1968] 1 All ER 466.

'If money belonging to another person is dishonestly taken by the defendant against the will of the owner and without any claim of right and with intention at the time of taking permanently to deprive the owner of the property in the notes and coins concerned, the defendant is guilty of larceny. The fact that he intended soon to replace the money taken with its currency equivalent and reasonably expected to be able to do so may be a matter of strong mitigation, but it does not constitute a defence to the charge.'

That headnote is fully justified by the reference by WINN LJ to a dictum of LORD GODDARD CJ in the case of *R v Williams* (1) there referred to. What LORD GODDARD had said was this:

'it seems to the court that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and fraudulently because they knew they had no right to take the money which they knew was not theirs. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation. It does not amount to a defence.'

To my mind those authorities make the whole situation in this case crystal clear. When the cheques were presented for payment, the respondent knew that he had no right to overdraw, he knew that he had no funds in the giro account to meet these cheques, and he had no sort of prospect of providing such funds before the cheques were presented in the ordinary course. He had at best the pious hope of repaying this money at some uncertain future date when the Post Office strike was over, and that, as LORD GODDARD pointed out, although it may be a matter in mitigation, is no defence to this charge. The element of dishonesty is satisfied on proof that he had no belief based on reasonable grounds that the money would be there when the cheque was presented. It is not enough to meet the allegation of dishonesty to say: 'I honestly meant to pay the money back some day.'

I might perhaps add that I have not referred to s 6 because, although the justices referred to it, I can see no relevance of s 6 to the facts of this case.

Accordingly as it seems to me the justices erred in this case, and had no alternative on the facts but to convict. I would send the case back to them with a direction to convict.

**MELFORD STEVENSON J.** I agree

**FORBES J.** I agree.

*Case remitted with direction to convict.*

Solicitor: *Solicitor for the Post Office.*

Reported by T R Fitzwalter Butler Esq, Barrister.

(1) 117 JP 251; [1953] 1 All ER 1068, [1953] 1 QB 660.

## QUEEN'S BENCH DIVISION

(ASHWORTH, MELFORD STEVENSON AND FORBES, JJ)

15th February, 1972

DOBLE v DAVID GREIG LTD

*Trade Descriptions—False description—Price—Misleading—4d refund label on bottle—Refusal of refund—Trade Descriptions Act, 1968, s 11 (2).*

The respondents carried on business as a self-service store in which purchasers were required to select goods from display stalls, take them to a cash desk some distance away, and there pay for them. At the material time on one stall a number of bottles of fruit juice were displayed. Each bottle bore a label applied by the manufacturer which stated: 'The deposit on this bottle is 4d. refundable on return'. A customer bought a bottle for 55 9d to which the respondents had applied a label bearing the price of 55 9d. On the side of the cash till at the cash desk was displayed a notice stating: 'In the interest of hygiene we do not accept the return of any empty bottles. No deposit is charged by us at the time of purchase'. Informations were preferred against the respondents charging them that in offering to supply goods for sale, namely a bottle of fruit juice, they gave by means of a price marked on the bottle top and a label on the bottle an indication that the goods were being offered at a price less than that at which they were in fact being offered, contrary to s 11 (2) of the Trade Descriptions Act, 1968. The magistrate dismissed the informations. On appeal by the prosecutor,

**Held:** (a) the statements on the bottle could be understood to mean that the price of 55 9d included the charge of 4d for the deposit and accordingly the net price was 55 5d only, and this possible inaccurate meaning was an indication likely to be taken as an indication that the bottle was being offered at a price less than that at which it was in fact being offered within the meaning of s 11 (2); (b) the relevant point of time to be considered was when the goods were displayed on the stall and the indication given, and as at that time it was an indication likely to be taken as an indication that the bottle was offered at a price less than that at which it was in fact being offered, the offence under s 11 (2) was there committed; the respondents could not escape from liability by putting a notice on the side of the till which might serve to correct the customer's impression already created; and the case must, therefore, be remitted to the magistrate with a direction to convict.

CASE STATED by a metropolitan magistrate.

On 8th June 1971 two informations were preferred by the appellant, Roderick Lawrence Doble, against the respondents, David Greig Ltd, that (a) on or about 24th August and on 15th September 1970 at the respondents' premises at Woolwich and Eltham, in offering to supply goods for sale, namely, bottles of Ribena fruit juice, they did give by means of a price marked on the bottle top and a label on the bottle stating that the deposit on the bottles was 4d. refundable on return an indication that the goods were being offered at a price less than that at which they were in fact being offered contrary to s 11 (2) of the Trade Descriptions Act 1968.

The informations were heard at Woolwich when the magistrate dismissed the informations and ordered the prosecutor to pay £25 towards the respondents' costs. The prosecutor appealed.

*E V Paynter Reece* for the appellant.

*John O Haines* for the respondents.

**ASHWORTH J:** This is an appeal by way of Case Stated from the stipendiary magistrate for the petty sessional division of Woolwich. In June 1971 two informations were preferred by the appellant against the respondents, and I need only read the second one. The reason for that course is that that named a specific price, whereas the first information had no such price in it. The second information charged that:

'On the 15th September, 1970 at the respondents' premises at 132-134 Eltham High Street London S.E.9, in offering to supply goods namely a bottle of Ribena fruit juice, they did give by means of a price marked on the said bottle top namely 5/9d. and a label on the said bottle stating "the deposit on this bottle is 4d. refundable on return" an indication that the said goods were being offered at a price less than that at which they were in fact being offered, namely, 5/9d. contrary to s 11 (2) of the Trade Descriptions Act, 1968.'

Both informations alleged similar offences, and the facts in each are to all intents and purposes indistinguishable.

The facts found are that on 15th September 1970 the respondents carried on their business at Eltham High Street as a self-service store; that a number of bottles of Ribena fruit juice were displayed at the store in a stack some distance away from the cash desk each bearing a label affixed by the manufacturer to its body which, inter alia, bore the statement 'the deposit on this bottle is 4d. refundable on return'; that on 15th September 1970 one Arthur Munns purchased one of the bottles for 5s 9d to the top of which the respondents had affixed the written price of 5s 9d by the 'self-service' procedure; that at the time when Mr Munns purchased the bottle from the respondents there was a notice which was displayed on the side of the cash till facing Mr Munns at which he paid for the bottle. The terms of the notice were as follows:

'In the interest of hygiene we do not accept the return of any empty bottles. No deposit is charged by us at the time of purchase',

and it ended with the respondents' name. I should say this is printed on white material in bold red letters. Its position appears to have been such that although Mr Munns deposed that he had not seen it, the magistrate has found that it was displayed there by the cash till. Finally the Case states:

'That in neither case did the respondents charge any sum by way of deposit additional to the written price and that neither bottle was in fact being offered by the respondents with a refund of 4d. on return of the bottle so that the fruit juice was in fact being offered at the price marked on the top of each bottle'.

Because of that finding the magistrate dismissed the informations. The question which now arises for decision in this court is whether on the true construction of the Trade Descriptions Act 1968 and the facts found by him, he was right in coming to that conclusion.

It is worth starting with a reference to s 6 of the 1968 Act, of which the sidenote reads 'Offer to supply':

'A person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them.'

In my judgment, those words are important because they serve to correct what might otherwise be the impression that the mere displaying of goods on a counter was not an offer to supply.

Section 11 is the first of a group of sections headed 'Misstatements other than false trade descriptions', and that section has the sidenote 'False or misleading indications as to price of goods'. Section 11 (1), which I need not read, deals with a false indication to the effect that the price at which the goods are offered is less than the recommended price or less than the price which had hitherto prevailed. Section 11 (2), under which these informations were laid, provides:

'If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

What is said on behalf of the prosecution in this case is that by stamping on the top of the bottles the figures 5s 9d and having on the bottle a label indicating that the deposit on the bottle was 4d refundable on return, an indication was being given which would be likely to persuade the customer that by paying 5s 9d for the bottle he would on returning it receive 4d—in other words that the goods were being sold at 5s 5d net and not at 5s 9d as indicated.

For my part, I find no difficulty at all on the first branch of the case, which is the question whether there was here an indication within the meaning of s 11 (2). It is to be noted that the words in that subsection are no doubt designedly wide. It would have been perfectly simple for Parliament merely to enact that a person who by whatever means represents, or indeed gives an indication, and stop there, and that would involve any court called on to consider it with the question whether what was said or done or displayed was a representation or an indication, and no doubt in many instances opinions might differ. But in order to spread its net more widely, and as I think to protect customers more carefully, Parliament chose wider language, and what was enacted was that a person who 'gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price', and so on. The words 'likely to be taken as an indication' seem to me quite plainly to involve a wider consideration than the single word 'indication'. One is looking, if I may say so, at the customers and the effect on the customers of whatever is said or done or displayed. If it is likely to be taken as an indication to the effect stated, then the conditions of the subsection are fulfilled.

In this instance there was on the bottle a label, placed there apparently by the manufacturers of Ribena, in which it was stated 'the deposit on this bottle is 4d. refundable on return'. I see no difficulty myself in saying that that was an indication likely to be taken as an indication that the purchaser who paid 5s 9d would receive 4d back on returning the bottle. The alternative view is that the statement that the deposit was 4d refundable on return would have indicated to the customer that when he came to the check-out, he would have to pay an additional 4d if he wished to take away the bottle of Ribena, in other words that the full charge would be 6s 1d, of which he would get 4d back on returning the bottle. If that were the true meaning of this indication, counsel for the respondents says, and rightly, then no offence would be made out.

My own view is that the facts found in this case bring the respondents fairly and squarely within the ambit of the section on the footing that there was here an indication likely to be taken as an indication that the goods were being offered at a price less than 5s 9d, and I may divert by saying, as I read the questions at the end of the case, it seems to me that the learned stipendiary magistrate himself took that view, because what he asked is:

'Whether I was right in law in holding that the facts found as aforesaid constituted an indication that the bottles were being offered at a price less than that at which they were in fact being offered'.

in other words, but for the point to which I am coming shortly, he would have convicted the respondents for the reasons which I have endeavoured to state.

But in answer to that counsel for the respondents submits that no matter what view the learned stipendiary magistrate took, on the facts of this case the preliminary hurdle has not been surmounted by the prosecution, by which I mean they have not



proved that there was here an indication of the sort indicated. He put it in this way to start with, that this is a case in which the maxim de minimis should apply. It is said that the writing on the label about the refund was in small size, that the amount involved is trivial, that the indication was only tenuous, and that it was not such a false indication, if false at all, as to fall within the ambit of s 11 (2). Moreover he pointed out that the retailers had to take the bottle as supplied; they did not themselves affix the label with this sentence on it to the bottle, and that in the circumstances it was a matter in which they were in no sense to blame, and that this court should find that there was not an indication of the type laid down by the statute.

In my view the de minimis principle has no application whatsoever to this case. This Act was passed for the protection of customers against instances where retailers were, without using the word offensively, misleading, and I do not think that the existence or otherwise of an offence depends either on the amount involved, or on the size of the lettering, or other reasons of that sort, assuming always that it is an indication of the type covered by the subsection.

The second point of counsel for the respondents, as I understood it, was that this was not truly an indication of the type mentioned, and he relied, and with some force, on the principle expressed in the often quoted statement that a person should not be convicted on an ambiguity. What he said was that anyone with common sense reading the label about the refund would see that it is ambiguous, that it is capable of the meaning alleged by the prosecution, but no less capable of the meaning for which he contended, and therefore it was not a false indication of the type covered by sub-s (2).

I am fully in agreement with him, that the principle that persons must not be convicted on an ambiguity should be upheld, but at the same time I venture to repeat what I have already said, that this section was so worded as to cater for cases where possibly the wording, strictly construed, might admit of two constructions. The whole point in my view of including in s 11 (2) the words 'likely to be taken as an indication' shows that Parliament was intending to protect people who might otherwise be met by a defence that on its true construction the offending words meant something different from that which they had thought. For these reasons, in my view the magistrate, if indeed he did come to the conclusion that *prima facie* the offence was made out, was right; certainly it is the view that I take.

Counsel for the respondents has another string to his bow, however, because he says: no matter what happened at the shelf or at the gondola, here there was a counter-indication displayed at the check-out which had the effect of disabusing the customer of the false impression which he might have gained from the stall itself. It is perfectly true that at that time there was a notice in the form which I have read out. In passing, while the magistrate found that it was so displayed, he has annexed to the case the evidence which was given, and whatever the rights and wrongs of that course, I have in fact read it. It is plain that the two customers claimed not to have seen the rescuing notice in red.

In my judgment, however, this point is of no avail to the respondents at all. I start with the question: when is the offence committed? The answer, one would have thought, was absolutely plain, that it was committed when the Ribena was placed on the stall with an indication that 5s 9d is the price, and that 4d will be refunded on the return of the bottle, and at that moment the respondents were contravening s 11 (2). Counsel for the respondents meets that by saying there must always be a *locus poenitentiae*. Whether that is so or not, I am quite satisfied that there is no *locus poenitentiae* in the form relied on in this case. The check-out place is found as a fact to be some distance from the stall at which the goods were displayed, and while I should leave open the question whether the respondents could have protected

themselves by placing a similar notice immediately above the relevant goods, that is not the situation here and can await further decisions.

But there is another reason why in my judgment this point fails. Before this court on 19th February 1970 there was considered the case of the *North Western Gas Board v Aspend* (1). A transcript of LORD PARKER CJ's judgment has been provided. That was a case similarly brought for contravention of s 11 (2). The goods in that case were gas fires, and in a showroom in the main street at Warrington the then appellants, the gas board, placed a large notice, which was some 2½ feet long and 18 inches high in bold colouring. It started with the words 'Ask about the', then no doubt from time to time the succeeding words were changed according as the gas board sought to make attractive offers. On this occasion the words that followed were: '£3 allowance when you buy any two gas fires at the same time.' The customer in that case went in, not minded to buy fixed hearth gas fires which were on display in the window and to which the gas board had intended the notice to relate, and only to those. He went in to buy some portable gas fires. He bought two and a water heater. He went to the counter and asked for the £3 reduction. No doubt much to his surprise the lady said that that did not apply to the portable gas fires or to water heaters, but only to the fixed hearth gas fires. As LORD PARKER put it:

'Mr Edwards however was undismayed, he completed his purchase, he did not receive his £3 allowance, and there is no doubt that thereafter he went and complained, as a result of which these proceedings were brought. The justices expressed their opinion in these words: "We were of the opinion that the notice referred to did give a written indication 'likely to be taken' as an indication that the goods were being offered at a price £3 less than that at which they were in fact being offered. We were of opinion that due to the colours in which the various writing on the notice had been printed, the words 'Ask about the . . .' were much less conspicuous than the remainder of the writing. We were also of opinion that the appellants could without difficulty have stated in the notice that the allowance was available only on purchase of major or 'fixed' gas fires. We held that the notice was likely to be taken as indicating a positive, as opposed to a possible, allowance".'

This court dismissed the gas board's appeal, LORD PARKER saying that in his view the justices took a common sense and correct view of the matter—in any event they were entitled to reach that view.

The reason I mention this in some detail is that the points on which counsel for the respondents now relies were brought plainly before the court on that occasion, because the lady at the counter in the gas board case counter-indicated before the purchase was completed that the imagined allowance was not operative in the case of portable fires. It is exactly what counsel for the respondents was suggesting: that the customer could then have said that he would not buy portable fires at that very store, and that he would go elsewhere; by that counter-indication, therefore, they had cured the false impression which the notice had given. That contention was not referred to in the judgment, but my recollection is that it was raised. I can say that because I was a member of the court that decided that case. But it seems to me that, just as in that case, the relevant point of time to be considered is when the goods are displayed and the indication is given, and if at that time it is likely to be taken to the effect already stated, then *prima facie* an offence is committed. I see no reason at all for saying that the respondents can get out of the offence by putting some notice under the till, which if seen, might serve to correct the customer's impression already created.

(1) (1970), *The Times*, 20th February.

In my view the magistrate was right in finding that there was an indication to the effect stated, but he was wrong when he said that that was made good or, to use his phrase, that the false impression was vitiated by the notice at the till. I would allow this appeal and send the case back to the magistrate with a direction to convict on these informations.

**MELFORD STEVENSON J:** I wholly agree with the judgment that has just been delivered, and I would add only this. This case may serve a useful purpose if it succeeds in focusing the attention of the public at large, and the retail traders in particular, on the fact that in this Act of Parliament language has been deliberately chosen which prevents the application of precise legal definitions of words such as 'offer' and 'indication'. The word 'offer' is specially defined in s 6 of the Act, as ASHWORTH J has indicated, in a way that extends its meaning beyond the confines of its ordinary connotations. The choice of the word 'indication' as distinct from some such word as 'representation' plainly shows to my mind that the section with which we are here concerned is intended to extend over conduct or signs of many different kinds, and its width and significance in my view cannot be too widely and clearly recognised.

**FORBES J:** I agree. I would add only this. It seems to me that the words 'the deposit on this bottle is 4d. refundable on return' are equivocal; they might be interpreted to mean that the price marked on the bottles included 4d earmarked as deposit, or, alternatively, that an additional 4d over and above the price marked would be asked for as a deposit. Speaking for myself, I would prefer the latter interpretation, but the former is quite clearly a possible one. The offence is giving an indication likely to be taken as an indication of the kind described in the Act. If it is reasonably possible that some customers might interpret the label as an indication of that kind, it seems to me that an offence is committed, even though many more customers might in fact take the opposite view. In other words the Act requires a shopkeeper, and this seems to me to be important, to take pains to resolve possible ambiguities of this kind, and if they are not adequately resolved an offence is committed. I agree that the appeal should be allowed in the sense that ASHWORTH J has indicated.

*Case remitted.*

*Solicitors: Town Clerk, London Borough of Greenwich; H Ragol-Levy.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

## QUEEN'S BENCH DIVISION

(ASHWORTH, MELFORD STEVENSON AND FORBES, JJ)

17th February 1972

## TRAILL v BUCKINGHAM

*Game—Deer—Killing during close season—Exemption from liability—Killing on enclosed woodland—Action necessary for preventing serious damage to crops "on that land"—Killing to prevent damage on adjoining land—Deer Act, 1963, s 10 (3).*

By s 1 of the Deer Act, 1963: '(1) Subject to ss 10 and 11 of this Act, no person shall take or wilfully kill deer of any species and description mentioned in Sch 1 to this Act during the close season prescribed by that schedule in relation to deer of that species and description . . . (4) If any person contravenes this section he shall be guilty of an offence . . . By s 4: '(1) Any person who attempts to commit an offence against this Act shall be guilty of an offence against this Act . . . By s 10 (3): 'A person shall not be guilty of an offence against s 1 . . . of this Act by reason of the taking or killing by means of shooting of any deer on any cultivated land, pasture or enclosed woodland if that person proves— (a) that he is the occupier of that land, pasture or woodland, or that he acted with the written authority of the occupier; and (b) that his action was necessary or the purpose of preventing serious damage to crops, vegetables, fruit, growing timber or any other form of property on that land, pasture or woodland'.

The respondent was the occupier of a farm in Devon. Immediately adjoining the farm was a wood which at one time had belonged to the respondent's father, but had been sold by him. In the conveyance the respondent's father reserved to himself and his successors in title the right to kill by shooting all deer which might be causing damage to crops. On 10th June, 1971, the respondent noticed damage to one of his fields near the wood, and, recognising the damage as having been caused by deer from the wood, armed himself with a shotgun, and, accompanied by some of his neighbours, entered the wood. He saw a deer among the undergrowth, shot and wounded it, and subsequently killed it with a further shot. He was charged, in respect of the first shot, with attempting wilfully to kill the deer during the close season, contrary to ss 1 and 4 of the Deer Act, 1963. Justices held that the words of s 10 (3) of the Act were wide enough to cover the respondent's action and dismissed the information. On appeal by the prosecutor,

**Held:** the words 'on that land' in s 10 (3) meant that land on which the shooting had taken place and could not be interpreted as allowing a person to shoot deer to prevent damage to crops on adjoining land; the case must, therefore, be remitted to the justices with a direction to convict.

**CASE STATED** by Tiverton, Devon, justices.

On 19th July 1971 an information was preferred by the appellant, Allan Traill, against the respondent, Dennis John Buckingham, charging that he on 10th June 1971 did attempt to wilfully kill a certain deer, namely, a red hind deer, during the close season prescribed by Sch 1 to the Deer Act 1963, contrary to ss 1 and 4 of that Act. The justices were of the opinion that the respondent was exempted from liability by the provisions of s 10 (3) of the Act and accordingly they dismissed the information. The prosecutor appealed.

V B Watts for the appellant.

The respondent did not appear.

**ASHWORTH J:** This is an appeal by way of Case Stated by justices for the county of Devon sitting at Tiverton before whom the respondent appeared charged on an information that he did on 10th June 1971 at Bampton attempt to wilfully kill a certain deer, namely a red hind deer, during the close season prescribed by Sch 1 to the Deer Act 1963, contrary to ss 1 and 4 of that Act.

Counsel for the appellant has told the court, and one can well understand, that the appellant was mindful of the possibility that, if he sought to rely on the second shot, he might be met by the exception provided by s 10 (1) of the Act, that there is no offence if one shoots to kill to prevent suffering by an injured deer. So he elected to proceed on the first shot, which, as I have already said, was plainly an attempt to kill.

The Act provides in s 10 (3) a broad exception in these terms:

'A person shall not be guilty of an offence against section 1 or section 2 of this Act by reason of the taking or killing by means of shooting of any deer on any cultivated land, pasture or enclosed woodland if that person proves—(a) that he is the occupier of that land, pasture or woodland, or that he acted with the written authority of the occupier; and (b) that his action was necessary for the purpose of preventing serious damage to crops, vegetables, fruit, growing timber or any other form of property on that land, pasture or woodland.'

It is therefore plain that two matters have to be established by the person charged. The first one is that he is the occupier of that land. The respondent was not the occupier of Ranscombe Wood where the shooting took place, and no attempt was made to rely on that part of para (a). But the second paragraph is 'that he acted with the written authority of the occupier', and it was submitted on his behalf, and is not seriously challenged here, that he had written authority in the shape of the reservation in the conveyance by which his father sold Ranscombe Wood. I should not like to be taken as deciding that that contention was right, but there is another ground on which this appeal, in my judgment, should be decided. The second limb of s 10 (3) provides a defence if the defendant proves that his action was necessary to prevent serious damage to crops etc "on that land". The land, counsel for the appellant contends, is quite plainly, as a matter of construction, the land on which the shooting took place. It cannot be otherwise, in my view. What the justices have done has been to extend the ambit of that exception by allowing a person to shoot on land over which he has some licence in order to prevent damage to crops not on that land but on adjoining land. The justices state their conclusions in this form:

'We were of the opinion that whilst the Deer Act, 1963 was enacted, inter alia, to prescribe close seasons for the killing of deer, Parliament had at the same time sought to preserve the age-old right of the occupier of land to protect his crops from the ravages of deer or other vermin at any season and that s 10 (3) of the Act was intended to embody that principle'.

Stated in that form I would not quarrel with it, but applied to the facts of this case without regard to the precise terms of s 10 (3) it is plainly wrong and in my judgment there is really no answer to this case. I would be in favour of allowing this appeal and remitting the case to the justices to find the offence proved.

**MELFORD STEVENSON J:** I agree.

**FORBES J:** I agree.

*Case remitted.*

Solicitors: Sharpe, Pritchard & Co, for N B Jennings, Exeter.

Reported by T R Fitzwalter Butler, Esq, Barrister.



## QUEEN'S BENCH DIVISION

(ASHWORTH, MELFORD STEVENSON AND FORBES, JJ)

16th February 1972

R v LIVERPOOL JUSTICES. Ex parte MOLYNEUX

*Criminal Law—Extra-territorial jurisdiction—Offence on board ship—"High seas"—Port in Commonwealth country forming part of high seas—Merchant Shipping Act, 1894, s 686 (1).*

By s 686 (1) of the Merchant Shipping Act 1894: 'Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong... and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.'

The expression 'high seas' in this subsection has the same meaning as when used with reference to the jurisdiction of the Court of Admiralty, i.e., it includes all oceans, seas, bays, channels, rivers, creeks and waters below low water-mark, and 'where great ships can go' with the exception only of such parts of such oceans etc as are within the body of a county.

Accordingly, where an offence of theft had been committed in a port of a Commonwealth country which formed part of the 'high seas' in the sense herein mentioned,

Held: an English court had jurisdiction to try the offence.

MOTION by Garry Maurice Molyneux for an order of certiorari to quash his conviction on 6th May 1971 by Liverpool justices of the theft at Nassau of 430 bottles of whisky, the property of Furness Withy & Co Ltd, from the SS Kenuta, when he was sentenced to six months' imprisonment suspended for three years and ordered him to pay a fine of £150.

D M Evans for the applicant.

W G O Morgan QC and G K Naylor for the respondent prosecutor.

**ASHWORTH J:** In these proceedings counsel for the applicant moves for an order of certiorari designed to bring up and quash an order by the justices for the city of Liverpool, before whom the applicant appeared charged with stealing a quantity of whisky. At the time of the theft to which he pleaded guilty, he was serving as a British seaman on board a British ship called the Kenuta then in Nassau. He pleaded guilty, and it is fair to say he was not represented, but there is no question before this court that he was undoubtedly guilty. There is exhibited a statement by him in which he confessed to the crime.

The applicant having been convicted, the justices dealt with him with what one might think very considerable leniency. They sentenced him to a term of six months' imprisonment which was suspended for three years, and they also fined him £150. He was minded to appeal to what was still at that time quarter sessions in the shape of the Crown Court at Liverpool, the Courts Act 1971 having not then come into force. His appeal, as it was thought to be, came before his Honour Judge Nance. In a manner which this court may have to investigate, the problem raised before the judge was whether the Liverpool justices ever had jurisdiction to deal with the applicant, and if they had not, the learned judge took the view that likewise he would have no jurisdiction to entertain or to determine the appeal. He gave a lengthy, erudite judgment discussing the problem whether the Liverpool justices had jurisdiction, and in the end he came to the conclusion that they had not, and accordingly that

he had no jurisdiction to entertain the so-called appeal and the matter there rested. Naturally enough the applicant's advisers thought it would be advisable somehow or other to get the conviction off his record—hence the application to this court.

Many problems have been touched on in the course of the argument, but at the end of the day, in my judgment, the matter depends on the true meaning and construction of s 686 of the Merchant Shipping Act 1894. Before I go to that section, let me dispose of a point which really now is of no substance at all. As I think by a slip, someone introduced in the proceedings below a reference to s 684 of that same Act. It is the first of a series of sections starting under the heading of 'Jurisdiction', and the sidenote to s 684 is: 'Provision as to jurisdiction in case of offences'. Someone thought that was an omnibus description of offences comprehensive of all offences wherever committed, and that under that section the Liverpool justices would have jurisdiction notwithstanding that the offence was a simple offence of larceny charged under the Theft Act 1968. For my part, I am grateful to counsel who has appeared for the respondent prosecutor here for helping to dispose of that point quickly and simply. It ought never to have been raised at all because he concedes, and I respectfully agree with him, that the offences covered by that section are offences against the provisions of the Act itself. That section has no bearing whatever on a charge alleging the contravention of the Theft Act 1968.

It is fair to the Liverpool police to say that whoever started the proceedings against the applicant was correct, because he referred originally to s 686 to which I now turn. That section has the sidenote: 'Jurisdiction in case of offences on board ship', a promising start because that is exactly what this was. It provides:

'(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong . . . and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed . . .'

Pausing there, in my judgment that section was intended to cover just such a case as this. Where a person being a British subject commits an offence abroad, and then in due course comes within the jurisdiction of a court sitting within the United Kingdom, or more particularly in Liverpool, then it is obviously convenient that the Liverpool court shall have jurisdiction to try him if the necessary preconditions laid down in the section are fulfilled, rather than go through the expensive time-wasting procedure of sending the person back to the actual place where the offence was committed.

I would approach the section with a view to giving it practical and realistic application. At one stage the question seems to have been discussed whether Nassau could be described as a foreign port. Again for my part I am indebted to counsel for the respondent for having cleared that nettle out of our path, because he does not suggest for a moment that Nassau, being within the British Commonwealth, can aptly be described as a foreign port. Accordingly, stripped of its inessentialities, this case comes down to the problem whether it was shown that the offence of stealing on board this vessel was committed on the high seas.

Counsel for the applicant has submitted that there were two schools of thought about the proper meaning and scope of the expression 'high seas'. He says that by international law, by at any rate the year 1894, the expression denoted a spot outside territorial waters or internal waters of a State, in other words 'high seas' covered broad expanses of water away from land altogether. But he said, and there may be force in it, that this could not be the definition which was applicable to s 686,

because it would leave out crimes that might be committed within internal waters. The other school of thought adopted the old definition, to which I must refer in a moment, which had prevailed in the Admiralty jurisdiction, and has found expression in varying forms. One of the attractive ones is: 'anywhere where the great ships can go' and, says counsel for the applicant, it cannot have that wide meaning because the words 'foreign port' which appear in s 686 would then be wholly unnecessary. He was pressed to suggest a definition of his own, and he chose something half way between those two in this form: 'All those seas which are outside internal waters', but of course including territorial waters. When asked, as was natural, by the court whether there was any authority which might support that definition, he candidly admitted there was none.

For my part I find it quite unnecessary to indulge in, so to speak, innovations on the definition of 'high seas' for the purpose of this Act. I start with the knowledge that the Act of 1894 was not itself an innovation at all. The Admiralty jurisdiction had already been considered by more than one court. For my part I think the draftsman when preparing s 686 by which jurisdiction was to be given, for example, to British courts over offences committed overseas, would have had in mind the definition of the expression 'high seas' which the courts had put forward over the years.

To make that good, there are only three cases to which I need refer. In *The Mecca* (1) the Court of Appeal, in the judgment of LINDLEY LJ, dealt with the matter specifically. LINDLEY LJ said:

'The expression "high seas," when used with reference to the jurisdiction of the Court of Admiralty, included all oceans, seas, bays, channels, rivers, creeks, and waters below low-water mark, and where great ships could go, with the exception only of such parts of such oceans, &c., as were within the body of some county . . .'

See also *R v Carr and Wilson* (2) to which I only refer because factually it is of interest and has some similarity to the present case. The headnote states:

'Certain bonds or valuable securities were stolen from a British ocean-going merchant ship whilst she was lying afloat, in the ordinary course of her trading, in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship:—*Held* . . . that the prisoners could be properly tried and convicted at the Central Criminal Court in this country, as the larceny took place within the jurisdiction of the Admiralty of England.'

In *The Mecca* LINDLEY LJ went on:

'A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other part of the high seas.'

Those words are to be noted because they indicate to my mind that a foreign or colonial port might be regarded as not being part of the high seas in the above sense,

(1) [1895] P 95.

(2) (1882), 47 JP 38; 10 QBD 76.

namely, the sense that he just set out, and if so provision would have to be made for it. Sure enough in s 686 provision is made for it.

The matter came in much more recent times before the Court of Appeal in *The Tolten* (1), where SCOTT LJ, in a lengthy judgment, referred to and quoted from the decision which I have just cited. What is important is that there was not a word in that judgment of SCOTT LJ to suggest that the matters to which I have referred were in any sense incorrect. It is true that on an irrelevant detail he did express a differing view from that expressed by LINDLEY LJ, but it is neither here nor there for the purposes of this case.

So with that citation of authority I ask myself: Is there any reason why this court should not now apply to the two words 'high seas' in s 686 the reasoning and meaning given by this line of authority? Is there any reason to adopt in preference to that established line of authority the new definition put forward by counsel on behalf of the applicant? I can see none whatever, and for my part with all deference to his Honour Judge Nance, I think that this case was bedevilled by research and academic discussion when it really admits of a relatively simple solution.

For my part I would say that the Liverpool justices had jurisdiction to deal with this particular offender charged with theft, and if they had jurisdiction, clearly they had jurisdiction to entertain the plea of guilty when he elected summary trial, as he did, and they were fully entitled to make the order which eventually they made.

For these reasons which I have expressed somewhat shortly, I would refuse this application.

**MELFORD STEVENSON J:** I wholly agree.

**FORBES J:** I agree.

*Motion dismissed.*

Solicitors: Sharpe, Pritchard & Co, for Bremner, Sons & Corlett, Liverpool; S Holmes, Town Clerk, Liverpool.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) [1946] 2 All E.R. 372; [1946] P 135.

**COURT OF APPEAL, CRIMINAL DIVISION**

(MEGAW AND ORR, LJ AND BRISTOW, J)

7th, 18th February, 1972

R v NICHOLLS

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath specimen—Requirement to provide—Defendant in hospital—Words spoken by constable in honest and reasonable belief that they would be understood—Failure by defendant to hear or comprehend request—Validity of requirement—Road Safety Act, 1967, s 3 (2) (b).*

By s 3 (2) of the Road Safety Act, 1967: 'A person while at a hospital as a patient may be required by a constable to provide at the hospital a specimen for a laboratory test ... (b) if that person has been required ... to provide a specimen of breath for a breath test, but fails to do so and a constable has reasonable cause to suspect him of having alcohol in his body ...'

There can be a valid requirement by a constable to provide a specimen of breath within the meaning of this section if the constable spoke the words constituting the requirement in the honest and reasonable belief that they would be, and were being, heard and understood by the person to whom they were addressed, although in fact that person failed to hear or understand them.

APPLICATION by Gerald Nicholls for leave to appeal against his conviction at Surrey Quarter Sessions of driving a motor vehicle while having a blood-alcohol proportion exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act, 1967, in respect of which he was fined £35 and disqualified for holding a licence for 12 months.

John Stucley for the appellant.

Ann Curnow for the Crown.

*Cur adv vult*

18th February. **MEGAW LJ** read the following judgment of the court: At 11.25 p m on 31st July 1970 a collision occurred between two motor cars in London Road, Staines. The appellant was driving one of the cars. He was taken by ambulance to Ashford Hospital. There, at or soon after 11.45 p m, Police Sergeant Hepworth saw him lying on a hospital trolley. He smelled very strongly of drink. The sergeant spoke to Dr Bumbra, who was the casualty officer on duty and thus was the medical practitioner in immediate charge of the appellant's case. Dr Bumbra gave his consent to the sergeant requiring the appellant to take a breath test. Having received the doctor's permission, Sergeant Hepworth tried to rouse the appellant, but did not succeed. There appears to have been evidence both of the doctor's view and the sergeant's view of the reasons for that state of affairs at that stage. Whether or not the evidence was admissible, nothing turns on it. The prosecution do not suggest that there was at that stage a requirement, or a failure, to give a breath specimen. The appellant does not allege any impropriety or irregularity on the part of the police officer.

The sergeant went away to deal with other matters which arose out of the accident. He returned at about 12.30 a m. He then had a conversation with the appellant. The appellant, according to the sergeant, appeared to understand everything which the sergeant said to him then. So, immediately following that conversation, Sergeant Hepworth in the presence of a medical aid, Mr Tanner, asked the appellant to give a specimen of breath for a breath test. The appellant made no reply, and, according to the officer, 'seemed dazed and confused at this'. An attempt to assist him to blow into the Alcotest ® 80 device failed. Thereafter Sergeant Hepworth asked Dr. Bumbra if it would be in order for a blood specimen to be taken from the appellant.



The doctor agreed. At 1.10 a m, in the presence of another doctor, Dr Foster, the sergeant required the appellant to provide a specimen of blood or urine for a laboratory test and gave him the warning required by s 3 (10) of the 1967 Act. The appellant at first refused. Then after a brief conversation about other matters he said: 'Take what you want'. At 1.15 a m Dr Foster took a blood sample. On analysis the sample showed 113 milligrammes of alcohol per 100 millilitres of blood.

The appellant's evidence was that he remembered nothing from a moment before the collision until he was asked for a specimen of blood in the hospital. There was no challenge to the good faith or truthfulness of the police sergeant. There was thus no challenge to his evidence that when, at about 12.30 a m he, spoke to the appellant asking for a breath specimen, he believed that the appellant would understand what he said, just as the appellant had, apparently, understood the immediately preceding conversation. On the other hand it must be accepted, as was expressly accepted by the deputy chairman in his address to the jury, that it is possible that for some reason the appellant did not in fact hear or understand what was said to him by the police officer at about 12.30 a m when he asked for the specimen of breath. The deputy chairman, however, told the jury that, there being no challenge to the good faith of the police officer, it did not matter that the appellant may not have heard or understood. The police officer had done what was necessary to require the appellant to provide a breath specimen; he had done so in good faith. There was no dispute that the appellant had failed to provide a specimen of breath.

The issue in this appeal can be simply stated. Section 3 (2) of the Road Safety Act 1967 lays down that a person while at a hospital as a patient may be required to provide a specimen for a laboratory test.

'(b) if that person has been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, but fails to do so . . .'

Was the appellant, on the facts, 'required . . . to provide a specimen of breath for a breath test', in the light of the fact that perfectly adequate words were used by the police officer to convey this requirement, and although the police officer honestly and reasonably believed at that time when he spoke the words that the appellant would understand them, the prosecution have failed to prove that the appellant in fact understood them?

We are not here concerned with a prosecution under s 2 (3) of the Act. It is a criminal offence if a person, without reasonable excuse, fails to provide a specimen of breath. But in the part of the Act with which we are concerned, Parliament has used, and deliberately used, the word 'failed' by itself. The additional words 'without reasonable excuse' have been deliberately omitted. (See the judgment of ASHWORTH J in *Hirst v Wilson* (1).) Parliament thought that a person who had failed to supply a breath specimen should not be held guilty of a criminal offence unless the prosecution could establish, not only the failure, but also the absence of reasonable excuse. A genuine failure to understand what was said, giving rise to a failure to provide the specimen, would no doubt, at any rate in some circumstances, constitute a reasonable excuse for the failure. (We say 'in some circumstances' because there is a passage in LORD DIPLOCK's speech in *Director of Public Prosecutions v Carey* (2) in which he indicates that a failure due to alcohol would not be 'with reasonable excuse'.) But in s 3 (2) (b) all that matters is failure, whether or not reasonably excused. It follows that a specimen of blood for a laboratory test may lawfully be required when there has been a requirement of a breath test followed by a failure to provide the specimen of breath, even though the failure was or may have been with reasonable excuse.

(1) [1969] 3 All ER 1566.

(2) 134 JP 59; [1969] 3 All ER 1662; [1970] AC 1072.

It is in that context—the context of the validity of the further steps leading up to the provision of a blood sample, and not in the context of the creation of a criminal offence for the failure—that we have to consider the meaning of the word ‘required’. Can a person properly be said to have been ‘required’ to do something if in fact he has not heard or has not understood the words spoken to him by another person, although the other person has spoken the words in the honest and reasonable belief that they would be, and were being, heard and understood by the person to whom they were addressed? In our judgment, the answer is Yes. The person concerned has been ‘required’. The fact that his brain has not absorbed the sound of the words spoken, or has not processed them into full understanding, does not prevent that which would otherwise be a requirement from being a requirement. Of course, if there were bad faith, the position would be wholly different; but not because of the meaning of the word ‘required’. However, that question does not arise here.

We would add these comments. First, we see nothing in *R v Clarke* (1) inconsistent with the conclusion which we have reached. Secondly, if the true view were that a requirement was not a requirement, unless it was heard and understood by the person to whom it was addressed, then it would, indeed, go far to make this Act ineffective. For, if such a point were raised, as it could always be raised, the burden would be on the prosecution affirmatively to prove beyond doubt that the person concerned—who, on the prosecution case, had a high alcohol content in his blood—had both heard and fully understood the several ‘requirements’ which form part of the process leading up to the proof of the alcohol content. Moreover, this would apply in a case such as the present, in which there can be no doubt in fact, because of the analysis, that the appellant’s blood contained an excess of alcohol; so that if the breath sample had been given, it must have proved positive. Thirdly, and related to the point which we have just mentioned, while this court is bound by the decision in *Scott v Baker* (2), it is to be observed that in *Director of Public Prosecutions v Carey* (3) there were observations, or reservations, by some of their Lordships, and in particular by VISCOUNT DILHORNE, that the doctrine enunciated in *Scott v Baker* (2) might require review by the House of Lords. The appeal against conviction is dismissed.

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) 133 JP 546; [1969] 2 All ER 1008.

(2) 132 JP 422; [1968] 2 All ER 993; [1969] 1 QB 659.

(3) 134 JP 59; [1969] 3 All ER 1662; [1970] AC 1072.

HOUSE OF LORDS

(LORD WILBERFORCE, VISCOUNT DILHORNE, LORD PEARSON, LORD CROSS OF CHELSEA  
AND LORD SALMON)

7th March, 26th April, 1972

TARR v TARR

*Husband and Wife—Matrimonial home—Rights of occupation—'Regulation' of exercise by spouse of right to occupy dwelling-house—Right wholly to exclude spouse therefrom—Matrimonial Homes Act, 1967, s 1 (2).*

By s 1 (1) of the Matrimonial Homes Act, 1967: 'Where one spouse is entitled to occupy a dwelling-house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then . . . the spouse not so entitled shall have certain rights referred to as "rights of occupation"'. By s 1 (2): 'So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order . . . regulating the exercise by either spouse of the right to occupy the dwelling-house.'

**Held:** the power given to the court in s 1 (2) to regulate the exercise by a spouse of the right to occupy the dwelling-house did not include a power wholly to exclude such spouse therefrom.

**APPEAL** by the husband, Anthony Denzil Tarr, against a decision of the Court of Appeal reported, 135 JP 222, allowing an appeal by the wife, Gladys Eileen Tarr, against a decision of his Honour Judge Paton at Taunton County Court confirming the dismissal of her application for an order that her husband should leave the matrimonial home and not return to live there so long as she continued to occupy it.

*Joseph Jackson QC and Hazel Counsell for the husband.*

*E H Laughton-Scott QC and S B Thomas for the wife.*

Their Lordships took time for consideration.

26th April. The following opinions were delivered.

**LORD WILBERFORCE:** I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, LORD PEARSON. I agree with it and would allow the appeal.

**VISCOUNT DILHORNE:** I agree with my noble and learned friend, LORD PEARSON, that this appeal should be allowed and the judgment of the county court restored and with his reasons for that conclusion.

By s 7 of the Matrimonial Homes Act 1967 the court is given power, where a spouse is entitled to occupy a dwelling-house by virtue of a tenancy to which the Rent Acts apply or by virtue of a statutory tenancy and the marriage has been dissolved by divorce or a decree of nullity, to order that that spouse's estate or interest in the dwelling-house shall be transferred to his or her former spouse, or, if there is a statutory tenancy, that the former spouse shall be deemed to be the statutory tenant. So in certain circumstances the Act does provide that a spouse can be deprived of his or her legal rights to occupy a dwelling-house.

Section 7 (7) declares that the court's power to do so under s 7 is in addition to the powers conferred by ss 1 and 2 of the Act. If under s 1 (2) the property-owning spouse could be deprived of his right to occupy the premises, it would not be necessary to provide this additional power, and the fact that it is given lends, in my view, further support to the conclusion that s 1 (2) does not give power to prohibit the exercise by the property-owning spouse of his or her right to occupy the dwelling-house.

**LORD PEARSON:** This appeal raises a short but important question as to the construction of the words in s 1 (2) of the Matrimonial Homes Act 1967 which empower the court to make an order 'regulating the exercise by either spouse of the right to occupy the dwelling house'. Do these words in conjunction with s 1 (4) empower the court to make an order wholly prohibiting a spouse from exercising his or her right to occupy the dwelling-house for a period specified in the order or until further order?

The parties were married on 16th June 1956, and they have a son born on 24th June 1957. In 1957 the urban district council of Wellington in Somerset granted to the appellant, who is the husband, a periodic tenancy of a small council house in Wellington. That is the house in which the parties and their son have lived and are still living. On 16th March 1969 the respondent, who is the wife, made a complaint against the husband under s 1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, alleging persistent cruelty. Initially the complaint was dismissed, but on appeal the Divisional Court ordered a retrial before different justices, and on the retrial the complaint was found proved and it was ordered that the wife be no longer bound to cohabit with the husband. Since then the parties, although both living in the house, have not cohabited together as man and wife.

On 6th March 1970 the husband's solicitors wrote to the wife's solicitors saying that she must leave the house and giving her a fortnight to find other accommodation. The wife then applied to the Taunton County Court under s 1 of the Matrimonial Homes Act 1967 for an order which would, inter alia, (i) declare that the wife was by virtue of s 1 of the Act entitled to occupy the house (ii) order the husband to vacate the house within seven days and not re-enter it without leave of the court. In her grounds of application paras 5 and 6 were as follows:

'(5) I find that in view of [the husband's] continuing physical cruelty I cannot be expected to remain in the same house as him any longer. I have no other house to go to as I work in Wellington and my son also attends school here.

'(6) The [husband], who is presently unemployed, has parents living in Wellington and it would be possible for him to reside at their house.'

The husband in his affidavit in answer to the application admitted that he was unemployed but otherwise denied those paras 5 and 6. He accepted that the wife was entitled to reside at the house and was protected from being evicted under the 1967 Act. He denied that she was entitled to the other relief claimed on the grounds that the court had no jurisdiction.

The application was heard by Mr Registrar Ligertwood. He granted the declaration that the wife was entitled to occupy the house, but refused to order the husband to vacate the house, holding that he had no jurisdiction under s 1 of the 1967 Act to make such an order. On the wife's appeal against the refusal to order the husband to vacate the house, his Honour Judge Paton affirmed the decision of the registrar. He said:

'This appeal raises a question of construction and although it involves a point within narrow limits it is nevertheless a difficult one. Certainly my first impression of the use of the word "regulating" (s. 1 (2) Matrimonial Homes Act, 1967) is that it does not include the forbidding or stopping of the exercise of a spouse's right to occupy a dwellinghouse. Had Parliament wished to do that, it would not have been too difficult to do so in reasonably plain language. But this is my first impression. Can "regulating" be construed to the extent of stopping the entire exercise of the right to occupy? I accept that the decision in *Maynard v. Maynard* (1) can be said to be obiter. On the other hand in that case, as I have

(1) [1969] 1 All ER 1; [1969] P 88.

already pointed out, the matter was fully argued by experienced counsel and I think that what the learned judge concluded was quite clear. He clearly concluded that regulating meant what it said, namely, regulating and not stopping. That being so, this authority has great persuasive value, and I feel I ought to follow it unless I take the view that it is clearly wrong. . . . In my view therefore the registrar was right in holding that he had no jurisdiction to make an order excluding the husband from the matrimonial home.'

The learned judge added this:

'This point is bound to arise in a great number of cases as it is very likely that spouses between whom differences have arisen are living under the same roof in circumstances where, because of the size of the accommodation, it is really only practicable to exclude one spouse from the home. Accordingly I do not know if there is anything which I can do to facilitate an appeal, but if there is I can say that I think that this is a point which ought to be decided.'

That judgment puts clearly the two sides of the case. On the one hand, regulating the exercise of a right of occupation would not naturally include entirely stopping the exercise of the right. On the other hand, without expressing any view of the merits in the present case, one can see that there might be cases in which there would be justified complaints against the property-owning spouse (the spouse having the title to possession of the house) and it might seem advantageous for the court to have a power to exclude him or her from the house until further order. The report of *Maynard v Maynard* (1) in the Law Reports includes the relevant passage in the speech of counsel for the Queen's Proctor as *amicus curiae*.

On the appeal to the Court of Appeal, they unanimously held that under s 1 (2) of the 1967 Act there is power for the court to make an order excluding the property-owning spouse from the dwelling-house for a limited period or until further order, and accordingly they allowed the appeal and remitted the matter to the county court judge for determination in the light of their judgment. LORD DENNING MR said:

'Counsel for the wife admits that regulation does not warrant an absolute prohibition, but says that it does warrant a partial prohibition in space or in time. It is a nice point of construction, but I think counsel for the wife is right. I think that in this context the word "regulation" should be given a liberal meaning so as to enable the court to make such orders as to the occupation of the house as the nature of the case may require. Assume a case where the husband has the legal title (e.g. he is the contractual tenant) and the wife has statutory "rights of occupation". If the house is large enough for both to live there separately and apart, the court has power to split it up. The court can make an order giving the wife a right to occupy two or three rooms and excluding the husband from those rooms indefinitely. If the house is so small that both cannot live there together any longer, the court can make an order giving the wife the right to occupy it for the time being, and excluding the husband from it until further order. The court would not, and probably could not, make an order prohibiting the husband from ever occupying the house again. But it can make an order excluding him from it for a limited period or until further order; and it can continue that order from time to time as it thinks right. That comes well within the scope of "regulating the exercise" of the right to occupy it.'

The other members of the court, EDMUND DAVIES and MEGAW LJ, agreed, although EDMUND DAVIES LJ said that he had veered a good deal during the hearing as to

(1) [1969] 1 All ER 1; [1969] P 88.



whether 'regulating' could possibly apply to the complete exclusion of the spouse from the house even for a short period.

It is to be observed that the practical effect of an order in either of the forms contemplated by the Court of Appeal might well, in the present case and in other cases, result in the total exclusion of the property-owning spouse from his or her own house (the house of which he or she has the title to possession) for many years. If the exclusion was until further order, there would be no reason for any further order until there was a sufficient change in the situation, and there might be no such change for many years. If the exclusion was for a specified period, it could be renewed at the end of the specified period and again and again thereafter, and presumably would be so renewed unless there was a sufficient change in the situation. If the parties both lived on for 40 years, the property-owning spouse might be totally excluded from his or her own house for 40 years.

Thus if the Court of Appeal's interpretation of the enactment is correct, it makes a very drastic inroad into the common law rights of the property-owning spouse. According to a well-established principle of construction, an interpretation which has this effect ought not to be adopted unless the enactment plainly bears that meaning. That principle has to be set against the possible practical advantages of a liberal interpretation which may support its claims to be the reasonable interpretation. In the end one has to read the enactment in its context and come to a conclusion as to what it means.

The provisions of s 1 of the 1967 Act, so far as they are material, are as follows:

'(1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as "rights of occupation"):(a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section; (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house.

'(2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house.

'(3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,—(a) may except part of the dwelling house from a spouse's rights of occupation (and in particular a part used wholly or mainly for or in connection with the trade, business or profession of the other spouse) . . .

'(4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order . . .

'(8) This Act shall not apply to a dwelling house which has at no time been a matrimonial home of the spouses in question; and a spouse's rights of occupation shall continue only so long as the marriage subsists and the other spouse is entitled as mentioned in subsection (1) above to occupy the dwelling house, except where provision is made by section 2 of this Act for those rights to be a charge on an estate or interest in the dwelling house.'

The drafting is a little complicated. To understand it one has to draw a distinction between the property-owning spouse and the non-property-owning spouse. These are not elegant expressions, but they are convenient. The property-owning spouse is the one who

'is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation' [s 1 (1) of the Act],

and is in the present case the appellant husband. The non-property-owning spouse is the other one, not so entitled, and is in this case the respondent wife. The non-property-owning spouse has conferred on him or her by this Act the 'rights of occupation' which are described in paras (a) and (b) of sub-s (1). The expression 'rights of occupation' is a term of art, a defined term. The property-owning spouse does not have any 'rights of occupation' conferred on him or her, because they are not needed. Then under the first part of sub-s (2);

'So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights'.

As these are the rights conferred on the non-property-owning spouse, presumably that spouse might apply for an order declaring or enforcing them, whereas the property-owning spouse might apply for an order restricting or terminating them. Then under the second part of sub-s (2):

'So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order . . . regulating the exercise by either spouse of the right to occupy the dwelling house.'

It is under this second part of the subsection that an order can be made 'regulating the exercise' by the property-owning spouse, in this case the appellant husband, 'of the right to occupy the dwelling house'.

I do not think it is too simple to say that the question is whether a power to regulate—at any rate this power to regulate—includes a power to prohibit. If the order is one which wholly excludes the property-owning spouse from the dwelling-house, it is an order which prohibits the exercise by him of his right to occupy the dwelling-house. Under s 1 (4) it may be limited so as to have effect for a period specified in the order or until further order. But it is, for so long as it has effect, a complete prohibition of the exercise of the right.

There is authority in several different connections for the proposition that a power to regulate does not (unless the context so requires) include a power to prohibit. In *Municipal Corp'n of the City of Toronto v Virgo* (1) LORD DAVEY said:

'It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised. It was contended that the by-law was ultra vires . . . No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply

(1) [1896] AC 88.

the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the legislature intended to give power to prevent or prohibit it did so by express words... through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.'

It was held that the by-law was ultra vires.

In *Attorney-General for Ontario v Attorney-General for the Dominion* (1) one of the questions considered was whether certain prohibitory enactments of the Canada Temperance Act 1886 fell within 'the regulation of trade and commerce', being a class of subjects to which the exclusive authority of the Parliament of Canada extended under s 91 of the British North America Act 1867. LORD WATSON said:

'The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by LORD DAVEY in *Municipal Corporation of the City of Toronto v. Virgo* (2) in these terms: "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."'

In *Ward v Folkestone Waterworks Co* (3), the local Waterworks Act provided that for the purpose of preventing waste of the water, all persons supplied with water by the waterworks company should provide 'proper ball or stop-cocks or other necessary apparatus for regulating such supply'. It was held that the waterworks company did not have power under this provision to require a consumer to instal a screw-down stop-valve. CAVE J said:

'The apparatus there spoken of must be something akin to a ball-cock, something, that is to say, which will prevent the water from running to waste consistently with its admission into the cistern as occasion may require. But the object of the screw-down valve which it is sought here to compel the consumer to put down is not to regulate the supply in the same manner in which the ball-cock regulates it, but to shut it off altogether.'

In *Birmingham and Midland Motor Omnibus Co Ltd v Worcestershire County Council* (4), the defendant county council as highway authority had statutory power to construct and maintain works 'at cross roads or other junctions for regulating the movement of traffic'. LORD DENNING MR said:

'This paragraph would justify works which send traffic round a roundabout, or sending traffic up, say, one hundred yards in one direction and back one

(1) [1896] AC 348.

(2) [1896] AC 88.

(3) (1890), 54 JP 628; 24 QBD 334.

(4) 131 JP 188; [1967] 1 All ER 544.

hundred yards in another. But does it extend to works which send the traffic seven-eighths of a mile up in one direction and seven-eighths of a mile down in another? Thus making it go an extra distance of some  $1\frac{3}{4}$  miles. Does that come within the words "regulating the movement of traffic"? I think not. In *City of Toronto Municipal Corpn. v. Virgo* (1), LORD DAVEY said that a power to "regulate" and "govern" seems to imply the continued existence of that which is to be "regulated" or "governed". So, here, when a highway authority simply sends the traffic round a roundabout or a short diversion, they can fairly be said to be "regulating the movement of traffic"; but if it forces the traffic to go  $1\frac{3}{4}$  miles out of its way, it ceases to be "regulating" the traffic. It is equivalent to prohibiting it.

In the Oxford English Dictionary under the word 'regulate' there is not given any meaning which could possibly include prohibition. Thus, the word 'regulating' in itself is not apt to include a power to prohibit. There is no evident reason why the draftsman should not have added the words 'or prohibiting' if he meant to include a power to prohibit. If a temporary prohibition were required, the duration could have been limited under s 1 (4). Alternatively the words 'or suspending' might have been added.

The context is of some significance. There are in the first part of s 1 (2) the four verbal nouns 'declaring, enforcing, restricting or terminating'—evidently carefully and accurately chosen, as one would expect in an Act of Parliament. It is reasonable to infer that the verbal noun 'regulating' in the second part of s 1 (2) was chosen with equal care and accuracy. If the draftsman had intended to give to 'regulating' an extended meaning to include prohibiting, this could have been done by means of a provision in s 1 (3). Also this word 'regulating' in s 1 (2) can be contrasted with the wording of s 7 (3) which provides that in a certain event 'that spouse shall cease to be entitled to occupy the dwelling house'.

The apparent objects of the Act should be taken into account. It was passed not long after the decision of this House in *National Provincial Bank Ltd v Ainsworth* (2) which overruled *Bendall v McWhirter* (3) and other cases relating to the rights of the wife in respect of the matrimonial home. It was made plain that these rights were personal rights attributable to her status as a wife and not amounting to an irrevocable licence or to a licence at all, nor to an equitable interest of any kind. The wife had by virtue of these personal rights a considerable measure of protection in her occupation of the matrimonial home against her husband, but not much, if any, protection against a purchaser or mortgagee from her husband. The principal objects of the Act, as they appear from its provisions, were to confer on the non-property-owning spouse—usually the wife—statutory rights of occupation, which are made a charge on the property-owning spouse's estate or interest and can be registered, so that there now is better protection for the wife's occupation of the matrimonial home. The Act confers on the court the power provided by s 1 (2). It might have taken the further step of empowering the court to prohibit exercise by the property-owning spouse of his right to occupy his home, but in fact the Act, as I read it, did not take this further step.

I would allow the appeal and set aside the order of the Court of Appeal and restore the judgment of the county court.

**LORD CROSS OF CHELSEA:** I agree with the opinion of my noble and learned friend, LORD PEARSON, and would allow the appeal.

(1) [1896] AC 88.

(2) [1965] 2 All ER 472; [1965] AC 1175.

(3) [1952] 1 All ER 1307; [1952] 2 QB 466.

**LORD SALMON:** I agree with the opinion of my noble and learned friend, LORD PEARSON, and would allow the appeal.

*Appeal allowed.*

Solicitors: Doyle, Devonshire, Box & Co, for Broomhead & Saul, Taunton; Jaques & Co, for Clarke, Willmott & Clarke, Wellington, Somerset.

Reported by G F L Bridgman, Esq, Barrister.

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### COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, ROSKILL, LJ, AND SIR GORDON WILLMER)

11th, 14th February, 1972

R v LIVERPOOL CORPORATION. EX PARTE LIVERPOOL TAXI OWNERS' ASSOCIATION AND ANOTHER

*Hackney Carriages—Licensing—Duty of licensing authority—Obligation to act fairly towards all persons whose interests are affected by decisions of authority—Town Police Clauses Act, 1847, s 37.*

By s 37 of the Town Police Clauses Act, 1847: 'The [licensing authority for taxi cabs] may from time to time license to ply for hire [within their district] such number of hackney . . . carriages of any kind or description adapted to the carriage of persons as they think fit.'

A licensing authority acting under this section is under a duty to act fairly towards all persons or bodies whose interests are affected by any decision of the authority. They must show due regard to all the conflicting interests concerned. If they do not do so the court will see that they do by the issue of a writ of prohibition.

Accordingly, where the chairman of a sub-committee of a licensing authority gave an undertaking to two associations of owners of taxi cabs that no licences in addition to those then existing would be issued until certain proposed legislation had come into force and later the sub-committee, without giving any information to the two associations, passed a resolution rescinding their previous resolution and recommending an immediate increase in the number of licences to be issued, a recommendation subsequently adopted by the full council of the authority.

**HELD:** an order should issue prohibiting the authority, their committee, and sub-committee from acting on the last-named resolution and recommendation and granting any further number of licences without first hearing any representations which might be made by or on behalf of any persons interested therein.

**APPEAL** by the Liverpool Taxi Fleet Operators' Association and the Liverpool Taxi Owners' Association, against a decision of the Divisional Court refusing them leave to apply for orders of prohibition, mandamus and certiorari against the corporation of Liverpool.

C E F James for the applicants.

M Morland for Liverpool Corporation.

**LORD DENNING MR:** This case concerns the number of taxi cabs on the streets of Liverpool. Since 1948 Liverpool Corporation have limited the number of taxi cabs to 300. The taxi cab owners want it to remain at 300, but the taxi cab drivers want the numbers increased. They point out that in recent years a great number of private hire cars have come on the streets. These private hire cars are not licensed.



There is no control over them. They do not have to come up to any required standard. The taxi drivers feel that they are taking custom which should belong to them. The mischief is such that Liverpool Corporation are promising a Bill before Parliament to bring these private hire cars under control. In addition Liverpool Corporation have passed a resolution to increase the number of taxi cabs. The owners seek to prohibit them from doing so. They say the corporation passed the resolution without hearing their case properly and contrary to an undertaking.

To consider the question, I must first state the jurisdiction of Liverpool Corporation. They are the licensing authority for taxi cabs in the city. They derive their powers from the Town Police Clauses Act 1847 which applies to hackney carriages. There were horse drawn carriages in those days, but now they are motor driven. Section 37 provides:

'The commissioners may from time to time license to ply for hire within the prescribed distance, or if no distance is prescribed, within five miles from the General Post Office of the city, town, or place to which the special Act refers, (which in that case shall be deemed the prescribed distance,) such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit.'

By s 43 a licence was to be in force for one year only. That Act was explained by LORD GODDARD CJ in *R v Weymouth Corpn, ex parte Teletax (Weymouth) Ltd* (1):

'It also seems reasonably clear that what Parliament had in mind was that it was desirable that the commissioners should be able to control the number of carriages which plied for hire in a given area, and should also be entitled to prescribe the kind and the description of the carriages . . . I have no doubt they . . . certainly could take into consideration the number of cabs which were already licensed, so that there would not be an undue number or, on the other hand, if they found there were not enough for the reasonable requirements of the public, they would be able to license more from time to time as they thought fit.'

The licence is a licence for the vehicle. It is not a licence for the owner or the driver. Accordingly the owner of a vehicle can transfer his vehicle during the year to a buyer. The buyer can use it under the licence for the rest of the year. When the owner applies for the licence to be renewed for another year, the corporation can take into consideration not only the then proprietor, but also any new applicant. We were referred to an unreported case on that point: *R v Southampton Corpn, ex parte Lankford* (2).

In the middle of 1970, when the owners heard that the corporation proposed to increase the number of taxi cabs, their association took up the matter. On 24th July 1970 the town clerk of Liverpool wrote to the solicitors for the taxi owners' association, saying:

'No decision has been taken on the number of hackney carriage plates and, before any such decision was taken, you have my assurance that interested parties would be fully consulted.'

That was re-affirmed on 28th October 1970 when the town clerk wrote:

'I have no doubt that your clients will be given an opportunity to make representations, at the appropriate time, should they wish to do so.'

(1) 111 JP 303; [1947] 1 All ER 779; [1947] KB 583.

(2) (27th October 1960) unrep.

In July 1971 the matter was considered by a special sub-committee of the Environmental Health and Protection Committee of the corporation. The taxi cab owners were represented by counsel. The sub-committee recommended an increase above 300 hackney carriage licences, to this extent—there should be 50 more licences in the year beginning in January 1972 (making 350) and a further 100 licences in the year beginning January 1973 (making 450), and thereafter an unlimited number. On 4th August that recommendation came up for consideration by the city council themselves. The minutes were approved subject to some matters being sent back. In addition the chairman of the sub-committee gave an undertaking of 11th August (which was put into writing by the town clerk in a letter):

'The chairman of the [sub-committee] gave an undertaking in council that no plates in addition to the existing 300 would be issued until the proposed legislation had been enacted and had come into force.'

After the meeting the chairman of the sub-committee, Alderman Craine, came out to the representatives of the taxi cab proprietors. The treasurer of the association asked:

'Is it right Alderman Craine that no licences will be issued until legislation controlling private hire vehicles is in force?'

The alderman replied: 'I have just stated that publicly. I have just made an announcement to that effect.'

So there was a clear undertaking, namely, no more than 300 licences until the legislation about private hire cabs was in force. It was expected that the Bill would be introduced towards the end of 1971, passed in 1972 and in force early in 1973. So things should have rested there until 1973. But not a bit of it. Behind the scenes the corporation seem to have been advised that that undertaking was not lawful and they ought not to hold themselves bound by it. So, without a word to the taxi cab owners or their association, the special sub-committee met on 16th November 1971, and rescinded the earlier resolution and put forward a new recommendation, namely, that from 1st January 1972 a further 50 licences should be issued bringing the total to 350, and that from 1st July 1972 a further 50, bringing the total to 400, with no limit from 1st April 1973.

The association got indirectly to hear of that recommendation. They were never told officially. So their solicitors asked for a further hearing. They asked if there were any new facts and requested that their clients should be given an opportunity of making further representations. On 7th December 1971 the town clerk replied:

'There are no new important material facts . . . If there are any such new matters of which you yourselves have become aware, please let me have details of them by return.'

The meeting was to be on the next day, 8th December. So it was quite impossible for the owners to make any reply by return.

On 8th December the Environmental Health and Protection Committee met. They confirmed the sub-committee. On 22nd December the city council met. They confirmed the committee and adopted the recommendation. The result was that the corporation resolved to increase the number from 300 to 350 from 1st January to July 1972, and to 400 from 1st July 1972; and after 1st April 1973 unlimited. That was quite contrary to the undertaking which had been most explicitly given in August. On getting to know of this, the taxi cab owners moved the Divisional Court *ex parte* for orders of prohibition and *certiorari*. The Divisional Court refused the

application. We desired to hear the corporation. So notice was served on them. We have had the full argument before us today.

First I would say this. When the corporation consider applications for licences under the Town Police Clauses Act 1847 they are under a duty to act fairly. This means that they should be ready to hear, not only the particular applicant, but also any other persons or bodies whose interests are affected. In *R v Brighton Corpn, ex parte Thomas Tilling Ltd* (1) SANKEY J said:

'Persons who are called upon to exercise the functions of granting licences for carriages and omnibuses are, to a great extent, exercising judicial functions; and although they are not bound by the strict rules of evidence and procedure observed in a court of law, they are bound to act judicially. It is their duty to hear and determine according to law, and they must bring to that task a fair and unbiased mind.'

It is perhaps putting it a little high to say they are exercising judicial functions. They may be said to be exercising an administrative function. But even so, in our modern approach, they must act fairly, and the court will see that they do so.

To apply that principle here. Suppose the corporation proposed to reduce the number of taxi cabs from 300 to 200, it would be their duty to hear the taxi owners' association because their members would be greatly affected. They would certainly be persons aggrieved. Likewise, suppose the corporation propose to increase the number of taxi cabs from 300 to 350 or 400 or more; it is the duty of the corporation to hear those affected before coming to a decision adverse to their interests. The town clerk of Liverpool was quite aware of this and acted accordingly. His letters of 24th July 1970 and 28th October 1970 were perfectly proper.

The other thing I would say is that the corporation were not at liberty to disregard their undertaking. They were bound by it so long as it was not in conflict with their statutory duty. It is said that a corporation cannot contract itself out of its statutory duties. In *Birkdale District Electric Supply Co Ltd v Southport Corpn* (2) the EARL OF BIRKENHEAD said that it was

'a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.'

But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say, and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case. It is better to hold the corporation to their undertaking than to allow them to break it. Just as it was in *Robertson v Minister of Pensions* (3) and *Lever (Finance) Ltd v Westminster Corpn* (4).

(1) (1916), 80 JP 219.

(2) 90 JP 77; [1926] AC 355.

(3) [1948] 2 All ER 767; [1949] 1 GB 227.

(4) 134 J.P. 692; [1970] 3 All ER 496; [1971] 1 QB 222.

Applying these principles, it seems to me that the corporation acted wrongly at their meetings in November and December 1971. In the first place, they took decisions without giving the owners' association an opportunity of being heard. In the second place, they broke their undertaking without any sufficient cause or excuse.

The taxi cab owners' association come to this court for relief and I think we should give it to them. The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved', and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him: see *Attorney-General of the Gambia v N'Jie* (1) and *Maurice v London County Council* (2). The taxi cab owners' association here have certainly a locus standi to apply for relief.

We have considered what the actual relief should be. On the whole we think it is sufficient in this case to let prohibition issue. The order should prohibit the corporation or their committee or sub-committee from acting on the resolutions of 16th November 1971, 8th December 1971, and 22nd December 1971, in particular, from granting any further number of licences pursuant to s 37 of the Town Police Clauses Act 1847 over and above the 300 currently existing without first hearing any representations which may be made by or on behalf of any persons interested therein, including the applicants in this case, and any other matters relevant thereto, including the undertaking recorded in the town clerk's letter of 11th August 1971. If prohibition goes in those terms, it means that the relevant committees, sub-committees, and the corporation themselves, can look at the matter afresh. They will hear all those interested and come to a right conclusion as to what is to be done about the number of taxi cabs on the streets of Liverpool.

I would say that the trouble has arisen because the corporation was advised that this undertaking was not binding on them, whereas it certainly was binding unless overridden by some imperative public interest. I am sure that all concerned have been acting as best they could, but nevertheless prohibition in my view should issue so as to prevent the corporation committee acting on those resolutions.

**ROSKILL LJ:** LORD DENNING has read the undertaking as it was given by the town clerk's letter of 11th August 1971, and as it is recorded in the affidavit of Mr Lynch, the treasurer of the second of the associations who are the applicants on this motion. Although there were two undertakings, they were in substance identical and their giving is not disputed. Nor is it disputed that the passing by the Liverpool Corporation of the resolution of 22nd December 1971 was in flagrant contradiction of the undertaking which was given both in council and privately. Thus the issue arises: Can the applicants enforce that undertaking before this court, or is it to be treated as of no effect? Although admittedly given, is it to be ignored and treated as a promise in no way binding on him who gave it or the local authority on whose behalf and with whose authority it was given? The applicants seek orders of prohibition, mandamus and certiorari. For my part I see no ground for allowing an order of certiorari to go. The resolution of 22nd December is not suggested to have been ultra vires. Moreover, now to quash it, as LORD DENNING has pointed out, causes difficulties in relation to the earlier resolution of 4th August, which was rescinded by the resolution complained of. Nor can I see any ground for an order of mandamus, for I see no failure by Liverpool Corporation to exercise a power which it is required by Parliament to exercise. It seems to me that if any redress can be given,

(1) [1961] 2 All ER 504; [1971] AC 617.

(2) 128 JP 311; [1964] 1 All ER 779; [1964] 2 QB 362.

it must be redress by way of an order of prohibition. The applicants have not sought relief, as perhaps they might have done, by way of injunction or declaration.

It has been said by counsel on behalf of the corporation that the undertaking given by Alderman Craine does not bind the council. He has sought to persuade this court that that is so because to oblige the council now to honour that undertaking would be to fetter the corporation's freedom of action in the performance of its statutory duty to consider other applications for licences after the respective dates mentioned in the resolution of 22nd December 1971. It is said that the corporation having lawfully passed that resolution, no prior undertaking, however clearly given, however much in conflict with the resolution, can be allowed to stand in the way of implementing that resolution. It is said that this court should refuse to grant the relief claimed because the court is under as great a duty to protect the interests of possible future licensees as to protect the interests of those who at present hold a monopoly of the existing licences.

I do not think this court is under any duty to protect the interests of either rival group of licensees or would-be licensees. Its duty is to see that in dealing with the conflicting interests the council acts fairly between them. It is for the council and not for this court to determine what the future policy should be in relation to the number of taxi licences which are to be issued in the city of Liverpool. It is not for this court to consider population growths or falls or the extent of the demand for taxis within or without the city or whether there should be more licences issued in the future than in the past or whether the present grave unemployment position on Merseyside is a relevant consideration. All those are matters for the council. This court is concerned to see that whatever policy the corporation adopts is adopted after due and fair regard to all the conflicting interests. The power of the court to intervene is not limited, as once was thought, to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness. It has been said by counsel for the corporation that there is no precedent for this court to intervene and enforce an undertaking which he claims to be of no legal effect and thus prevent the council giving effect to delegated legislation of the validity of which there is no doubt. I am not prepared to be deterred by the absence of precedent if in principle the case is one in which the court should interfere. The long legal history of the former prerogative writs and of their modern counterparts, the orders of prohibition, mandamus and certiorari, shows that their application has always been flexible as the need for their use in differing social conditions down the centuries had changed. If I thought that the effect of granting to the applicants the relief sought was to prevent the council validly using those powers which Parliament has conferred on it, I would refuse relief. But that is not the present case. It seems to me that the relief claimed will in the end, as counsel for the corporation in effect ultimately conceded, assist the council to perform rather than inhibit the performance of its statutory duties.

LORD DENNING has referred to *Birkdale District Electric Supply Co Ltd v Southport Corpn* (1). The decision of this court in *William Cory & Sons Ltd v London Corpn* (2) shows that a local authority, such as the council, cannot contractually fetter the performance of its statutory duties. But the present is not such a case. The principle applicable is plain. In matters of this kind, such as the granting of licences to hackney carriages, the local authority concerned is required to act fairly, as well as, as LORD DENNING has said, in a quasi-judicial capacity. It has been said that the council and

(1) 90 JP 77; [1926] AC 355.

(2) 115 JP 371; [1951] 2 All ER 85; [1951] 2 GB 476.



its relevant committee and sub-committee were never under any duty to hear any representations from the applicants. That may or may not be correct. In the light of what has happened, I do not think it necessary to express any opinion on that question. The relevant sub-committee had the advantage of hearing representations made on behalf of the applicants. Subsequently, having heard those representations, they made the recommendation which led up to the resolution of 4th August 1971 as well as, of course, to the undertaking of the breach of which complaint is made. It seems to me, therefore, that now to allow the council to resile from that undertaking without notice to and representations from the applicants is to condone unfairness in a case where the duty was to act fairly. To stop temporarily action on the resolution of 22nd December 1971 is not in any way to perpetuate that undertaking; nor should it embarrass the council in carrying out its statutory duties. The council must make up its own mind what policy it wishes to follow, but before doing so it must act fairly to all concerned, to present licensees and to future licensees and to others also who may be interested. In the end it may adhere to its present policy or it may not, but in my view this court should not allow the undertaking given by Alderman Craine on 4th August and repeated by the town clerk with the council's authority in the letter of 11th August to be set at naught. The council can at some future date, if it wishes, depart from that undertaking, but, if it does so, it must do so after due and proper consideration of the representations of all those interested. I am not persuaded that any such due and proper consideration has yet been given. On the contrary, the evidence before this court shows that the passing of the resolution of 22nd December was—as I have said—a flagrant breach of the undertaking.

While I make no criticism, I think it right to draw attention to the fact that the minutes of the meeting of the relevant sub-committee on 16th November 1971 show that one member of the council who was a member of the Environmental Health and Protection Committee, although not a member of that sub-committee, attended that meeting of the sub-committee. The earlier minutes of the meeting of the council on 4th August show that that same gentleman had unsuccessfully moved an amendment to the resolution of that date adverse to the interests of the applicants. It may well be that there was no reason why he should not have been present at the sub-committee on 16th November of the happening of which the applicants were unaware, but the fact that he was there perhaps lends some support to their submission that their interests were not properly taken into account at that meeting. I have great hesitation in differing from the Divisional Court which included on this occasion both LORD WIDGERY CJ and PHILLIMORE LJ, but they did not have the opportunity of hearing the full argument of which we have had the benefit. For the reasons I have given as well as those given by LORD DENNING I agree that orders of certiorari and mandamus should be refused, but that an order of prohibition should issue in the terms LORD DENNING has suggested. I would accordingly grant this application.

**SIR GORDON WILLMER:** I have reached the same conclusion, and I agree with the terms of the order proposed by LORD DENNING. I confess that, as I have listened to the story of what happened in this case, I have not found the behaviour of Liverpool Corporation particularly attractive. We are not, of course, concerned with the question of how many taxi cabs there ought to be in Liverpool. That is a matter of policy, the decision of which is entrusted to the corporation as the local authority. The objection here is to the method which was adopted, or sought to be adopted, in framing the corporation's policy with regard to the number of taxi cabs. The applicants, who represent the owners of the existing licensed taxi cabs operating

in the city of Liverpool, are of necessity persons who are vitally interested in that policy. During the year 1970 they received repeated assurances that they would be consulted with regard to the number of licences to be allowed. Moreover, following the publication of the proposed resolution by the special sub-committee in March or April 1971, they were specifically invited to make any representations they desired to make about the proposed resolution. As a result, they did have the opportunity of appearing by counsel and making representations in July 1971.

So far, so good. The applicants at that date could have no possible ground of complaint against the procedure adopted. The special sub-committee before whom counsel appeared reached certain conclusions, which were later adopted by the full committee and eventually by the city council at its meeting on 4th August 1971. Again I need not go into the merits of the policy which was decided on; that is not a matter for this court. But it was accompanied by an undertaking publicly given by the chairman of the special sub-committee, the terms of which LORD DENNING has already read. That undertaking was repeated in the town clerk's letter of 11th August to the applicants' solicitors. Naturally, following that, the applicants thought, and were entitled to think, that if there were to be any further change of policy, they would be amongst the first people to be consulted and invited to make representations. They were, therefore, naturally surprised to learn that this same sub-committee had met on 16th November 1971, and without notice to them had recommended what amounted to an important change of policy which it could be expected would result in a very large increase in the number of licences to be issued for taxi cabs in the city of Liverpool. About this they were obviously very concerned, and wrote to the town clerk to protest at such a decision having been arrived at without any consultation with them, or without their having been given the opportunity to make representations. They received in answer a letter from the town clerk of 7th December 1971, which in effect said two things. First, it said that:

'The special sub-committee and the parent committee are indeed reconsidering the matter on the basis of the information which they then had. There are no new important material facts.'

Secondly, the letter continued:

'I am sure that the council would not want to deprive your clients of the opportunity of drawing attention to any new important material facts of which you yourselves may now be aware. If there are any such new matters of which you yourselves have become aware, please let me have details of them by return.'

As LORD DENNING has pointed out, the applicants were being asked to let the town clerk have details of any new material facts by return of post—not a very practical suggestion.

I venture to criticise that letter in two respects. First, the statement that the special sub-committee were 'reconsidering' the matter strikes me as something less than candid, in view of the fact that the special sub-committee had already on 16th November 1971 reached its decision. The second thing to which I draw attention is the fact that, as the letter states, the proposal was to rescind the previous resolution, although there were no new important material facts. As I have already pointed out, the letter invited the applicants to inform the town clerk if they had 'any new important material facts' of which they were aware. It seems to me that that request hardly met the applicants' objection, which was that, without having consulted them, the sub-committee had sought to reverse its previous decision in the absence of 'any new material facts', which was the whole point of their objection. As a matter of history, the new resolution by the special sub-committee was duly adopted by the

full committee and eventually by the city council at its meeting on 22nd December 1971.

As has been pointed out by LORD DENNING, what is now sought to be done can only be regarded as being in flat defiance of the undertaking publicly given by the chairman of the sub-committee at the meeting of the city council, and repeated privately to the applicants through the town clerk's letter. It seems to me that in these very special circumstances, having regard to the history of how this matter had been dealt with in the past, and having regard especially to the giving of the undertaking, the applicants are justified in regarding themselves as 'aggrieved' by what I can only describe as unfair treatment on the part of Liverpool Corporation. Accordingly, it seems to me that this is indeed a proper case in which this court can and should interfere in order to ensure that a decision should be arrived at only after fair discussion and after hearing all proper representations of the parties interested. I share the hope expressed by LORD DENNING that this will give the corporation an opportunity of tackling the problem afresh, and arriving at a fair conclusion after hearing all interested parties.

*Order of prohibition.*

Solicitors: Markbys, for Layton & Co, Liverpool; Cree, Godfrey & Wood, for S Holmes, Town Clerk, Liverpool.

Reported by G F L Bridgman, Esq, Barrister.

### FAMILY DIVISION

(SIR GEORGE BAKER, P, WRANGHAM, J AND WATKINS, J)

28th, 29th February, 1972

JUSSA v JUSSA

*Child—Custody—Care and control—'Split order'—Joint custody order—Jurisdiction of justices—Principles to be applied in determining order—Guardianship of Minors Act, 1971, s 9.*

By s 9 of the Guardianship of Minors Act, 1971: "(1) The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding—(a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father . . ."

The husband, who was an Indian by birth and a mussulman by religion, had lived in England since 1959. In 1964 he married. His wife was an Englishwoman and a Christian and there were no religious differences between the parties. They had three children all at the material time under the age of seven. In 1971 the husband and wife parted, the children going with her and thereafter living with her and her parents. In July, 1971, the wife applied under s 8 (above) to justices for an order for the custody of the children. There was nothing in the circumstances of the parting which told against either parent on the consideration of the matters in issue. Each of the spouses admitted that the other was an admirable parent and well qualified to look after the children. The husband admitted that he was unable to offer the children care and control of the kind which the mother could offer, but he contended that the proper order for the justices to make was either one for joint custody to both parents with a provision that the children should not be removed from the care and control of the wife without further order or one giving him alone custody with a similar provision. The justices, being of opinion that there was not 'anything unusual or exceptional [in the circumstances] to merit a joint custody order', granted legal custody to the wife. On appeal by the husband,

**HELD:** (i) under the Act of 1971 the justices had jurisdiction to make a 'split order', ie, either a joint order for custody with care and control to one spouse or an order for custody to one spouse solely with care and control to the other; (ii) the appropriate test in determining whether a joint custody order should be made was not whether the circumstances were unusual or exceptional, but whether there was a reasonable prospect that the parties would co-operate, and what order would best promote the interests of the children: where there were two unimpeachable parents who could reasonably be contemplated as being capable of co-operating with each other in the interests of the children whom they both loved, there could be no serious objection to an order for joint custody and many advantages for the children for such an order; (iii) in the present case a joint custody order was appropriate and the order of the justices would be varied accordingly.

**APPEAL** by the husband against an order of New Sarum justices committing the custody of the three children of the marriage to the wife and ordering the husband to pay £3 per week for each of the children while under the age of 18.

*N Taylor* for the husband.

*J E Previté* for the wife.

**WRANGHAM J:** This is an appeal against a decision of the justices of New Sarum, sitting at Salisbury, dated 13th August 1971, when they committed the custody of the children of the parties to the complainant wife, made an order that the husband should pay to the wife £3 a week for the maintenance of each of the children while under the age of 18, and gave the defendant husband access to the children, roughly speaking, it may be said, for a week during each of the school holidays, and also weekend access. Against that decision the husband has appealed on the ground that the custody of the three children should have been committed to him, or, alternatively, no order for custody made at all, while admitting that the children should remain in the care and control of the wife.

The facts of the matter are short and simple. The parties consist of the husband, who (according to information given to us on behalf of the husband and not dissented from by the learned counsel for the wife) is a man of 41, an Indian by birth who went to East Africa in 1954 and since 1959 has been living in England. He is a teacher by profession and, in particular, is concerned with remedial teaching. He is at the moment, I think, the head of a remedial teaching department. By religion he is a Mussulman, but, I gather, not practising. At any rate no religious difficulties between himself and his wife, who is a Christian, have arisen in this matter at all. The wife is an English girl of 28. They married on 12th September 1964. They have three children, a boy of nearly seven, a boy of five and a girl of two, and the boys, at any rate, bore names appropriate to Mussulmans.

After their marriage in 1964 the parties lived together in England. In 1971 they were living at Wallington in Surrey. Unfortunately there were differences between them, mainly, apparently, about money. On 5th June 1971 the wife left the husband, took the three children with her, and went to stay with her parents in Salisbury, where she now is with them. Her case was that the parting had come about because the husband had told her to leave. The husband's case was that he had not told her to leave, and, indeed, that he was very anxious for her to return. It is perhaps sufficient in this connection to say that there is nothing in the circumstances of the parting which, in my view, should tell against either parent in the consideration of the matters in issue in these proceedings, and it is one of the happiest features of this case that each of the spouses admits freely and frankly that the other is an admirable parent. In her evidence the wife said that the children love their father and enjoy his visits. She made no suggestion against him as a father, but said that he took great care of them when he

visited them. Equally, the husband had no word of criticism of the wife as a mother. It is therefore a case in which either party would be admirably qualified to look after the children, although it is conceded, in my view very rightly conceded, that the proper place for them now is with their mother.

It was on 13th July 1971 that an application was made by the wife under the Guardianship of Minors Act 1971 asking for the custody of these children and for maintenance, which led to the order of 13th August 1971 to which I have referred. In these circumstances the only matter which is really in issue between the husband and the wife now, and the only matter which has been argued in these proceedings, is whether the justices were right in making the order which they did, committing the legal custody of these three children to the wife alone. It has been contended on behalf of the husband that he should not have been deprived of the custody of these children altogether, even though, being a father and not a mother, he was unable to offer them care and control in the way that the mother could offer it to them. He recognised, in other words, that the right and duty of looking after three little children of this age were best committed to an unimpeachable mother, but he contended that there was no reason why a wholly unimpeachable father should be cut out from any form of guardianship of his children at all. It was therefore argued that the proper order was either an order that the custody of these children should be committed to the husband and wife jointly, with a provision that they should not be removed from the care and control of the wife without further order, or, alternatively, that the custody of these children should be committed to the father alone, with the same provision that they should continue to be in the care and control of the wife. A possible alternative was canvassed in argument, namely, that there should be no order as to custody at all, but that was abandoned by both learned counsel, and, in the circumstances, I need say no more about it.

The wife contended, through her learned counsel, that the order of the justices was correct and that no order for custody, either solely or jointly, should be made in favour of the husband, the main ground for that being that it was said that an order splitting the responsibility for these children in any measure between the wife and the husband would lead to complications, to difficulties, and, perhaps, ultimately to actual conflict which would have to be decided by the court. So the choice was between the split order and the straight order for custody in favour of the wife.

This matter was clearly argued before the justices, because, in the very careful and thorough note of their reasons with which they have supplied us, they put as the first of their conclusions as to the custody of the children: 'We did not feel there was anything unusual or exceptional to merit a joint custody order'. They then referred to the textbook, Pugh on Matrimonial Proceedings before Magistrates (2nd edn, p 169) and said they granted legal custody to the wife because they concluded that she was a very good mother. This was agreed, as they said, by the husband, and also borne out by the evidence of the husband's witnesses and by the lack of complaint on behalf of the husband of the condition of or anything wrong with the children when he visited them every weekend. They continued:

'We considered that, having regard to the ages of the children, it was definitely in their interests that legal custody be vested in the [wife].'

It is not completely clear whether they were there really directing their minds to legal custody as opposed to care and control, because, while it might well be said that, having regard to the ages of these children, ranging from nearly seven to two, it was very much in their interests that the day-to-day care and control of them should be committed to their mother, it was not so obvious that their ages led to



the conclusion that legal custody should be vested in her. Their other conclusions, add little to what they had said before.

In these circumstances it becomes necessary to say something about the approach made by courts to the question of a split order, i.e., an order in which the responsibility for children is divided between spouses either by a joint order for custody with care and control to one spouse, or, what must be the more normal form of split order, an order for custody to one spouse solely with care and control to the other. The split order for separate custody is an order which appears to have been known for many years. There are references to its history in the decisions of the Court of Appeal in *Re W (J C) (an infant)* (1) which was cited to us. The value of a split order of that kind was emphasised by DENNING LJ in *Wakeham v Wakeham* (2) where he said:

'Cases often arise in the Divorce Court where a guilty wife deserts her husband and takes the children with her, but the father has no means of bringing them up himself. In such a situation the usual order is that the father, the innocent party, is given the custody of the child or children, but the care and control is left to the mother. That order is entirely realistic.'

It is plain that DENNING LJ was attaching importance to the proposition that a wholly unimpeachable parent should not be cut out from having a voice in the future of his or her children.

The joint order for custody with care and control to one of the two parents is, perhaps, of rather more recent origin. When, in March 1964, an application was made to KARMINSKI J in *Clissold v Clissold* (3) to sanction such a joint order for custody with care and control to the wife, he said that it was the first time that he had been asked to make such an order, and he was unwilling to do it on that occasion, first of all, because disputes might arise between the parents over questions relating to the child, in which case the matter would have to come back to the court, and, secondly, because it was, in his view, wholly inappropriate to the facts of that particular case. My own experience is that since 1964 the order which was then so exceptional has been made on many occasions, and I think it is not too much to say that the apprehensions expressed by KARMINSKI J have not been fulfilled to their full extent. For my part, I recognise that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will co-operate. Where there is a case such as the present case, in which the father and the mother are both well qualified to give affection and wise guidance to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to co-operate sensibly over the children for whom both of them feel such affection, where there is that kind of situation it seems to me that there can be no real objection to an order for joint custody. Perhaps it is a little cynical (although it is the kind of cynicism which is difficult to avoid in this Division) to regard such a state of affairs as exceptional. It was regarded rather from that point of view, I think, by CAIRNS J in *S v S* (4) decided about a year later than the case before KARMINSKI J of *Clissold v Clissold*. There CAIRNS J said that he was satisfied that both parties had the welfare of their children at heart, and, in the exceptional circumstances, he would make the exceptional order asked for. But there was nothing apparently exceptional about that case, as reported, except for the fact that the children in question, two girls, were on good terms with both their parents, the bond of affection between the father and the

(1) 127 JP 529; *Re* [1963] 3 All ER 459; [1964] Ch 202.

(2) [1954] 1 All ER 434.

(3) (1964), 108 Sol Jo 220.

(4) (1965), 109 Sol Jo 289.

younger girl being very close, and that both parents supported the proposal. In those circumstances, as it seems to me, it would be wrong to say that joint orders for custody should only be made in exceptional circumstances unless by that is meant that the circumstances in which both parents can be expected to co-operate fully in making such an order work are themselves to be regarded as exceptional, and that, I hope, as I have said, is too pessimistic a conclusion. The matter is of importance because the passage in Pugh on Matrimonial Proceedings before Magistrates, which clearly influenced the justices in the view that they took, rests on the authorities to which I have referred, and without a rather fuller consideration of the authorities in question it seems to me that that passage might well mislead justices, as I think it misled them in this case.

We have also had a most interesting argument on the question whether the justices ever had jurisdiction in this case to make a split order at all. As to that I need only say this. In *Re W (J C) (an infant)* (1) the Court of Appeal held that a stipendiary magistrate had jurisdiction to make a split order in a case which arose under the Guardianship of Infants Act 1886. Without tracing the words in any detail, I am satisfied that the change in language and structure which is effected by the Guardianship of Minors Act 1971 has in no way affected the validity of the decision in *Re W (J C) (an infant)*. In other words, the jurisdiction which existed under the 1886 Act must equally exist under the 1971 Act.

That there are difficulties about orders for maintenance is plain. They were referred to by DAVIES LJ in *Re W (J C) (an infant)*, in his judgment. They need not concern us here today, partly because they do not, in any event, arise on the making of a joint order for custody rather than a sole order for custody in favour of the husband, and partly because, in any event, the decision of the Court of Appeal is binding on us. I need only refer in passing to the decision of this court in *W (C) v W (R)* (2), in which this court decided that the power which existed under the guardianship of infants legislation did not exist under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

I now come to mention very shortly the actual arguments on the merits of the contention made by the husband that he should not be cut out altogether from a voice in his children's future; that he should be recognised still as their parent and their guardian. He is an unimpeachable parent. He has much, by reason of his career and training, to contribute to their welfare. And in this case there is perhaps an additional point to be made, that this was a mixed marriage between a man of Oriental origin and a woman of European origin. The children, therefore, have a mixed inheritance. For my part I would say this, that it is much in their interests to get the full value of that mixed inheritance. The husband can contribute to them something which no European could do; the wife can contribute something that no Oriental could do. I feel myself it would be a great advantage to them that they should retain the closest possible contact with their father while remaining, of course, in the care and control of their mother.

I am not so much impressed in this case as I might be in another with the argument that there must be somebody to decide and that a multitude of counsels only brings complexity and difficulty. In my view, when one has two wholly unimpeachable parents of this character, who could, I think, be reasonably contemplated as capable of co-operating with each other in the interests of the children whom they both love, there can be no serious objection to an order for joint custody, and many advantages for the children from that order; and, of course, one comes back always to the point that it is the welfare of the children that is the paramount consideration.

(1) 127 JP 529; *Re* [1963] 2 All ER 459; [1964] Ch 202.

(2) 132 JP 572; [1968] 3 All ER 608; [1969] P 33.

In those circumstances I propose that the order of the justices be varied by substituting an order for joint legal custody to both husband and wife, but with a provision that the children be not taken from the care and control of their mother without further order of the court, a provision which has the inevitable effect that the right which the husband might otherwise have under s 13 of the Guardianship of Minors Act 1971 to enforce an order for custody on his behalf does not exist. It would be contrary to the order for care and control to be committed to the mother. There is no appeal by either party against the order for maintenance, and that should stand, nor is there, in the circumstances, any obstacle to its doing so. We have noted that during the argument, when it was thought there might be some obstacle to the enforcement of the maintenance order, the husband was perfectly content to undertake to comply with that order whether it was technically enforceable or not. It was not necessary for him to give such an undertaking. The fact that he was ready to give such an undertaking is merely one more manifestation of what kind of father he is.

**WATKINS J:** I agree, and I adopt that.

**SIR GEORGE BAKER, P:** I agree. I think the question to be asked is not whether there is anything unusual or exceptional to merit a joint custody order, or to merit a split order, but what order will best promote the welfare of the infant.

The appeal will, therefore, be allowed to the extent only that the order is varied to give the legal custody to both parents jointly, the children not to be taken from the care and control of the mother without the leave of the court, or further order, and it is noted that the undertaking has been filed.

*Order varied.*

Solicitors: Wm Easton & Co; Burchell & Ruston, for Pye-Smiths, Salisbury.

Reported by T R Fitzwalter Butler, Esq, Barrister.

HOUSE OF LORDS

(LORD WILBERFORCE, VISCOUNT DILHORNE, LORD PEARSON, LORD CROSS OF CHELSEA  
AND LORD SALMON)

14th, 15th March, 3rd May 1972

ALPHACELL LTD v WOODWARD

*River—Pollution—"Causes"—Common sense meaning—Liability in absence of negligence or knowledge—Novus actus interveniens—Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a).*

By s 2 (1) of the Rivers (Prevention of Pollution) Act, 1951: 'Subject to this Act, a person commits an offence punishable under this section—(a) if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter ...'

'Causes' in this subsection is to be given a common sense meaning without the introduction of such refinements as *causa causans*, effective cause, or *novus actus*.

Where, therefore, as the natural consequence of operations deliberately conducted by the appellants, albeit without negligence or knowledge on their part, polluting matter entered a river,

HELD: there being no need for the prosecution to prove *mens rea*, the appellants had been rightly convicted of an offence under s 2 (1) (a).

Per LORD SALMON: The appellants could only escape being held to have caused polluted effluent to enter the river if they proved that the overflow had been brought about by some event which could fairly be regarded as being beyond their ability to foresee or control.

APPEAL by Alphacell Ltd against a decision of a Queen's Bench Divisional Court dismissing their appeal against their conviction by Bury justices of causing to enter the River Irwell polluting matter, contrary to s 2 (1) of the Rivers (Prevention of Pollution) Act 1951.

F M Drake QC, H K Goddard and Douglas Hogg for the appellants.

Iain Glidewell QC and D G Nowell for the respondent.

Their Lordships took time for consideration.

3rd May. The following opinions were delivered.

**LORD WILBERFORCE:** The enactment under which the appellants have been convicted is the Rivers (Prevention of Pollution) Act 1951. The relevant words are 'if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter'.

The subsection evidently contemplates two things—*causing*, which must involve some active operation or chain of operations involving as the result the pollution of the stream; *knowingly permitting*, which involves a failure to prevent the pollution, which failure, however, must be accompanied by knowledge. I see no reason either for reading back the word 'knowingly' into the first limb, or for reading the first limb as, by deliberate contrast, hitting something which is unaccompanied by knowledge. The first limb involves causing and this is what has to be interpreted.

In my opinion, 'causing' here must be given a common sense meaning and I deprecate the introduction of refinements, such as *causa causans*, effective cause, or *novus actus*. There may be difficulties where acts of third persons or natural forces are concerned but I find the present case comparatively simple. The appellants abstract water, pass it through their works where it becomes polluted, conduct it to a settling tank communicating directly with the stream into which the polluted water will inevitably overflow if the level rises over the overflow point. They plan, however, to recycle the water by pumping it back from the settling tank into their

works; if the pumps work properly this will happen and the level in the tank will remain below the overflow point. It did not happen on the relevant occasion due to some failure in the pumps.

In my opinion, this is a clear case of causing the polluted water to enter the stream. The whole complex operation which might lead to this result was an operation deliberately conducted by the appellants and I fail to see how a defect in one stage of it, even if we must assume that this happened without their negligence, can enable them to say they did not cause the pollution. In my opinion, complication of this case by infusion of the concept of *mens rea*, and its exceptions, is unnecessary and undesirable. The section is clear, its application plain. I agree with the majority of the Divisional Court who upheld the conviction, except that rather than say that the actions of the appellants were a cause of the pollution I think it more accurate to say that the appellants caused the polluting matter to enter the stream.

There are two previous decisions which call for brief comment. The first is *Moses v Midland Railway Co* (1) which was decided on similar terminology in s 5 of the Salmon Fishery Act 1861. The cause of the escape of the polluting creosote was a defective tap in the tank wagon which did not belong to the railway company but to a private owner. The conclusion that the railway company had not caused it to flow was, I should have thought, inevitable. The second is *Impress (Worcester) Ltd v Rees* (2). The appellants had placed a fuel oil tank near, although not adjacent to, the River Severn. The oil escaped through a valve which was not kept locked. The Divisional Court found that it was an inevitable conclusion of fact that some unauthorised person had opened the valve for purposes unconnected with the appellants' business. They held that the opening of the valve was of so powerful a nature that the conduct of the appellants was not a cause of the flow of oil. I do not desire to question this conclusion, but it should not be regarded as a decision that in every case the act of a third person necessarily interrupts the chain of causation initiated by the person who owns or operates the installation or plant from which the flow took place. The answer to such questions is one of degree and depends on a proper attribution of responsibility for the flow of the polluting matter.

The actual question submitted to this House under the Administration of Justice Act 1961, s 1 (2) is:

'Whether the offence of causing polluting matter to enter a stream contrary to section 2 of the Rivers (Prevention of Pollution) Act 1951 can be committed by a person who has no knowledge of the fact that polluting matter is entering the stream and has not been negligent in any relevant respect.'

The answer to this, I suggest, should be 'Yes', it being understood that the test is whether the person concerned caused or knowingly permitted the poisonous, noxious or polluting matter to enter the stream. As, in my opinion, the appellants did so cause, I would dismiss the appeal.

**VISCOUNT DILHORNE:** The appellants, Alphacell Ltd, were convicted by the justices at Radcliffe in Lancashire on an information that they had caused polluting matter to enter the River Irwell contrary to s 2 (1) of the Rivers (Prevention of Pollution) Act 1951. Section 2 (1), so far as material, provides:

'Subject to this Act, a person commits an offence punishable under this section—(a) if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter . . .'

(1) (1915), 79 JP 367.

(2) [1971] 2 All ER 357.



At their Mount Sion works, which are on the bank of the river, the appellants treated manilla fibres as part of the process of manufacturing paper. The fibres had to be boiled and the water in which they were boiled became seriously polluted. It was drained into tanks from which it was removed by road tankers. There was also a washing process and the water used in the washing process was drained into two settling tanks situated on the edge of the river. One settling tank was higher than the other and the overflow from the higher tank went into the lower. In a shed above the lower tank there were two pumps with pipes extending downwards into the liquid in the lower tank, through which the water was sucked and pumped back into a reservoir from which it could be taken and, after filtration, used again.

If the pumps worked properly, there should have been no overflow from the lower tank, but if that tank did overflow, the liquid flowing from it went straight into a channel, provided for the purpose, which led straight into the river. So if the pumps for some reason failed to operate properly, the system instituted by the appellants made provision for any overflow to go straight into the river. One of the two pumps worked automatically, coming into operation when the water in the lower tank reached a certain level and switching itself off when the level dropped three feet three inches below the level at which it would overflow into the river. The other pump was manually operated. Evidence was given by a consultant of the paper trade, a Mr Evans, who had been concerned with the planning of the circulation of the water. He said that one pump was sufficient to keep the liquid from overflowing if nothing went wrong, and that the second pump was there in case anything went wrong with the first.

At 4.30 p.m. on Tuesday, 25th November 1969, an assistant inspector employed by the Mersey and Weaver River Authority saw that liquid was overflowing from the lower tank into the river at the rate, he estimated, of 250 gallons an hour. Both pumps were then working. He took samples, analysis of which showed that the liquid being discharged had a biological oxygen demand of 160 milligrammes per litre. The river authority only permitted the discharge of an effluent with a biological oxygen demand not exceeding 20 milligrammes per litre. Each of the pipes which carried the water to the pumps was fitted with a rose to prevent foreign matter being sucked into the pump. The holes in each rose were  $\frac{1}{4}$  inch in diameter.

Mr Atkinson, a foreman employed by the appellants, testified that on 25th November he had inspected the tanks at 8.15 a.m. and that one pump was operating then. He inspected the tanks again at 11.15 a.m. and saw that the level in the lower tank was rising so he switched on the second pump. He made another inspection at 1.15 p.m. and did not notice any difference in the level. He came back again at 3.45 p.m. and the level in the tank was the same despite the fact that both pumps had been operating since 11.15 a.m. If Mr Atkinson knew that, if nothing was wrong, one pump was sufficient to cope with the flow and to prevent an overflow, he surely should have suspected that something was seriously wrong when he found that both pumps operating for several hours had not lowered the level of the water.

A fitter employed by the appellants, a Mr Courtney, stated that he had inspected and emptied the roses at the end of the pipes every weekend and that both pumps had been inspected by him during the weekend before 25th November. He said that he had then inspected the impellers to the pumps and had got his fingers in the vents. After the samples were taken the pumps were stopped and dismantled. It was then found that brambles, ferns and long leaves were wrapped around each impeller and that the vents of both pipes were blocked. Mr Courtney said that he had installed the pumps and had been employed there ever since and that he had never before found such things in the pumps.

If it be the case that the pumps were properly inspected during the weekend and were then in proper order, the brambles and leaves must have got into the

impellers on the Monday and Tuesday and, if the roses at the end of each pipe were in place, have been sucked through the  $\frac{3}{4}$  inch holes in the roses. It sounds improbable that this should have happened with both pumps in so short a time to such a degree that both pumps were blocked but one does not know, for the Case Stated does not reveal, what conclusion, if any, the justices came to about this.

The Case Stated is unfortunately in an unsatisfactory form. In para 2 the justices said that they found the following facts. One would expect that to be followed by a statement of the facts found, that is to say, the conclusions on questions of fact to which the justices had come after hearing the evidence. But para 3 of the case merely sets out the evidence the justices had heard and not their conclusions thereon. Merely to set out the evidence is no substitute for findings of fact. Paragraph 3 records that one witness said that the appellants had taken all reasonable steps to make sure that water did not escape into the river. Did the justices accept this evidence and find as a fact that all reasonable steps had been taken or did they not do so? The Case Stated leaves that uncertain and were it not for the fact that it is possible to reach a conclusion in this appeal without knowing whether that had or had not been found, I would have been in favour of the Case being sent back to the justices to be properly stated.

The respondent, so the Case states, contended that the appellants had caused polluting matter to enter the river and that they

'had not done everything in their power to ensure that the machinery which should ensure that the tanks should not allow any overflow into the river had not worked efficiently [sic].'

Presumably what was meant was that they had not done everything to ensure that it had not worked inefficiently. The justices in the paragraph numbered 7 in the Case (in fact para 8) said that they were

'of the opinion that the appellants had caused the polluting matter to enter the river by their failure to ensure that the apparatus was maintained in a satisfactory condition to do the job for which it was provided.'

One does not know whether they were of the opinion that that failure was due to negligence on the part of the appellants or their servants, or whether it was their view that the appellants had caused the overflow without negligence, they having installed a system which was bound to lead to an overflow if the pumps for one reason or another proved inadequate for their task.

Counsel for the respondent did not seek in this House to contend that the justices' conclusion involved a finding of negligence and to support the conviction on that ground. On the evidence given, it is apparent that the justices might well have concluded that there was negligence in not appreciating by 3.45 pm that the pumps were not working properly, and, in view of the improbability that sufficient debris to block the impellers and the vents of both pumps had been sucked in in the course of the Monday and Tuesday, that there had been negligence in the inspection at the weekend. In view of the attitude taken by the respondent, although it may be that the justices were in fact of the opinion that there had been negligence, one must treat this case as one in which there was no finding of negligence on the part of the appellants.

In the Divisional Court, LORD PARKER CJ and WIDGERY LJ were in favour of dismissing the appeal. They found it unnecessary to consider whether the offence charged was an absolute offence. They were satisfied that the actions of the appellants were a cause of the pollution and that in their opinion sufficed. BRIDGE J, dissenting, held that there could be no criminal liability for causing polluting matter to enter a stream

unless there was actual knowledge on the part of the alleged offender or at least the means of knowledge that his act might be expected to lead to pollution.

In this House counsel for the appellants again contended that the appellants had not caused the pollution; that the section did not create an absolute offence; and that the appellants could not be convicted in the absence of knowledge or negligence on their part. He also contended that in a section which, like s 2 (1), creates two offences, the fact that knowledge is required for one leads to the presumption that it is also required for the other, in other words, that s 2 (1) (a) should be read as if it said 'if he knowingly causes or knowingly permits'. He also relied on the well-known principle that if the wording of a penal statute is capable of two interpretations, that most favourable to the accused should be taken as the correct interpretation.

The first question I propose to consider is, leaving the question of mens rea on one side, whether on the evidence the act or acts of the appellants caused the pollution. Its immediate cause was the blocking of the impellers and vents. The presence of the polluting liquid on the bank of the river, and it would appear, within a foot or so of the river, was due to the acts of the appellants. The provision of the settling tanks with an overflow channel from the lower tank leading directly to the river was directly due to their acts. When the works were operating, there was, under the system which they had instituted, bound to be an overflow into the river unless the pumps provided were of sufficient capacity and working sufficiently efficiently to prevent that happening.

If they had not installed any pumps or only pumps of insufficient capacity and an overflow into the river had followed from the operation of the works, I do not think it could be suggested that their acts had not caused the overflow and consequent pollution. Does it make any difference if they had installed pumps of sufficient capacity and for some reason the pumps had broken down or were only able to pump a fraction of what they should have? I think not. It was the operation of the works which led to the flow of liquid to the tanks. It was that operation which, with the system they had installed, led to the liquid getting into the river. The roses at the end of the intake pipes must have been fitted because it was realised that there was a risk that without them debris would be sucked into and block the pumps. The fact that despite them debris was sucked in and prevented the pumps from working properly shows that that safeguard was insufficient and the result was the same as that which would have followed from the operation of the works if pumps of insufficient capacity had originally been installed. In these circumstances I see no escape from the conclusion that it was the acts of the appellants that caused the pollution. Without their acts there would not have been this pollution. It was their operation of their works that led to the liquid getting into the tanks and their failure to ensure that the pumps were working properly that led to the liquid getting into the river. I therefore think that the justices' conclusion on the facts was right.

Then it is said that even if that was so, there should not have been a conviction for the offence charged was not an absolute offence. As my noble and learned friend, LORD DIPLOCK, said in *Sweet v Parsley* (1):

"The expression "absolute offence" . . . is an imprecise phrase currently used to describe an act for which the doer is subject to criminal sanctions, even though when he did it he had no mens rea; but mens rea itself also lacks precision . . ."

In this case it was argued that it was an essential ingredient of the offence that the appellants should—the case being dealt with as if there was no negligence—have intended the entry of the polluting matter into the river, that is to say, that they should have intended the commission of the offence. I cannot think that that was

(1) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

the intention of Parliament for it would mean that a burden of proof would rest on the prosecution that could seldom be discharged. Only if the accused had been seen tipping the polluting material into a stream or turning on a tap allowing a polluting liquid to flow into a stream or doing something of a similar character could the burden be discharged. Parliament cannot have intended the offence to be of so limited a character. Ordinarily all that a river authority can establish is that a discharge has come into a stream from a particular source and that it is of a polluting character. But the Act does not say that proof of that will suffice. If that were so, the Act would indeed create an absolute offence. It has also to be proved that the accused caused or knowingly permitted the pollution. This Act is, in my opinion, one of those Acts to which my noble and learned friends, LORD REID and LORD DIPLOCK, referred in *Sweet v Parsley* which, to apply the words of WRIGHT J in *Sheras v De Rutzen* (1), deals with acts which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty'.

What, then, is meant by the word 'causes' in the subsection? If a man, intending to secure a particular result, does an act which brings that about, he causes that result. If he deliberately and intentionally does certain acts of which the natural consequence is that certain results ensue, may he not also be said to have caused those results even though they may not have been intended by him? I think he can, just as he can be said to cause the result if he is negligent, without intending that result. I find support for my view in the observations of BOWEN LJ in *Kirkheaton District Local Board v Ainley, Sons & Co* (2). He said:

'It appears to me that any person causes the flow of sewage into a stream . . . who intentionally does that which is calculated according to the ordinary course of things and the laws of nature to produce such flow.'

We have not here to consider what the position would be if pollution was caused by an inadvertent and unintentional act without negligence. In such a case it might be said that the doer of the act had not caused the pollution although the act had caused it. Here the acts done by the appellants were intentional. They were acts calculated to lead to the river being polluted if the acts done by the appellants, the installation and operation of the pumps, were ineffective to prevent it. Where a person intentionally does certain things which produce a certain result, then it can truly be said that he has caused that result, and here in my opinion the acts done intentionally by the appellants caused the pollution.

I now turn to the contention that the subsection should be read as if the word 'knowingly' appeared before 'causes'. Whether the inclusion of that word before 'permits' makes any difference to the meaning of 'permits', is, I think, open to doubt, for as LORD GODDARD CJ said in *Lomas v Peek* (3):

'If a man permits a thing to be done, it means that he gives permission for it to be done, and if a man gives permission for a thing to be done, he knows what is to be done or is being done . . .'

(See also per LORD DIPLOCK in *Sweet v Parsley* (4).) If the insertion of 'knowingly' before 'causes' meant only that the acts which produced the result must be intentional, then that insertion would not, in my view, add anything to the meaning to be given to the subsection. If, on the other hand, it meant that the accused must know what

(1) 59 JP 440; [1895] 1 QB 918; [1895-99] All ER Rep 1167.

(2) [1892] 2 QB 274.

(3) 112 JP 13; [1947] 2 All ER 574.

(4) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

the end result would be, then it imports the requirement of a guilty mind accompanying the acts. In this connection reliance was placed on *Derbyshire v Houlston* (1). That was a decision on a very different statute and I do not think that it constitutes any authority for the proposition that in this Act s 2 (1) (a) must be read as if the word 'knowingly' appeared before 'causes'. I therefore reject this contention.

In support of the contention that the offence in question is an absolute one the appellants relied on the last part of s 2 (1) which provides that a local authority shall be deemed to cause or knowingly permit pollution which passes into a stream from a sewer or sewage disposal works of theirs where the local authority were bound to receive the polluting matter into the sewer or sewage disposal unit or had consented to do so. This was obviously intended to deal with a special case and to prevent a local authority from being able to contend that in such circumstances they had not caused the pollution. I do not consider that it throws any light on the meaning to be given to s 2 (1) (a).

The function of the courts is to interpret an act 'according to the intent of them that made it'. If the language of a penal statute is capable of two interpretations, then that most favourable to the subject is to be applied. Having regard to the nature of the Rivers (Prevention of Pollution) Act 1951, the mischief with which it was intended to deal and the fact that it comes within the category of acts to which my noble and learned friends, LORD REID and LORD DIPLOCK, referred in *Sweet v Parsley* I do not think that the subsection is capable of two interpretations or that it was intended to be interpreted or should be interpreted as making the causing of pollution only an offence if the accused intended to pollute.

For these reasons I would dismiss the appeal with costs.

**LORD PEARSON:** The appellants have their Mount Sion Works at Radcliffe beside the River Irwell in Lancashire. Water is drawn from the river along a goit and is taken into the works and used in processing manilla fibres for use in papermaking. The first stage of the processing produces a very strong effluent which is removed by tankers and disposed of elsewhere; no question arises with regard to that effluent. At the second stage of the processing the fibres are washed, and this leaves polluted washing water, which is taken down to two settling tanks on the banks of the river. After some purification by settling, this water is recirculated and used again in the processing. There are two pumps which draw water out of the settling tanks; one of these operates automatically in the sense that it switches itself on whenever the water in one of the settling tanks has risen to a certain level; the other is a standby pump which can be switched on manually when the automatic pump is not keeping down the level of the water. At the bottom of the intake pipe of each pump there is a rose, similar in principle to the rose in a watering can, with holes of  $\frac{3}{4}$  inch diameter, intended to keep out foreign matter while admitting a sufficient inflow of water. As the settling tanks are beside the river, it must follow that, if the pumps fail to keep down the level of the water and the rising water overflows, the overflow must be into the river, and it is polluted water.

On 25th November 1969 the processing plant had been in use for about a year, and it was being operated on that day. The foreman inspected the tanks at 8.15 a.m., and found the automatic pump working and everything normal. When he inspected the tanks again at 11.30 a.m. he found that the water level had risen and he switched on the standby pump. At 1.15 p.m., and again at 3.45 p.m., he found the water level unchanged with both pumps working. But at 4.30 p.m., the river authority inspector visited the tanks and found that there was an overflow of polluted water from them into the river at a rate which he estimated at 250 gallons per hour. The inspector

(1) 61 JP 374; [1897] 1 QB 772.



took a sample of the polluted water immediately before it entered the river and on analysis it was found that the biochemical oxygen demand on this sample was 160 milligrammes per litre whereas, when the river authority allowed a discharge of effluent, the biochemical oxygen demand should be no more than 20 milligrammes per litre. What had happened was that in each of the pumps the impeller had become clogged with foreign matter—brambles, bracken or ferns and long leaves—which had entered the intake pipe through the holes in the rose.

There was evidence, accepted by the justices, from the appellants' fitter to the effect that he had inspected the rose and the impeller and emptied the rose once a week and had done so on the Sunday preceding 25th November 1969, which was a Tuesday, and that the rose had never been blocked before or since that date, but on that date he had found brambles, ferns and long leaves wrapped around the impeller and the vents blocked; he had never found such things before in the pumps.

There was also expert evidence, accepted by the justices, that the appellants had taken all reasonable steps to make sure water did not escape into the river. The expert witness did say, however, that an alarm system would be desirable but there was not one on 25th November 1969. The appellants' general manager said that as an extra aid to their foreman an alarm system, a probe actuating a bell, was installed in December 1969, but that this alarm system was not essential as two pumps were adequate to keep the effluent out of the River Irwell and one pump was normally more than adequate. The general manager also said that neither he nor anyone in authority had knowledge of the discharge of effluent until informed by the inspector. The foreman gave evidence of his regular inspection of the tanks. He said that the level of the water in the tanks depended on the amount of processing going on.

The justices said in the Case Stated:

'We were of the opinion that the appellants had caused the polluting matter to enter the river by their failure to ensure that the apparatus was maintained in a satisfactory condition to do the job for which it was provided. We accordingly convicted the appellants.'

Counsel have stated that the Divisional Court with the assent of counsel assumed that the justices had not made any finding of negligence. Although perhaps a different view might have been taken of the evidence, I think, having regard to the findings of fact, that the assumption has to be made.

The relevant enactment is s 2 (1) (a) of the Rivers (Prevention of Pollution) Act 1951, providing that:

'Subject to this Act, a person commits an offence punishable under this section —(a) if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter . . .'

The question is whether the justices could properly find that the appellants caused the polluted water to enter the River Irwell.

It has been contended that the prosecution had to prove *mens rea* on the part of the appellants, and consequently the appellants were wrongly convicted because, even if they caused the polluted water to enter the river, they did not do so intentionally or knowingly. In my opinion, this contention fails. First, in the wording of the enactment there is the contrast between 'causes' and 'knowingly permits', raising the inference that knowledge is not a necessary ingredient in the offence of 'causing'. Secondly, *mens rea* is generally not a necessary ingredient in an offence of this kind, which is in the nature of a public nuisance. In *Sherras v De Rutzen* (1) WRIGHT J said:

(1) 59 JP 440; [1895] 1 QB 918; [1895-99] All ER Rep 1167.

'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: *Nichols v Hall* (1) . . . the principal classes of exceptions may, perhaps be reduced to three . . . Another class comprehends some, and perhaps all, public nuisances: *Reg v Stephens* (2) where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in *Rex v Medley* (3) and *Barnes v Ackroyd* (4).

In *R v Medley* there was an indictment against the directors and other officers of a gas company for discharging the refuse of gas manufacture into the Thames. DENMAN CJ in summing up said to the jury:

'It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to Leadbeter to conduct the works, they will be answerable.'

There is an authority on a similar enactment. In *Moses v Midland Railway Co* (5) the railway company were conveying on their line a private owner's tank wagon containing creosote, and on the journey the creosote began to leak out from a defective tap and when this was discovered the train was stopped and the defect was remedied. Some of the creosote which leaked out found its way into a tributary of a salmon river. The railway company were prosecuted under s 5 of the Salmon Fishery Act 1861, where the relevant wording was:

'Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing salmon, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause waters to poison or kill fish, shall incur the following Penalties . . .'

LORD READING CJ dealt only with causation. AVORY J dealt with mens rea at the beginning of his judgment, where he said:

'I have had some doubt about this case, because when it was first read to us I certainly understood it to mean that the creosote which caused the damage in fact escaped from this tank while the train was pulled up and while the operations were going on for the purpose of repairing it. If that had been clearly the state of facts I should have hesitated before agreeing with the view that under these circumstances the railway company were not causing the liquid to flow into the stream within the meaning of this section, because it appears to me to be not one of those cases where it is necessary to prove any mens rea. It is an absolute prohibition, and the person liable is the person who in fact causes the liquid to flow; and I do not think it is necessary to shew in the words of one of the judgments quoted to us, that the person was intentionally causing the liquid to flow.'

I think the judgments of LORD ESHER MR and BOWEN LJ in *Kirkheaton District Local Board v Ainley, Sons & Co* (6) tend to show that mens rea was not a necessary ingredient

(1) (1873), 37 JP 424; LR 8 CP 322.

(2) (1866), 30 JP 822; LR 1 QB 702.

(3) (1834), 6 C & P 292.

(4) (1872), 37 JP 116; LR 7 QB 474.

(5) (1915), 79 JP 367.

(6) [1892] 2 QB 274.

in the offence of causing sewage to fall or flow into a stream contrary to the Rivers Pollution Prevention Act 1876. LORD ESHER said:

'The sewage matter starts from their premises by their volition in such a way that it must go through a sewer, which, by the natural process of gravitation, will carry it into the stream. Reading the words of the Act according to their ordinary meaning, did or did not the defendants cause the sewage, which they thus sent from their premises, to flow into the stream? It seems to me that they did. Unless they had done what they did, it would not have flowed into the stream. They seem to me to be the *causa causans*, or, at any rate, the *causa sine qua non*.'

The view that *mens rea* is not a necessary ingredient in an offence of this kind seems to me to be consistent with, and supported by, what was said in *Sweet v Parsley* (1) by LORD PEARCE and by LORD DIPLOCK.

The appellants' other contention is that they did not cause the polluted water to flow into the river. I think that their main grounds for this contention are that they did not intend the polluted water to flow into the river, they did not know it was happening and (according to the assumption that has been made) it did not happen by reason of any negligence on their part. On the general question of causation there is an illuminating passage in the speech of LORD SHAW OF DUNFERMLINE in *Leyland Shipping Co v Norwich Union Fire Insurance Society* (2). He said:

'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.'

This passage may have been partly inspired by the argument of R A Wright KC. In *Yorkshire Dale Steamship Co Ltd v Minister of War Transport, The Coxwold* (3), VISCOUNT SIMON LC said:

'The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for "the cause" involves a selection of the governing explanation in each case'.

LORD WRIGHT said:

'This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards.'

In *Cork v Kirby Maclean Ltd* (4) DENNING LJ said:

'It is always a matter of seeing whether the particular event was sufficiently powerful a factor in bringing about the result as to be properly regarded by the law as a cause of it . . .'

(1) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

(2) [1918] AC 350; [1918:19] All ER Rep 443.

(3) [1942] 2 All ER 6; [1942] AC 691.

(4) [1952] 2 All ER 402.

When one sets out to select in this case from the whole 'complex of the facts' the 'governing explanation' of the overflow of polluted water into the river there are a number of factors to be taken into account. These include the absence of intention, the absence of knowledge and the assumed absence of negligence on the part of the appellants. It would have been easier to decide that they caused the overflow if they had intended it or known of it when it was happening or brought it about by their negligence.

Nevertheless, I think that the justices and the majority of the Divisional Court were right in holding that the overflow was caused by the activities of the appellants. Those were positive activities and they directly brought about the overflow. What other cause was there? There was no intervening act of a trespasser and no act of God. There was not even any unusual weather or freak of nature. Autumn is the season of the year in which dead leaves, ferns, pieces of bracken and pieces of brambles may be expected to fall into water and sink below the surface and, if there is a pump, to be sucked up by it. In my opinion, the activities of the appellants were the cause of the overflow of polluted water into the river. It is not necessary for the purposes of this case to decide whether a conviction should be upheld if the activities of a defendant were to be regarded as only a cause of such an overflow. Subject to reservation of that question I agree with the judgments of the majority in the Divisional Court.

I would dismiss the appeal.

**LORD CROSS OF CHELSEA:** I have found this a difficult case. At one time I was inclined to agree with the dissenting judgment of BRIDGE J, but in the end I have come to the conclusion that the appeal should be dismissed.

The appellants in the course of their business cause large quantities of polluted effluent to flow into a settling tank on the bank of the River Irwell. The tank would have inevitably overflowed with the result that the effluent would have entered the river had not the appellants installed two pumps to keep the level of the water in the tanks low enough to prevent any overflow. At the base of the pumps there are or were metal 'roses' with holes of a diameter of  $\frac{3}{4}$  inch designed to allow water to reach the pump freely but to prevent any solid matter which might get into the tank from passing through the rose and coming into contact with the impeller.

On Tuesday, 25th November 1969, the pumps failed to prevent the settling tank from overflowing, the reason for the failure being—as was subsequently discovered—that a quantity of brambles, leaves and other vegetable matter had found its way through the holes in the 'roses' and was wound round the impellers. The evidence, which the justices accepted, was to the effect that the 'roses' had been regularly inspected each weekend since they had been installed a year previously, that no vegetable matter had been in them when the pumps were inspected a few days before the overflow, and indeed that no vegetable matter had ever been found in the pumps before. How all these brambles and leaves had found their way through the roses in the course of the two or three days before 25th November was an unsolved mystery.

These being the facts, did the appellants commit the offence created by s 2 of the Rivers (Prevention of Pollution) Act 1951 of 'causing' the polluted effluent to enter the river? BRIDGE J said—and I agree with him—that the contrast drawn in the section between 'causing' and 'knowingly permitting' shows that a man cannot be guilty of causing polluting matter to enter a stream unless at the least he does some positive act in the chain of acts and events leading to that result. I cannot, however, follow him when he goes on to say that it is also necessary if the man is to be held to have 'caused' the result that he should have known or have had the means of knowledge that his act might be expected to lead to it. Suppose that the contractor whom

the appellants had employed to install these works on the bank of the Irwell had provided a defective pump with the result that when the appellants operated their plant for the first time the tank had overflowed—surely they could fairly be said to have ‘caused’ the pollution of the river even though they neither knew nor had any means of knowing that their act in setting the plant in operation would lead to that result? But, of course, the appellants can say—and here lies the strength of their case—that the justices have not found that the pumps, albeit they had such wide holes in the roses, were unsuitable and that they have accepted the evidence of their employees as to the frequency and thoroughness of their inspections. This enables them to advance the argument which was accepted by BRIDGE J that the unexplained presence of this quantity of vegetable matter wrapped round the impellers should be regarded as a separate cause of the pollution of the stream which relieves the appellants from the responsibility for it. ‘If it had been shown that the brambles had been put there by a trespasser’ so the argument runs ‘the appellants could not be held to have “caused” the overflow. For all that one knows they may have been put there by a trespasser. What difference does it make that one cannot say how they came there providing that the appellants have not been shown to be in any way to blame for their presence?’ This argument is plausible—but I think fallacious. The appellants did not advance any evidence to show that the brambles had been placed there by a trespasser or that the ‘inanimate forces’—to use the words of BRIDGE J—which brought them there were in the category of acts of God—analogueous to the destruction of the pumps by lightning or the flooding of the tank by a storm of altogether unexampled severity and duration. All that the evidence shows is that despite the false sense of security into which the appellants had been lulled by their experience over the past 12 months, vegetable matter was in fact liable to collect quite quickly inside the roses and that, although it may not be fair to blame them for not inspecting the roses more often than once a week, if they did not have more frequent inspections they were running the risk of ‘causing’ polluting effluent to enter the river. It was not for the respondent to prove that the appellants had been negligent. The appellants having started to operate their plant on that day could only escape being held to have caused polluted effluent to enter the river if they proved that the overflow of the tank had been brought about by some other event which could fairly be regarded as being beyond their ability to foresee or control.

I would, therefore, dismiss the appeal.

**LORD SALMON:** I agree that this appeal should be dismissed and I wish to add only a few brief observations of my own. It is undisputed that the river on the banks of which stand the appellants’ Mount Sion Works was polluted by contaminated effluent which flowed from those works into the river. The vital question is whether the appellants caused that pollution within the meaning of s 2 (1) of the Rivers (Prevention of Pollution) Act 1951. The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

It seems to me that, giving the word ‘cause’ its ordinary and natural meaning, anyone may cause something to happen, intentionally or negligently or inadvertently without negligence and without intention. For example, a man may deliberately smash a porcelain vase; he may handle it so negligently that he drops and smashes it; or he may without negligence slip or stumble against it and smash it. In each of these examples, no less in the last than in the other two, he has caused the destruction of the vase.



The appellants clearly did not cause the pollution intentionally and we must assume that they did not do so negligently. Nevertheless, the facts, so fully and clearly stated by my noble and learned friend, VISCOUNT DILHORNE, to my mind make it obvious that the appellants in fact caused the pollution. If they did not cause it, what did? There was no intervening act of a third party nor was there any act of God to which it could be attributed. The appellants had been responsible for the design of the plant; everything within their works was under their control; they had chosen all the equipment. The process which they operated required contaminated effluent being pumped round their works until it came to rest in an open tank which they sited on the river bank. If the pumps which they had installed in this tank failed to operate efficiently the effluent would necessarily overflow into the river. And that is what occurred. It seems plain to me that the appellants caused the pollution by the active operation of their plant. They certainly did not intend to cause pollution but they intended to do the acts which caused it. What they did was something different in kind from the passive storing of effluent which could not discharge into the river save by an act of God or, as in *Impress (Worcester) Ltd v Rees* (1), by the active intervention of a stranger, the risk of which could not reasonably have been foreseen.

The appellants relied strongly on *Moses v Midland Railway Co* (2). In that case a private owner's tank wagon filled with creosote formed part of a train being driven by the defendants. At the beginning of the journey the wagon was subjected to careful examination by the defendants which revealed no defect. There was, however, a latent defect in one of its taps. Whilst the train was travelling along the banks of a river this defect caused creosote to leak into the river and polluted it so that many fish were killed. On a charge under s 5 of the Salmon Fishery Act 1861 the justices held that the defendants had not caused the pollution, and that decision was upheld by the Divisional Court. The facts were strikingly different from those of the present case. The wagon was not owned by the defendants, they were in no way responsible for its design or maintenance; they exercised no control over the defective tap; and they had no knowledge or means of knowledge of the latent defect which caused the leak. The decision, which to my mind is not relevant to this appeal, may well have been correct on its facts although the judgments as reported are not very satisfactory.

The appellants contend that even if they caused the pollution still they should succeed since they did not cause it intentionally or knowingly or negligently. Section 2 (1) (a) of the Rivers (Prevention of Pollution) Act 1951 is undoubtedly a penal section. It follows that if it is capable of two or more meanings then the meaning most favourable to the subject should be adopted. Accordingly, so the argument runs, the words 'intentionally' or 'knowingly' or 'negligently' should be read into the section immediately before the word 'causes'. I do not agree. It is of the utmost public importance that our rivers should not be polluted. The risk of pollution, particularly from the vast and increasing number of riparian industries, is very great. The offences created by the 1951 Act seem to me to be prototypes of offences which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty': *Sherras v De Rutzen* (3) per WRIGHT J referred to with approval by my noble and learned friends, LORD REID and LORD DIPLOCK, in *Sweet v Parsley* (4). I can see no valid reason for reading the word 'intentionally', 'knowingly' or 'negligently' into s 2 (1) (a) and a number of cogent reasons for not doing so. In the case of a minor pollution such as the present, when the justices find that there is no wrongful intention or negligence on the part of the defendant, a comparatively nominal fine will no doubt be imposed.

(1) [1971] 2 All ER 357.

(2) (1915), 79 JP 367.

(3) 59 JP 440; [1895] 1 QB 918; [1895-99] All ER Rep 1167.

(4) 133 JP 188; [1969] 1 All ER 347; [1970] AC 132.

This may be regarded as a not unfair hazard of carrying on a business which may cause pollution on the banks of a river. The present appellants were fined £20 and ordered to pay in all £24 costs. I should be surprised if the costs of pursuing this appeal to this House were incurred to the purpose of saving these appellants £43.

If this appeal succeeded and it were held to be the law that no conviction could be obtained under the 1951 Act unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence s 2 (1) (a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it.

I do not consider that the appellants can derive any comfort (as they seek to do) from the inclusion in s 2 (1) (a) of the words 'knowingly permits' nor from the deeming provision against local authorities in relation to sewage escaping into a river from sewers or sewage disposal units. The creation of an offence in relation to permitting pollution was probably included in the section so as to deal with the type of case in which a man knows that contaminated effluent is escaping over his land into a river and does nothing at all to prevent it. The inclusion of the word 'knowingly' before 'permits' is probably otiose and, if anything, is against the appellants, since it contrasts with the omission of the word 'knowingly' before the word 'causes'. The deeming provision was probably included to meet what local authorities might otherwise have argued was a special case and cannot, in my opinion, affect the plain and unambiguous general meaning of the word 'causes'.

For these reasons I would dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Beardall, Fenton & Co*, for *Elliott & Buckley*, Manchester; *Norton, Rose, Botterell & Roche*, for *R E Woodward*, Warrington.

Reported by *G F L Bridgman*, Esq, Barrister.

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## COURT OF APPEAL (CRIMINAL DIVISION)

(KARMINSKI, LJ, ASHWORTH AND HINCHCLIFFE, JJ)

35th February, 3rd March 1972

R v JOHAL. R v RAM

*Criminal Law—Indictment—Amendment—Amendment after arraignment—When permissible—Avoidance of injustice likely to be caused to defendant—Indictments Act, 1915, s 5 (1).*

By s 5 (1) of the Indictments Act, 1915: 'Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice . . .'

No rule of law precludes the amendment of an indictment after arraignment, whether by adding a new count or otherwise, provided that such amendment can be made without injustice to the defendant. An amendment during the course of a trial is likely to prejudice the defendant and, the longer the interval between arraignment and amendment, the more likely it is that injustice will be caused to the defendant.

APPEALS by Balbir Singh Johal and Curmit Kelso Ram against their convictions before SWANWICK, J, at Birmingham Assizes on two counts of an indictment charging them with unlawfully and maliciously wounding one Shangara Singh.

*B A Farrer for the appellants.*

*A R Arneil for the Crown.*

*Cur adv vult*

3rd March. **ASHWORTH J** read this judgment of the court: The two appellants appeared at Birmingham Assizes in June 1971 charged with a number of offences involving in respect of each of them more than one indictment. This appeal is concerned only with the first indictment which in its original form contained only two counts—the first count charging them jointly with wounding with intent, and the second charging them jointly with unlawful wounding. On this indictment they were duly arraigned and each pleaded not guilty. This occurred on the afternoon of 14th June, 1971, and apart from arraignments on the other indictments, nothing further occurred on that day.

On the following day, before the trial of the appellants on the first indictment began and indeed before a jury had been empanelled, counsel who appeared for both appellants sought directions from the trial judge in regard to statements, alleged to have been made by the appellants respectively, in which each purported to blame the other for wounding the victim. The trial judge ruled that the statements were admissible, adding, as might be expected, that he would give a careful direction to the jury to the effect that neither statement could be treated as evidence against the co-accused referred to in it. Thereupon, counsel for the prosecution applied for leave to amend the indictment by adding four further counts. In two of them he proposed to charge the appellant Johal alone with wounding with intent and with unlawful wounding, and in the other two he proposed to charge the appellant Ram alone with the same offences. The application was strenuously resisted but in the end the trial judge granted leave to amend the indictment in the manner sought. The appellants were then arraigned on the further counts and each pleaded not guilty to the charges relating to him. A jury was then empanelled and the trial proceeded. In the course of argument regarding the proposed amendment, counsel for the appellants applied for separate trials of the two appellants, but this application was refused. Eventually

the jury found each appellant not guilty on the first two counts (alleging joint offences) but found each guilty of unlawful wounding on the count charging him alone with that offence.

The main issue in this appeal is whether the trial judge had power to allow the indictment to be amended, after arraignment by the addition of further counts.

[His LORDSHIP dealt with a matter which does not call for report.] On the main issue there is no direct authority although views have been indicated about it in earlier cases. The relevant statutory provision is to be found in s 5 (1) of the Indictments Act 1915, in the following terms:

'Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice . . .'

In passing, it is to be noted that the subsection expressly provides for amendment at any stage of a trial; there is nothing in it precluding amendment after arraignment.

In the two earliest cases cited by counsel for the appellants, *R v Errington* (1) and *R v Jennings* (2), amendments were held to have been wrongly allowed on the ground that the accused would be prejudiced thereby. On the other hand, in *R v Smith* (3) the amendment was upheld, and in the course of giving the reserved judgment of the court HUMPHREYS J said:

' . . . the question argued before us on this appeal was whether the judge had any jurisdiction to direct that amendment. The power to amend an indictment has been contained since 1915 in s. 5 (1) of the Indictments Act, 1915. That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the sub-section in question provides, and, as we think, was intended to provide, that in future the power should be very considerably extended . . . The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law does not charge any offence at all, and, therefore, is bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case, or in any case where the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment, to direct that one person should be tried separately from others, or the trial may be postponed. It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, i.e., the valuable security with which in fact the society parted. We have no hesitation in this case in supporting the action of the judge in amending the indictment.'

It should be noted that in that case the amendment was made at the close of the prosecution's case long after arraignment, but it does not appear to have been

(1) (1922), 16 Cr App Rep 148.

(2) (1949), 33 Cr App Rep 143.

(3) 114 JP 477; [1950] 2 All ER 679; [1951] 1 KB 53.

argued that the time of the amendment was fatal to its validity, still less was it so decided.

Some support for counsel for the appellants' contention is to be found in *R v Martin* (1). In that case the indictment was amended before arraignment, and most of the argument was directed to the issue whether the indictment was defective within s 5 (1) of the Indictments Act 1915. LORD PARKER CJ said:

'We appreciate that no case has been reported which approves the adding of a new count before arraignment and by way of amendment, but nevertheless we consider that there is no objection in principle to this being done provided it can be done without injustice . . . Unless a defendant has ample warning of an intention to apply for a count to be added, the probabilities are that the addition cannot be made without injustice. After arraignment it is doubtful whether a new count can be added at all as the defendant will not have pleaded to it nor, if the trial has started, have been put in charge of the jury on it; and if it were made, injustice, as *R v Errington* (2) and *R v Hughes* (3) show, would almost certainly be caused.'

So far as the last sentence of this quotation is concerned, it is important to realise that in the present case the trial had not started, and counsel for the appellants very properly conceded that neither of the appellants was in any way prejudiced by the addition of the four further counts. All that had happened was that the appellants had been arraigned on the first two counts, and there was no difficulty in arraigning them on the further counts before the trial started.

The decision in *R v Harden* (4) was also relied on by counsel for the appellants. In that case, at the close of the case for the prosecution, application was made to amend the indictment; in respect of some counts leave was refused but in respect of others it was granted. On appeal it was held that leave was rightly granted in respect of one count, but wrongly in respect of another. It is unnecessary to quote from the judgment in which the difference in nature between the two relevant amendments is emphasised. The effect of the decision is that when amendment of a particular count is under consideration it may be a question of degree whether the proposed amendment is no more than the correction of a misdescription or on the other hand involves the substitution of a different charge. In the headnote to the Criminal Appeal Reports of this case it is stated:

'An amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged . . .'

As a statement of principle, to be applied generally, this is, in the judgment of this court, too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally charged, or for the purpose of adding a further charge, injustice would be caused to the accused by granting the amendment, but in some cases (of which the present case is an example) no such injustice would be caused and the amendment may properly be allowed.

Reference was also made to the decision in *R v Hall* (5) but there is no need to consider it in detail; it is an example of an amendment being properly allowed before arraignment when there was no injustice to the person accused.

(1) 125 JP 480; [1961] 2 All ER 747; [1962] 1 QB 221.

(2) (1922), 16 Cr App Rep 148.

(3) (1927), 91 JP 39.

(4) 126 JP 130; [1962] 1 All ER 286; [1963] 1 QB 8.

(5) 132 JP 417; [1968] 2 All ER 1009; [1968] 2 QB 788.



In the judgment of this court there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise. The words in s 5 (1) of the Indictments Act 1915 'at any stage of the trial' themselves suggest that there is no such rule; if the suggested rule had been intended as a limitation of the power to amend, it would have been a simple matter to include it in the subsection.

On the other hand this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

In the present case, although amendment was made after arraignment, the situation was to all intents and purposes the same as if application to amend had been made before arraignment. In the view of this court it would be wholly wrong to decide that in these circumstances the indictment could not be amended.

At the end of counsel's arguments this court indicated that the appeal of each appellant would be dismissed and that the court's reasons would be given later; this has now been done.

*Appeals dismissed.*

Solicitors: Registrar of Criminal Appeals; D E Morgan, Birmingham.

Reported by T R Fitzwalter Butler, Esq, Barrister.

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### COURT OF APPEAL (CRIMINAL DIVISION)

(KARMINSKI, LJ, ASHWORTH AND HENCHCLIFFE, JJ)

29th February 1972

R v STAMFORD

*Criminal Law—Sending obscene or indecent article through post—Issue of obscenity or indecency—Matter entirely for jury—Admissibility of evidence as to effect of article—Post Office Act, 1953, s 11 (1) (b).*

On a charge of sending an obscene or indecent article through the post, contrary to s 11 of the Post Office Act, 1953, the issue whether the article is obscene or indecent is for the jury alone, and it is an issue which they must decide without the evidence of persons who may have views on the matter or may be able to speak as to the effect of the article on them. Although accepted public standards as to obscenity or indecency may vary from age to age, it is exclusively within the province of the jury to determine and safeguard current standards, and it is not open to the prosecution or the defence to call evidence to assist the jury in ascertaining what are the current standards which they have to apply.

APPEAL against conviction and APPLICATION for leave to appeal against sentence. by John David Stamford convicted at Brighton Quarter Sessions of sending an indecent article by post contrary to s 11 of the Post Office Act, 1953, and then sentenced to six months' imprisonment suspended for three years on one charge and fined £100 on each of other four charges.

*J Mulcahy for the appellant.*

*H J Leonard QC and R J A Batt for the Crown.*

**ASHWORTH J** delivered this judgment of the court: This appeal comes before this court as the result of a certificate granted by the recorder of Brighton before whom the present appellant appeared on 30th March 1971 when he was convicted of five offences of sending an indecent article by post contrary to s 11 of the Post Office Act 1953. The form of the certificate is quite short and is as follows:

'I certify that this is a fit case for appeal on the ground that the court should consider whether I was correct in refusing leave to the defence to call evidence of other persons as to the effect upon them of the publications concerned.'

It will be observed from that certificate that this court is concerned, and concerned only, with the question whether in a charge under the Post Office Act 1953, on the issue whether the article or letter is indecent or not, evidence may be called, as counsel put it, to assist the jury in their determination of the question whether the article is indecent. What happened before the learned recorder was that in the course of the defence an application was made for the purpose of calling witnesses, who, it appeared wished to say to the jury what the effect of the brochures in question had been on them when they saw them. The learned recorder quite rightly, in the view of this court, intervened and said he would not allow such evidence to be called, and accordingly it was not called. In due course the present appellant was convicted and a certificate was granted on the recorder's own initiative.

What is urged on behalf of the appellant in this case is that the question of indecency or not is a matter on which the jury may be assisted by evidence from persons of standing or repute who can say what the effect of the article was on them, or who may say, according to counsel for the appellant, that they have published similar articles without criminal prosecutions taking place and so on.

In the judgment of this court the proper starting place is that to which counsel for the Crown directed the court's attention, namely, the section itself. Section 11 (1), as amended by the Post Office Act 1969, provides:

'A person shall not send or attempt to send or procure to be sent a postal packet which . . . (b) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film, book, card or written communication, or any indecent or obscene article whether similar to the above or not; or (c) has on the packet, or on the cover thereof, any words, marks or designs which are grossly offensive or of an indecent or obscene character.'

The recipient, and the effect of the article on him, is nowhere mentioned in the section. Moreover an offence may be committed not only by an attempt to commit it, which is expressly made an offence. It may be committed if the article in question has been detained by the Post Office in the course of transit without ever reaching the intended recipient at all.

So one starts from the premise that the Post Office Act 1953, by this provision, was intended to preclude the use of the Post Office services for the dispatch of dangerous or indecent matter. It is quite true that in that Act there is no express definition of indecency or obscenity. That is not by any means surprising; one has only to reflect on the list of what is prohibited in that section to realise that the words used are all words of common import. Anyone called on to consider the question whether a particular article offends against one or other of the provisions has before him not necessarily the easy, but the simply expressed, task of deciding whether the article falls within one of the words in question.

By contrast Parliament did think it right to include in the Obscene Publications Act 1959 a definition of the word 'obscene', introducing factors which in the view of this court are not present at all in the 1953 Act. Moreover the 1959 Act provided

by s 4 a special defence which would not be expected in the Post Office Act 1953, nor indeed is there present the defence which is commonly referred to as the defence of public good. Section 4 (2) provides:

'It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground'

The said ground is the public good.

Two points should be mentioned at once on that. First, expert evidence is not admitted on the main issue before the jury which is whether the article comes within the prohibition of the Act at all. The second point is that the expert evidence is limited to the special defence which is provided by s 4 (1). It is in terms said in s 4 (2): 'either to establish or negative the said ground' namely, the ground of public good, not to establish or negative the contention that the article is obscene.

Accordingly, one starts, in the view of this court, from the contrast between the two Acts and the mischief against which they were respectively directed. That there is a contrast between the two Acts can be seen by a study of some of the reported cases. The question now arising before this court is to what extent evidence may be given on the basic issue whether an article is indecent or obscene or not. Except is one very special instance, the cases establish, or will have established by the time when this decision is given, that no such evidence is admissible.

One reason why the present appeal comes before the court is because of the decision in *R v Stanley* (1). In that case the charge was brought under the same section of the Post Office Act 1953, the allegation being that the article sent was indecent and obscene. Among the issues canvassed in the case was the question whether 'indecent or obscene' gave rise to some kind of duplicity. The reason why that case is important is that in the course of the trial a boy witness had been called in order to prove that he had ordered a brochure and received it. The chairman of London Sessions took the view on his own initiative that it might be valuable to the jury if the boy were asked what the effect was on him. Objection was taken for the accused and counsel, who then appeared for the prosecution, was taken by surprise by the chairman's suggestion, and perhaps was not armed by sufficient reflection on the matter to sustain an objection on his part convincingly. At any rate the evidence was allowed. This court was asked to rule whether such evidence was properly admitted or not but it declined to grasp that particular nettle. One can find this passage:

'There has been a number of cases in which, under the Obscene Publications Act, 1959, witnesses have been called or have been cross-examined as to the effect that some article or photograph had had on them individually. As far as the court knows, there has not yet been any ruling on the matter. However, though the point is raised in the present case, this court once more does not propose to decide the matter, and for this reason, that, having seen the brochure, it is absolutely inconceivable that it could have made the slightest difference whether [the boy] had or had not given this evidence.'

Therefore it remained open at least for argument until today.

In the same year there came before the Court of Criminal Appeal *R v Straker* (2) in which the accused was convicted on four counts of sending an indecent photograph by post contrary to s 11. He applied for leave to appeal on the ground that in previous proceedings under the Obscene Publications Act 1959 the photographs had been

(1) 129 JP 279; [1965] 1 All ER 1035; [1965] 2 QB 327.

(2) [1965] Crim LR 239.

held not to be obscene, and, secondly, indecency must be tested by the effect of the article on the person to whom it is sent. He took care to send the photographs only to people who would not find them indecent. It was held, refusing his application, first, that the issue in the case was indecency not obscenity, and, secondly, and more importantly for the purpose of the Post Office Act 1953, that the test of indecency was objective and the character of the addressee immaterial. While that decision does not in terms dispose of the issue involved in this case, it is in the view of this court implicit in the ruling given that the type of evidence now sought to be introduced in the present case would have been rejected by that court.

It is fair to counsel for the appellant, who has presented this appeal if I may say so with great skill, to say that he candidly admitted that in the light of decided cases it would not have been open for counsel appearing for the appellant to tender a witness for the express purpose of saying: 'In my view this brochure is not indecent'. The reason why he makes that concession is because there is a decision of this court precisely to that effect, and secondly—this lies behind that decision—that is the very issue which the jury have to determine. The decision where one can find the principle set out most conveniently is *R v Calder and Boyars Ltd* (1) in this passage:

'No doubt in very special circumstances (which do not exist here) expert opinion on the issue of obscenity may be admissible (see *Director of Public Prosecutions v. A. & B. C. Chewing Gum, Ltd.* (2)). In the present case, however, the jury were rightly told by the learned judge to consider the issue of obscenity by itself and decide on the tendency of the book without reference to the evidence of the expert witnesses.'

The *Chewing Gum* case was indeed a very special case involving young children, and the Court of Criminal Appeal, as it then was, decided that in the circumstances expert evidence of psychiatrists expert in dealing with children could be admitted, but it is indeed a very special case not likely to be extended.

But the matter can be taken a little further as a result of the well-known case relating to *Oz* magazine, *R v Anderson* (3). There is a passage which is worth citing in full because it is the most recent and the most helpful authority on this whole issue.

'The second matter which arose in the court below, and which requires some general comments by this court, relates to the expert evidence which was called. The defence called expert evidence for something more than 20 days. A great mass of expert evidence was called. Part of the evidence was directed to what is called the "public good" defence contained in s 4 of the 1959 Act . . . So far as evidence was called under that section, no question arises on it now, but a majority of the expert evidence called by the defence in this case bore no relation to the defence of public good under s 4, but was rather directed to showing that the article was not obscene. In other words, it was directed to showing that in the opinion of the witness it would not tend to deprave or corrupt. Now whether the article is obscene or not is a question exclusively in the hands of the jury, and it was decided in this court in *R v Calder and Boyars Ltd* that expert evidence should not be admitted on the issue of obscene or no. It is perfectly true that there was an earlier Divisional Court case in which a somewhat different view had been taken. It was the case of *Director of Public Prosecutions v A and BC Chewing Gum Ltd.* That case in our judgment should be

(1) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

(2) 131 JP 373; [1967] 2 All ER 504; [1968] 1 QB 159.

(3) Ante p 97; [1971] 3 All ER 1152; [1972] 1 QB 304.

regarded as highly exceptional and confined to its own circumstances, namely a case where the alleged obscene matter was directed at very young children, and was of itself of a somewhat unusual kind. In the ordinary run of the mill cases in the future the issue "obscene or no" must be tried by the jury without the assistance of expert evidence on that issue, and we draw attention to the failure to observe that rule in this case in order that that failure may not occur again.'

The result so far on these decided cases in that, first, it is quite plain that evidence is not admissible on the issue whether a particular article is indecent or not or whether it is obscene or not. That issue is a matter entirely for the jury, and it is one which they must decide without what counsel for the appellant calls the assistance of persons who may have views on the matter, or might be able to speak as to the effect on them of the article in question. It was said by counsel for the appellant, and rightly, that one way of expressing the test of indecency or obscenity which are at either end of the scale common to both, was that a matter is obscene if it is one that offends against recognised standards of propriety, and it may be that the same test applies to a matter alleged to be indecent, bearing in mind, as the courts have said, that those are different concepts, different steps on the scale of impropriety, obscenity being the graver of the two. He said, and again rightly, that the standards of propriety vary from age to age, and that it was therefore open to an accused person, or possibly the prosecution, to provide evidence to assist the jury in ascertaining what are the current standards which they have to apply.

That argument, attractive though it was in presentation, is wholly contrary to the principles which have already been mentioned in this judgment, and it is perhaps of assistance to refer to one passage only, although there are many to which reference could be made, in *Shaw v Director of Public Prosecutions* (1). In the speech of LORD MORRIS OF BORTH-Y-GEST the following appears:

'Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries who can be trusted to maintain the corporate good sense of the community and to discern attacks on values that must be preserved.'

That says in a sentence all that need be said on the task which is entrusted to juries and their competence to discharge their duty. They do not need assistance; they are themselves, so to speak, the custodians of the standards for the time being.

That is really all that need be said on this problem, which now one hopes receives its quietus, but in the view of this court the learned recorder was right in refusing to admit this evidence, and the question he asks is to be answered 'Yes'. The result of answering it 'Yes' is that this appeal is dismissed.

There is also an application for leave to appeal against sentence; leave to appeal is granted. Counsel for the appellant points out that unknown to the learned recorder at the time, the business, if I may call it that, carried on by the appellant has now ceased to function, and the offending literature has not been distributed since he was convicted. That does alter the position and the learned recorder was obviously anxious to safeguard the position; for that reason he imposed on count 1 a sentence of six months' imprisonment suspended for three years. In the view of this court he was quite right to do that and that sentence will stand. But at the same time he took the view that owing to a previous conviction for a similar offence, and not knowing of any imminent discontinuance, he ought to show his disapproval

(1) 125 JP 437; [1961] 2 All ER 446; [1962] AC 220.



of the whole matter by imposing a quite considerable fine, namely, £100 on each of the four charges. In the light of what has happened since this court thinks that fine can be considerably reduced and instead of £100 on each of the four charges, the fine will be £25, making £100 in all, but the order for £200 costs will stand.

*Appeal against conviction dismissed. Application for leave to appeal against sentence granted; appeal allowed in part; sentence varied.*

Solicitors: *Peter Moore & Madok*; T Lavelle, Chief Prosecuting Solicitor, Lewes.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(Sir George Baker, P and Rees, J)

16th, 29th July 1971

McEWAN v McEWAN

*Husband and Wife—Maintenance of wife—Assessment of weekly payment—Consideration of husband's potential earning capacity—Jurisdiction of court.*

On an application to vary a matrimonial order the principle stated in *Foster v Foster* [1964] 3 All ER 541 applies, namely, the jurisdiction of the court is not a jurisdiction to fix de novo the amount of maintenance, but the court must consider whether an order to vary should be made, and, if so, for how much the order for maintenance should be varied. When assessing the amount of the weekly sum to be paid by a husband justices are entitled to take into account, not only the husband's actual earnings, but also his potential earning capacity.

APPEAL by the husband from an order of Hartlepool justices dismissing an application by him for variation of a maintenance order made by the justices in favour of his wife.

R A Percy for the husband.

P J M Kennedy for the wife.

*Cur adv vult*

29th July, 1971. **REES J** read the following judgment: This is the judgment of the court on an appeal by a husband from an order made on 9th September 1970 by justices for the county borough of Hartlepool. The justices dismissed an application by the husband to vary, by reducing, maintenance in the sum of £6 per week payable by him pursuant to an order of the same court made on 20th December 1967. The main ground of appeal argued before us was that the justices reached their conclusion by unjustified speculation as to the husband's earning potential without paying any or any sufficient regard to, alternatively ignoring, the fact that he was unemployed at the date of the hearing and had been unemployed for some weeks prior to that. We gave leave to appeal out of time, there being no opposition to that course by counsel for the wife.

The case raised questions as to the proper approach of the court to, and as to the assessment of the means in, the case of a husband who, although presently unemployed, is found to have a substantial potential earning capacity. We have had the advantage of being referred to a number of the decided cases and we think that the problem is one which may not infrequently face justices. At the conclusion of the argument we announced our decision that the appeal would be dismissed and

indicated that we would give our reasons in a considered judgment to be delivered at a later date.

The basic facts of the marriage did not appear from the evidence. The husband, who is a retired detective constable, is about 59 years of age and the wife some two years younger. At all material times the husband had, and still has, a police pension of £24.98 per calendar month providing him with slightly less than £6 per week. The maintenance order in favour of the wife for the weekly sum of £7 was originally made on 19th January 1966 on the grounds of the husband's desertion. On 20th December 1967 the husband applied successfully to the justices to vary that order and it was reduced to £6 per week. We were informed at the Bar that the ground of this application was that the husband was then unemployed but have no information as to his financial or other circumstances at the time save that, no doubt, he was in receipt of his police pension.

We were also informed that a second application to the justices to vary the maintenance order was made by the husband on 27th August 1969, and failed. On this occasion the husband was unemployed and in receipt of unemployment pay of about £10 per week which together with his police pension made up his weekly income to about £16.

We understand there was no appeal against the orders made by the justices on the two occasions last mentioned.

[His LORDSHIP referred to the evidence given before the magistrates on 9th September, 1970, and continued:] Having heard the evidence the justices dismissed the husband's application to reduce the order. In their 'Reasons' they stated that they were not satisfied that the husband was speaking the truth and supported their decision in these terms:

'In consequence we were not convinced, after hearing the evidence of the [husband], that he had made a genuine effort to retain and obtain work suitable to a man of his intelligence and experience. He was obviously fit and mentally alert, and we were not impressed by his statement that he could not find work.

'It was common knowledge that the [husband] was a retired police officer and that he would be in receipt of a pension. He was therefore in a substantially better position than most unemployed men of his age and so long as he was not compelled to obey the court's order he had no great incentive to find work. We considered that it would be quite wrong for us to ignore his earning potential as a fit and capable retired detective constable.'

Counsel in the course of his robust argument for the husband complained that the justices were wrong in approaching the case on the basis of what he described as an unjustified speculation as to the potential earnings of the husband who was, in fact, unemployed and earning nothing. Counsel for the wife put her case in two ways. First he reminded us that this was an application made by the husband to vary an existing order for maintenance and argued that it was, therefore, for him by credible evidence to establish the factual basis for a variation including some material change in circumstances since the matter was last considered by the justices. Secondly, he argued that it was in law the duty of the justices to take into account the potential earning capacity of the husband as they did and there was ample material to support the conclusion that he was capable of earning sufficient to meet the order which he sought to have varied. We deal separately with these arguments.

The application which came before the justices was for the variation of the original order for the sum of £7 per week made on 19th January 1966 which had been varied by reducing the amount to £6 per week by the order of 20th December 1967. This

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application was made pursuant to s 8 (1) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 which applied s 53 of the Magistrates' Courts Act 1952 to matrimonial orders made under the 1960 Act subject to certain statutory restrictions immaterial for the present purpose. Section 53 of the Magistrates' Courts Act 1952 is in the following terms:

'Where a magistrates' court has made an order for the periodical payment of money, the court may, by order on complaint, revoke, revive or vary the order.'

Since 1949 the requirement of the repealed s 7 of the Summary Jurisdiction (Married Women) Act 1895 that such an order could only be varied 'upon cause being shown upon fresh evidence to the satisfaction of the court' has not been re-enacted. The powers of the justices under s 53 of the 1952 Act are thus usefully described by LORD MERRIMAN P in *Trathan v Trathan* (1):

'... and now with the Magistrates' Courts Act, 1952, it is, in relation to increase or diminution of quantum, unnecessary to establish the complaint "upon fresh evidence", with all the limitations, which I need not go into, which the use of those words imports.'

So the complainant seeking the variation need not support his case by 'fresh evidence'. But counsel for the wife argues that nevertheless in order to justify a variation in the amount of the order the complainant must establish that there has been a material change in some relevant circumstance since the order was made which it is sought to vary. So far as orders for maintenance made in the High Court are concerned the proper approach of the court to an application to vary was considered by the Court of Appeal in *Foster v Foster* (2). In that case the statutory power to vary the order was given by s 28 of the Matrimonial Causes Act 1950 of which sub-s (3) was in these terms:

'In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.'

WILLMER LJ stated the views of the court in these words:

'Two things seem to me to emerge from that. The first is that the jurisdiction is a jurisdiction to vary, and basically what the court has to do is to consider whether an order to vary should be made, and, if so, by how much the order should be varied. Prima facie, it is not a jurisdiction to re-fix de novo the amount of maintenance. Secondly, the court is specifically directed to take into consideration any increase or decrease in the means of either of the parties. In those circumstances, it seems to me that the judge was right to take the order of Mr. Registrar FORBES as his starting point. Moreover, I think that he was entitled to proceed on the basis that the order was properly made at the time when it was made. All the more was he entitled to do so having regard to the fact that there never was any effective appeal against that order.'

Since the repeal of the Matrimonial Causes Act 1950, s 9 (7) of the Matrimonial Proceedings and Property Act 1970 has expressly provided that the court shall have regard, inter alia, to 'any change in any of the matters to which the court was required to have regard when making the order to which the application relates'. In our view the principle stated in *Foster v Foster* has not been affected by the change in the terms of the relevant statute.

(1) 119 JP 451; [1955] 2 All ER 701.

(2) [1964] 3 All ER 541.

Does the same principle apply when the justices are dealing with an application to vary an order for periodical payments? The point was considered by this court in *Marpole v Marpole* (1) wherein it was held that the exercise by justices of powers to vary orders for periodical payments should be governed by the principle enunciated in *Foster v Foster*.

According to the evidence of the husband in the instant case there was a change in the relevant circumstances because in addition to his police pension, in August 1969 and January 1970 and possibly also in December 1967, he was in receipt of unemployment pay whereas in September 1970 he was not. Where, as here, a complainant is required to show to the reasonable satisfaction of the justices that there has been a change in the relevant circumstances his case may well fail in limine when the evidence supporting the alleged change is not found to be credible. Even if the justices accepted the evidence of the husband that in spite of proper efforts to obtain unemployment benefit or other social security payments he had been refused them, it by no means followed, in the circumstances of this case, that they were bound to find that his resources in terms of money or benefits in kind were reduced by an equivalent, or any, amount.

There is ample authority for the proposition that when assessing the amount of the weekly sum to be paid by a husband justices are entitled to take into account not only his actual earnings but also his potential earning capacity. To do so is a proper exercise of their duty under s 2 (1) (b) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, as amended, to order that 'the husband shall pay to the wife such weekly sum as the court considers reasonable in all the circumstances of the case'. The point is made in the following terms as early as 1928 by LORD MERRIVALE P in *N v N* (2):

'The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term "faculties" describes the capacity and the ability of the respondent to provide maintenance. And the principle went to this extent, that if a man were living at ease upon an income which was given him voluntarily by other parties, that income could be taken into account. And it went further than that: If a man were living in idleness and chose to refuse to earn money, his "faculties" were not treated as non-existent for that reason.'

That passage has been cited with approval on a number of occasions and notably in the Court of Appeal by HODSON LJ in *J v J* (3). It will be sufficient to conclude this aspect of the matter by a reference to the following passage in the judgment of LORD MERRIMAN P in *Klucinski v Klucinski* (4):

'It is elementary law that, in assessing the amount of maintenance, justices ought to take into account, just as we are bound to do here, not merely the husband's basic wage, but his earning capacity.'

In exercising this power justices must not assess a sum not warranted by the direct evidence before them or by justifiable inferences from the evidence. Thus an excessive order must not be made in order to attempt to force a husband to grant a tenancy to the wife (*Wakeford v Wakeford* (5)). Nor must an order be made which is higher than is justified by a fair assessment of his actual earnings or his potential earning capacity in order that part of the amount should accumulate by way of arrears

(1) (1964), 108 Sol Jo 240.

(2) [1928] All ER Rep 462.

(3) [1955] 2 All ER 617; [1955] P 215.

(4) 117 JP 187; [1953] 1 All ER 683.

(5) 117 JP 455; [1953] 2 All ER 827.

(*Ivory v Ivory* (1)). In a case such as the present where justices have concluded that a husband has not been frank as to his financial position they are entitled to have regard to the realities and to draw inferences that his actual or potential earning capacity is greater than he has stated (*Ette v Ette* (2) and *Brett v Brett* (3) per WILLMER LJ).

Counsel for the husband has sought to argue that in a case where a husband is in fact unemployed at the time of the hearing it is wrong to award any sum on an assessment of his potential earning capacity. He argued that there is a distinction to be drawn between such a case and one in which the husband is in employment but is earning less than a court finds he could earn if he wished. In our judgment such a distinction is not a valid one. Whether the man is in employment or not it is open to justices in an appropriate case on direct evidence or justifiable inference to make an order on the basis of potential earning capacity. An order may more readily be made where justices are satisfied that a husband has not been frank in his evidence before them. We think that the decision of SCARMAN J in *W v W* (4) affords a useful illustration of the proper approach to a case of an unemployed husband who had no capital but nevertheless managed by one means or another to live reasonably well. SCARMAN J said:

'Absence of regular income, though an important circumstance, is not, by itself, decisive: *J v J* (5). One must look also at the man's mental and physical resources, the money at his disposal, however it may be used, his capital position, and the rate of his current personal expenditure. I do not pretend this list is exhaustive, but it serves to emphasise the point that the ability of a husband to make provision for a wife falls to be determined not by a cash calculation but by an evaluation of all his circumstances and resources (see *Klucinski v Klucinski* (6), *J v J* and *Donaldson v Donaldson* (7)).'

For these reasons we are satisfied that the justices were entitled to dismiss the husband's application to vary the order which required him to pay £6 per week to his wife. Since they did not believe his evidence they did not have before them acceptable evidence of a material reduction in the means of the husband. In any event they were entitled to find on the whole of the evidence before them that this husband had an ample earning capacity to enable him, together with his police pension of about £6 per week, to maintain his wife at the rate of £6 per week.

For these reasons we dismissed the appeal.

*Appeal dismissed.*

Solicitors: Crossman, Block & Keith, for Smith & Graham, Hartlepool; Pritchard, Englefield & Tobin, for Levinsons, Walker & Lister, Hartlepool.

Reported by G F L Bridgman, Esq, Barrister.

(1) 118 JP 275; [1954] 1 All ER 898.

(2) [1965] 1 All ER 341.

(3) [1969] 1 All ER 1007.

(4) [1962] 1 All ER 736; [1962] P 124.

(5) [1955] 2 All ER 617; [1955] P 215.

(6) 117 JP 187; [1953] 1 All ER 683.

(7) [1958] 2 All ER 660.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR., MEGAW AND STAMP, LJJ)

22nd March 1972

BEXLEY CONGREGATIONAL CHURCH TREASURER v LONDON BOROUGH  
OF BEXLEY

*Rating—Rateable occupation—Unoccupied premises—House held for eleven months by church available for occupation by minister—General Rate Act, 1967, sched 1, para 2 (f).*

By Sch 1, para 2, to the General Rate Act, 1967: 'No rates shall be payable under para 1 of this schedule in respect of [an unoccupied] hereditament for . . . any period during which . . . (f) the hereditament is held for the purposes of being available for occupation by a minister of religion as a residence from which to perform the duties of his office.'

The managers of a church provided a house as a residence for the minister. A minister who had occupied the house retired on July 30, 1969, and left the house which remained empty until July 2, 1970, when a newly-appointed minister took up residence. During the period July 30, 1969, to July 2, 1970, the managers held the house available as a minister's residence.

**HELD:** when premises were left vacant a mere intention to occupy them in the future did not constitute occupation for rating purposes—there must be something more, such as furniture left on the premises or some use being made of the premises; accordingly, the house in question was not occupied by the church during the relevant period, and it came clearly within the total exemption from rates provided by Sched. 1, para 2 (f) *supra*.

**APPEAL** by the honorary treasurer of the Bexley Congregational Church against the decision of a Queen's Bench Divisional Court, reported 135 JP 574, dismissing an appeal by the appellant against the decision of Bexley justices to issue a distress warrant for £47 os 8d rates alleged to be owing in respect of 259 Upton Road, Bexley, which was owned by the church and used by them as a house for their minister. On 30th July 1969 the then minister left the house and it remained empty until his successor was appointed and took up residence on 2nd July 1970.

The Divisional Court held that it was a legitimate inference from the findings of the justices that during the intervening period the house was being 'held available' within s 49 of the General Rate Act, 1967, on behalf of the church so that it could be offered to a successor to the retiring minister as his residence; actual residence was not essential to constitute occupation where there had been an actual occupation followed by a period of non-occupation and there was an intention to re-occupy at some future date for a charitable purpose; the occupation for use by the church was, accordingly, continued during the intervening period, and the decision of the justices was right. From that decision the treasurer of the church on his own behalf and on behalf of the managers appealed.

*A B Dawson* for the appellant.

*Guy Seward* for the respondent.

**LORD DENNING MR:** The Bexley Congregational Church own a house, 259 Upton Road, Bexley. They use it to house their minister. The house was occupied as a residence by the minister from 1966 until 30th July 1969. That minister was then posted elsewhere. The house was empty until 2nd July 1970, when a newly appointed minister took up residence. So it was empty for 11 months. During this period the church held the house available as a residence. The question is whether or no the church is liable to pay rates in respect of the time when the house remained empty. The justices for the Bexley division held that the church was liable to pay rates, but



they stated a Case for the opinion of the court. The Divisional Court affirmed the decision of the justices. Now the church appeals to this court.

If this had come up for consideration before 1967, the one question would have been this: Was the church in 'occupation' of the house during the 11 months when it was empty but being held available for a minister? If the house was in the 'occupation' of the church, then the church would be liable to pay rates on it, but, being a charity, it would only have to pay one half of the amount otherwise chargeable: see s 8 of the Rating Act 1955 and *Glasgow City Corp'n v Johnstone* (1). But if the house was not in the occupation of the church during those 11 months, then prior to 1967 the church would not be liable to pay any rates for that period because rates were only payable on premises that were occupied. They were not payable on unoccupied premises.

In 1967 however Parliament for the first time enacted that rates were to be paid on unoccupied property but, whilst unoccupied, only one half was payable. This was enacted by s 17 of the General Rate Act 1967 and Sch 1. Parliament made exceptions, however, even to that half liability. It gave total exemption to certain premises which are specified in Sch 1, para (2). In particular it said in para 2 (f) that no rates at all should be paid for any unoccupied house for any period during which

'the hereditament is held for the purpose of being available for occupation by a minister of religion as a residence from which to perform the duties of his office.'

This house at Bexley certainly fulfilled the requirements of para 2 (f) during the 11 months when it was empty. It was held available for the next minister. It would seem, therefore, that the church was not liable to pay any rates at all on the house.

How then have the Divisional Court escaped from para 2 (f)? They have done so by holding that during those 11 months this house was not unoccupied. It was 'occupied' by the church. They said:

'... during the "held available" period the premises in this case would under the old law have been treated as occupied for rating purposes'

Being 'occupied', the house qualified for relief in the period that it was occupied by a charity (see s 40 of the General Rate Act 1967) and was only liable to pay half rates. But it did not qualify for total exemption under Sch 1, para 2 (f), because that only applied to unoccupied premises.

The ultimate question is, therefore: During those 11 months was the house occupied by the church or was it 'unoccupied'? The Divisional Court said it was 'occupied', relying on *Gage v Wren* (2) and *R v Melladew* (3). In *Gage v Wren* a seaside boarding house (which was left empty in the winter apart from a little furniture) was held to be in occupation all the year round. In *R v Melladew* a warehouse (which was being held available for use whenever there were enough goods) was held to be in occupation. While those two cases were, no doubt, rightly decided, they have to be read nowadays in the light of *Hampstead Borough Council v Associated Cinema Properties Ltd* (4). In that case a company during the war took accommodation and kept the premises empty. Their intention was to use them in case they were bombed out of their other premises. It was held that they were not in occupation. This court stated:

'... a mere intention to occupy premises on the happening of a future uncertain event cannot, without more, be regarded as evidence of occupation ...'

(1) 129 JP 250; [1965] 1 All ER 730; [1965] AC 609.

(2) (1902), 67 JP 32; [1900-3] All ER Rep 247.

(3) 71 JP 125; [1907] 1 KB 192; [1904-7] All ER Rep 339.

(4) 108 JP 155; [1944] 1 All ER 436.

That case shows that when premises are left vacant, a mere intention to occupy them in the future does not constitute occupation. There must be something more, such as furniture left on the premises or some use being made of them.

Applying this principle, to the facts stated in the Case, I think that under the previous law there was no occupation by the church and they would not have been liable before 1967 to pay any rates at all. And once the house is held to be unoccupied during those 11 months, it now comes clearly within the total exemption provided by Sch 1, para 2 (f) which I have read. That sub-paragraph covers this case completely. It is a specific provision saying that, although this house is unoccupied and would prima facie be liable to pay half rates, nevertheless, as it is being held available for a minister of religion, it is exempt even from paying half rates.

We have had some discussion on s 40 of the General Rate Act 1967 and particularly sub-s (9). That section is dealing with premises that are occupied, not premises that are unoccupied. It gives to charitable organisations relief up to half the rates when the hereditament is occupied by a charity and wholly or mainly used for charitable purposes. Section 40 (9) deals with houses which are occupied by a minister or are occupied (by the presence of furniture there) whilst being held available for a minister. It provides that it shall be regarded as occupied by a charity and wholly or mainly used for charitable purposes. That section applies only to occupied premises. It does not apply to an unoccupied house. Such a house, whilst being held available for a minister, falls precisely within Sch 1, para (2) (f).

This interpretation gives a sensible meaning to para 2 (f) of Sch 1, whereas the Divisional Court found it difficult to explain its presence. I think para 2 (f) is enacted expressly to give exemption altogether to such a case as the present. The church is not liable even to half rates because it is being held available to a minister. I would allow the appeal accordingly.

**MEGAW LJ:** I agree. With great respect to the Divisional Court, I think the presence of sub-para (f) in para (2) of Sch 1 to the General Rate Act 1967 is conclusive of the issue which here arises. I agree with the proposition put forward by counsel on behalf of the appellant, that by reason of the inclusion of that paragraph it is clear that Parliament contemplated that premises can be unoccupied for rating purposes despite the fact that they are being held for the purpose of being available for occupation by a minister of religion as a residence from which to perform the duties of his office. On the facts as found in the Case Stated, that seems to me to be conclusive in favour of the appellant.

**STAMP LJ:** I agree. Section 40 (9), which is a relieving section and on which reliance was placed in the Divisional Court, is in the nature of a definition section or a section expository of the language of s 40, and only applies for 'the purposes of this section'. It can in my view have no effect in determining whether a particular person is or is not in occupation for the purposes of other sections of the Act.

*Appeal allowed.*

Solicitors: Kingsford, Dorman & Co; E M Bennett, Erith.

Reported by G F L Bridgman, Esq, Barrister.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(LAWTON, LJ, GEOFFREY LANE AND MARS-JONES, JJ)

2nd, 9th March 1972

**R v CAVANAGH. R v SHAW**

*Criminal Law—Evidence—Witness—Witness listed on back of indictment as prosecution witness—Duty of prosecution with regard to securing attendance—Prosecution prevented from securing attendance by events outside their control—Discretion of judge to permit trial to proceed—No injustice to defence.*

The prosecution must take all reasonable steps to secure the attendance of any of their witnesses who are not the subject of a conditional witness order or whom the defence might reasonably expect to be present. Where, however, the prosecution are prevented, despite such steps, from securing the attendance of a witness by events outside their control, the trial judge may in his discretion permit the trial to proceed provided that no injustice will be done thereby.

The appellants were charged with the robbery of T, the robbery of B, and unlawfully wounding B. T, B and a third witness, M, were Indian seamen and left England for India. B was unable to sail back from India with T and M by reason of illness, though there was a possibility of his being able to be flown to England within a few days from the date when the case came on for trial. B was listed on the back of the indictment as a prosecution witness, and the prosecution were anxious to call him, but nevertheless were prepared to proceed in his absence. No application was made that B's deposition should be read, but the defence contended that the trial should not proceed in the absence of B. The trial judge overruled a submission to that effect by the defence. The appellants were convicted of unlawful wounding, the counts for robbery having been withdrawn by the judge from the jury. On appeal.

**HELD:** the judge's ruling was correct, as on balance the defence were not prejudiced by the absence of B.

**APPEALS** by James Michael Cavanagh and William Anthony Shaw against their convictions at Liverpool Crown Court of unlawfully wounding one Anil Bhatanagar when they were sentenced to terms of imprisonment.

*A D Kennedy for the appellants.*

*P G Smith for the Crown.*

*Cur adv vult*

9th March. **GEOFFREY LANE J** read the following judgment of the court: On 29th April 1971 at Liverpool Crown Court these two appellants were convicted of the offence of unlawfully wounding a man named Bhatanagar. Cavanagh was sentenced to 18 months' imprisonment and a suspended sentence of six months' imprisonment imposed on him on 10th July 1970 at the same court was ordered to take effect consecutively as a term of three months, making a total of 21 months. Shaw was sentenced to two years' imprisonment. In his case also suspended terms of nine and six months' imprisonment imposed on 10th July 1970 were ordered to take effect consecutively as a term of 12 months, making in all three years' imprisonment. Each of them now appeals to this court against conviction, the single judge having adjudged that the grounds of appeal raised a point of law.

The indictment contained three counts. The first alleged against both appellants that they had jointly robbed one Talwar; the second, a similar charge of robbery in respect of Bhatanagar; the third count was likewise a joint charge that both men had wounded Bhatanagar with intent to cause him grievous bodily harm. At the close of the case for the prosecution the judge withdrew both counts of robbery from

the jury's consideration, and left to their consideration only the alternative on the third count of unlawful wounding.

The facts of the case were these. Talwar, Bhatanagar and Moses were three Indian seamen. They went together to a club in Liverpool on the evening of 3rd December 1970. That club proved unsatisfactory because it was overcrowded and there were apparently insufficient women available. The Indians then met the two appellants outside the club and were invited by the appellants to go to what was described as a better club in another part of the town. A taxi-cab was summoned and all five travelled in it to a house apparently known to the appellant Shaw. There they stayed. Shaw knocked on the door of the house and a man came out to speak to him.

Shaw then returned to the Indians and struck Bhatanagar on the left eyebrow causing laceration and bruising. At the committal proceedings Bhatanagar gave evidence that he was then robbed of a sum of money. This evidence was not given at the trial owing to the absence of Bhatanagar. Talwar ran off when he saw what was happening, but the appellant Cavanagh ran after him and seized him by the overcoat collar. The coat came off, Talwar escaped, and was joined by Moses, who had also decided that retreat was advisable.

Talwar and Moses came back to the house shortly afterwards with a policeman. Shaw was still there. Talwar said to the policeman: 'That's the man who hit my friend', to which Shaw replied: 'What's the game?' He was told that he would be arrested for robbery and replied: 'It was self-defence'. As they were on their way back to the police station, they saw the appellant Cavanagh who was thereupon arrested. When charged he said, according to the policeman: 'You've got me bang to rights'. Bhatanagar was said to have identified both men at the police station. Shaw's riposte was that Bhatanagar had started the fight.

The issues before the jury were accordingly simple. Were they certain that the attack on Bhatanagar was in pursuance of a joint plan between the appellants? Were they certain that Shaw was not acting in self-defence? No criticism is, or indeed could be, made of the direction to the jury.

The sole point in this appeal arises in this way. All the three Indians, being seamen, were not readily available to give evidence. The case was listed for mention on 19th February and again on 5th March 1971. On each occasion it was stated on behalf of the prosecution that the witnesses were not available. When the case finally came on for trial on 26th April 1971, it happened that contrary to expectations the witness Bhatanagar had been unable to sail with the other two Indians because of illness or injury. There was a possibility that he might perhaps be able to be flown to this country from India within two or three days, but it was by no means certain. His name was listed on the back of the indictment as a witness.

The prosecution were ready and willing to proceed. No application was made that the deposition of Bhatanagar should be read. Counsel for the defence submitted that the trial should not proceed in the absence of Bhatanagar. That submission was overruled by the learned judge and the trial accordingly continued.

Counsel for the appellants now submits to this court that the decision was wrong, and that the trial should not have been allowed to proceed in the absence of Bhatanagar. That submission is based primarily on the judgment of this court in *R v Oliva* (1). LORD PARKER CJ, in delivering the judgment of the court, said this:

'Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they

<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner. <i>Dutton v Bognor Regis United Building Co Ltd</i> .. .. .	CA	201
<b>LOCAL GOVERNMENT</b> - Elections. See <b>ELECTIONS</b> .		
<b>LOTTERY</b> . See <b>GAMING</b> .		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <i>R v Coleshill Justices. Ex parte Davies</i> .. .. .	QBD	51
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine. <i>R v Southampton Justices. Ex parte Briggs</i> .. .. .	QBD	237
<b>MARKET</b> - Statutory monopoly - Injunction to restrain unlicensed person holding market - Birmingham Corporation (Consolidation) Act, 1883, s 89. <i>Birmingham Corporation v. Perry Bar Stadium Ltd</i> .. .. .	ChD	359
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2). <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42. <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>OBSCENITY</b> . See <b>CRIMINAL LAW</b> ; <b>CUSTOMS AND EXCISE</b> .		
<b>PILOT</b> . See <b>SHIPPING</b> .		
<b>POLICE</b> - Obstruction. See <b>CRIMINAL LAW</b> .		
<b>POLLUTION</b> . See <b>RIVER</b> .		
<b>POST</b> . Sending obscene article through. See <b>CRIMINAL LAW</b> .		
<b>PUBLIC ORDER</b> - Insulting behaviour conducive to breach of peace - 'Insulting' - Behaviour affronting other people and evidencing disrespect or contempt for their rights - Behaviour foreseen by reasonable person as likely to cause resentment or protest - Public tennis match - Disruption of match by defendant jumping over barrier and running on court - Public Order Act, 1936, s 3, as replaced by Race Relations Act, 1965, s 7. <i>Cozens v. Brutus</i> .. .. .	QBD	390
<b>PUBLIC ORDER</b> - Public place - Open space to which public have access - Tennis court - Grounds consisting of courts, administrative buildings, and partly covered stands around one court - Match disrupted on that court - Public Order Act, 1936, s 9. <i>Cozens v Brutus</i> .. .. .	QBD	390
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs. <i>Riggall v Hereford County Council</i> .. .. .	QBD	172
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declaration by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (2) (10). <i>London Borough of Ealing v Race Relations Board</i> .. .. .	HL	112
<b>RACE RELATIONS</b> - Provision of facilities - Discrimination - Members' club - Refusal to admit coloured man as member - Members of club 'section of public' - Impersonal quality distinguishing them from public at large - Clubs where admission by invitation - Race Relations Act, 1968, s 2 (1). <i>Race Relations Board v Charter</i> .. .. .	CA	249
<b>RATING</b> - Rateable occupation - Unoccupied premises - House held for eleven months by church available for occupation by minister - General Rate Act, 1967, sched 1, para 2 (f). <i>Bexley Congregational Church Treasurer v London Borough of Bexley</i> .. .. .	CA	532
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Capricious, frivolous, or vexatious action - Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .. .. .	CA	367
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Need of tenants' consent to reference - Reference of number of contracts together - Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .. .. .	QBD	11



<b>RIGHT OF WAY</b> – Land sold by Secretary for Air – Conveyance of land ‘freed from rights’ – Application to rights of way – Defence Act, 1842, s 14. <i>Attorney-General v Shonleigh Nominees Ltd</i> .. .. .	CA	407
<b>RIVER</b> – Pollution – ‘Causes’ – Common sense meaning – Liability in absence of negligence or knowledge – Novus actus interveniens – Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a). <i>Alphacell Ltd v Woodward</i> .. .. .	HL	505
<b>ROAD TRAFFIC</b> – Causing death by dangerous driving – Evidence – Previous drinking – Admissibility – Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit – Evidence of substantial excess rightly admitted on major charge – Road Traffic Act, 1960, s 1. <i>R v Thorpe</i> .. .. .	CA	301
<b>ROAD TRAFFIC</b> – Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit – Breath test – Requirement to provide specimen – ‘Person driving or attempting to drive’ – Pursuit by constable after suspicion – Requirement when person no longer driving or attempting to drive – Road Safety Act, 1967, s 2 (1). <i>Sakhuja v. Allen</i> .. .. .	HL	414
<b>ROAD TRAFFIC</b> – Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit – Specimen of blood for laboratory test – Analyst’s certificate of proportion of alcohol – Admissibility in evidence – Failure to serve copy on defendant – Waiver – No objection to evidence before close of case for prosecution – Road Traffic Act, 1962, s 2 (2). <i>R v Banks</i> .. .. .	CA	306
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – ‘Accident’ – Broken down car pushed by other car – Interlocking of bumpers – Breath test – Damage to both cars – Road Safety Act, 1967, s 2 (2). <i>R v Morris</i> .. .. .	CA	194
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Breath specimen – Requirement to provide – Defendant in hospital Words spoken by constable in honest and reasonable belief that they would be understood – Failure by defendant to hear or comprehend request – Validity of requirement – Road Safety Act, 1967, s 3 (2) (b). <i>R v Nicholls</i> .. .. .	CA	481
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Disqualification – Special reasons – Vehicle parked on highway – Driving of vehicle few yards from highway to private parking place – Road Traffic Act, 1962, s 5 (1). <i>James v Hall</i> .. .. .	QBD	385
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Disqualification – Special reasons – Vehicle parked on highway – Vehicle driven from one parking place to another – Route covering 200 yards along busy street – Potential source of danger to other road users – Road Traffic Act, 1962, s 5 (1). <i>Coombs v Kehoe</i> .. .. .	QBD	387
<b>ROAD TRAFFIC</b> – Motorway – Hard shoulder – Part of verge – Marginal strip – Part of carriageway – Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f). <i>Wallwork v Rowland</i> .. .. .	QBD	137
<b>ROAD TRAFFIC</b> – Motorway – Prohibition against stopping on verge – Stopping permitted ‘by reason of any accident, illness or other emergency’ – ‘Emergency’ – Need for element of suddenness – Danger alleged to constitute emergency not apparent before driver got on motorway – Drowsiness – Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9. <i>Higgins v Bernard</i> .. .. .	QBD	314
<b>ROAD TRAFFIC</b> – Regulations relating to construction, etc., of vehicles – Using vehicle on road in contravention of regulations – ‘Using’ – Vehicle driven by person other than owner’s servant at owner’s request – Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64. <i>Crawford v Haughton</i> .. .. .	QBD	234
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Pilotage by unlicensed pilot after offer – Ship moving from one mooring to another – Pilotage district byelaws – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws Part IX, byelaw 2. <i>Crouch v McMillan</i> .. .. .	QBD	179
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Ship moving from mooring to discharge berth – Pilotage by unlicensed pilot after offer – General offer insufficient – Need of specific offer communicated in relation to particular movement of ship – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2. <i>Montague v Babbs</i> .. .. .	QBD	144

<b>TOWN AND COUNTRY PLANNING - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).</b>		
<b>McDonald v Howard Cook Advertising Ltd .. .. .</b>	<b>QBD</b>	<b>79</b>
<b>TOWN AND COUNTRY PLANNING - Compulsory purchase - Compensation - Assessment - Land in area zoned for residential building - No prospect of permission being given for that use - Land Compensation Act, 1961, s 16 (2).</b>		
<b>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council .. .. .</b>	<b>CA</b>	<b>93</b>
<b>TOWN AND COUNTRY PLANNING - Enforcement - Notice - Mining operations - Notice specifying substantial area - Actual working only in two smaller areas within specified area - Some operations more than four years before service of notice - Town and Country Planning Act, 1962, s 45 (1) (2).</b>		
<b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council .. .. .</b>	<b>QBD</b>	<b>276</b>
<b>TOWN AND COUNTRY PLANNING - Enforcement - Notice - Notice to be served within four years from carrying out of development - Mining operations - Initial working of area more than four years prior to notice - Subsequent working of area within four-year period - Whether new development or continuation of original development - Validity of notice - Town and Country Planning Act, 1962, s 12 (1), s 45 (2).</b>		
<b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council .. .. .</b>	<b>QBD</b>	<b>276</b>
<b>TOWN AND COUNTRY PLANNING - Enforcement - Notice - Service on occupier of land affected - 'Occupier' - Licensee of caravan site - Right to be served with notice - Control over site - Duration of enjoyment - Town and Country Planning Act, 1962, s 45 (3).</b>		
<b>Stevens v London Borough of Bromley .. .. .</b>	<b>CA</b>	<b>261</b>
<b>TRADE DESCRIPTIONS - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3).</b>		
<b>Naish v Gore .. .. .</b>	<b>QBD</b>	<b>1</b>
<b>TRADE DESCRIPTIONS - False description - Price - Misleading - 4d refund label on bottle - Refusal of refund - Trade descriptions Act, 1968, s 11 (2).</b>		
<b>Doble v David Greig Ltd .. .. .</b>	<b>QBD</b>	<b>469</b>
<b>YOUTHFUL OFFENDER, See CRIMINAL LAW; MAGISTRATES.</b>		

1. The first part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a list of contacts for a specific organization or group.

2. The second part of the document is a series of paragraphs of text, which are written in a cursive script. The text appears to be a letter or a report, and it contains several paragraphs of information. The handwriting is somewhat difficult to read, but the general structure of the document is clear.

3. The third part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a list of contacts for a specific organization or group.

4. The fourth part of the document is a series of paragraphs of text, which are written in a cursive script. The text appears to be a letter or a report, and it contains several paragraphs of information. The handwriting is somewhat difficult to read, but the general structure of the document is clear.

5. The fifth part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a list of contacts for a specific organization or group.

6. The sixth part of the document is a series of paragraphs of text, which are written in a cursive script. The text appears to be a letter or a report, and it contains several paragraphs of information. The handwriting is somewhat difficult to read, but the general structure of the document is clear.

7. The seventh part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a list of contacts for a specific organization or group.

8. The eighth part of the document is a series of paragraphs of text, which are written in a cursive script. The text appears to be a letter or a report, and it contains several paragraphs of information. The handwriting is somewhat difficult to read, but the general structure of the document is clear.

9. The ninth part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a list of contacts for a specific organization or group.

10. The tenth part of the document is a series of paragraphs of text, which are written in a cursive script. The text appears to be a letter or a report, and it contains several paragraphs of information. The handwriting is somewhat difficult to read, but the general structure of the document is clear.

should call them, either calling and examining them, or calling and tendering them for cross-examination.'

Taken at face value, that ruling provides strong support for the appellants' case. The court in *R v Oliva*, however, was concerned with a case in which the prosecution had certain witnesses available but chose not to call them on the basis that they were, in the view of the prosecution, unreliable. The present case is entirely different. The prosecution were anxious to call Bhatanagar whom they regarded as reliable. They were prevented from so doing by events outside their control. In such circumstances, in the judgment of this court, the decision in *R v Oliva* and the passage cited from the judgment of LORD PARKER CJ have no application.

The prosecution must take all reasonable steps to secure the attendance of any of their witnesses who are not the subject of a conditional witness order or whom the defence might reasonably expect to be present. The reason for that is obvious and was expressed in *R v Woodhead* (1), a case at Liverpool Assizes, where ALDERSON B said:

'You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule.'

If, however, it proves impossible, despite such steps, to have the witnesses present, the court may in its discretion permit the trial to proceed provided that no injustice will be done thereby. What considerations will affect the exercise of the court's discretion will vary infinitely from case to case. Would the defence wish to call the witness if the prosecution did not? What are the chances of securing the witness's attendance within a reasonable time? Are the prosecution prepared to proceed in his absence? If so, to what extent would the evidence of the absent witness have been likely to assist the defendant? If the absent witness can be procured, will other witnesses by then have become unavailable? There will be many other matters which may have to be considered.

In the present case the defence put forward by the appellants was this. Cavanagh, it was submitted, was not party to any plan to assault or wound Bhatanagar. Shaw, although he admittedly struck Bhatanagar, did so in self-defence after he himself had been threatened or attacked by Bhatanagar.

Counsel for the appellants has informed this court that he was anxious to cross-examine Bhatanagar for the following purposes. First, in an endeavour to establish that Bhatanagar had made a homosexual approach to Cavanagh and that this had started all the trouble. The result of any cross-examination on these lines would have been to let in the character of Cavanagh, whereas in the absence of Bhatanagar, Cavanagh could with impunity have made such allegations as he saw fit. Secondly, he wished to put questions to Bhatanagar in the hope of demonstrating a discrepancy between the evidence of that witness and the evidence of the police officer. Thus he hoped to discredit the police officer and thereby cast doubt on the accuracy of his evidence about his interview with Cavanagh. This court has seen Bhatanagar's deposition and has come to the firm conclusion that hope this of counsel for the appellants was misplaced. Such difference as there was between the evidence of

(1) (1847), 2 Car & Kir 520.

the police officer and the deposition of Bhatanagar was minimal and gave no ground for doubting the veracity of either.

On the other side of the balance sheet there were many advantages to be gained by the appellants from the absence of the witness. They could run the 'homosexual advance' defence with impunity. Shaw escaped the possibility of a conviction for robbery. Both might have been acquitted altogether. On balance the defence was better off with Bhatanagar in India than if he had been in Liverpool. The learned judge was, in the judgment of this court, correct in allowing the trial to proceed as he did. These appeals are accordingly dismissed.

There is further before this court an application by the appellant Shaw for leave to appeal to the House of Lords. As far as that application is concerned, this court certifies that a point of law of general public importance is involved in the decision of this court, but refuses leave to appeal.

*Appeals dismissed.*

Solicitors: Registrar of Criminal Appeals; R N Nicholson, Liverpool.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### CENTRAL CRIMINAL COURT

(SHAW, J)

11th, 12th, 13th, 14th, 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th January, 22nd March, 1972

R v ROBSON R v HARRIS

*Criminal Law—Evidence—Tape recordings—Admissibility—Prima facie case of originality—Quality adequate to enable jury to form fair assessment of conversations recorded.*

Before a tape recording can be admitted in evidence the judge is required at the first stage to do no more than satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recording up to the moment of production in court. Where the judge has arrived at a clear view that on the balance of probabilities a tape recording is original and authentic and that in continuity, clarity and coherence its quality is at the best adequate to enable the jury to form a fair and reliable assessment of the conversations recorded, no injustice can arise from the tape being put before the jury as a matter for their consideration.

PRELIMINARY ISSUE AND RULING on the question of the admissibility of tape recordings sought to be put in evidence at the trial of Detective-Inspector Bernard Jack Robson and Detective Sergeant Gordon Frederick Harris on charges of conspiracy to pervert the course of justice, conspiracy to obstruct the course of justice, and corruptly accepting bribes.

J C Mathew and Richard Du Cann for the Crown.

J P Comyn QC and I Finstein QC for the accused Robson.

R H K Frisby QC and J Thomas for the accused Harris.



*Cur adv vult*

22nd March. **SHAW J** read the following judgment: On 11th January 1972 when the two accused had been arraigned counsel intimated that objection was taken to the admissibility of tape recordings which were a prominent part of the evidence for the prosecution. In all the circumstances it appeared expedient that the question of admissibility should be decided before the case was opened to the jury. Accordingly I heard evidence and argument in this regard in the absence of the jury but after they had been empanelled and sworn. On 26th January I ruled against the objections, but then gave no reasons since to have done so would have meant expressing views on matters which the jury would have to decide for themselves as to the authenticity and originality of the tape recordings. The trial proper then proceeded and on 3rd March the jury returned verdicts of guilty against both accused. There is now no possibility of prejudice if I state the reasons which led me to reject the objections which were taken, and, indeed, as there may be an appeal, it is desirable that I give those reasons so that any point arising out of them may be argued on behalf of the prospective appellants.

It was not contended that the tape recordings were, as such, inadmissible evidence of what was recorded on them. The objections taken were put under the following heads. First, it was said that the recordings, being in the nature of documentary evidence, must be excluded unless either (a) they were shown to be originals, or (b) the absence of the originals was satisfactorily explained and it was shown that the recordings which it was sought to be put in evidence were true copies of those originals. This objection was, of course, founded on the strict rule requiring that the best evidence must be tendered or its absence accounted for before secondary evidence can be received. The application of the rule in a trial by jury can give rise to difficulties in delimiting the function of the judge in deciding admissibility while at the same time avoiding any unnecessary or unwarranted incursion into matters which go to cogency and weight which are for the jury to consider and to decide. In the present case the tape recordings were put forward by the prosecution as being original copies.

The second head of objection was that the recordings which the prosecution intended to produce were so defective as to be unreliable and misleading. It was submitted that they were riddled with discontinuities; that they were in many parts unintelligible; that some were of very poor quality and that altogether they were so untrustworthy and suspect that their potential prejudice far outweighed any evidential value claimed for them. Even if, therefore—so it was submitted—the recordings were strictly admissible, the court ought in its discretion to exclude them so as to ensure that no injustice would be done to the accused.

Counsel on both sides supported the proposition that it was for the prosecution, as the party seeking to put forward the recordings, to prove them to be originals and that the standard of proof in this regard was the balance of probabilities. On this basis the judge would have to consider all the evidence proffered by the prosecution and by the defence which might go to the question whether the recordings were originals or not. The determination of the question is rendered more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.

I may say in passing that in a recent criminal trial, *R v Stevenson* (1), where a similar question arose it was contended that the standard of proof of originality was that which applied to any issue which had to be resolved by the jury in such a trial, namely, proof beyond reasonable doubt. This is, of course, right if and when the issue does come before the jury as a matter they have to decide as going to weight and cogency.

(1) 135 JP 174; [1971] 1 All ER 678.

In the first stage, when the question is solely that of admissibility—i.e., Is the evidence competent to be considered by the jury at all?—the judge, it seems to me, would be usurping their function if he purported to deal with not merely the primary issue of admissibility but with what is the ultimate issue of cogency. My own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a *prima facie* case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court. If that evidence appears to remain intact after cross-examination it is not incumbent on him to hear and weigh other evidence which might controvert the *prima facie* case. To embark on such an enquiry seems to me to trespass on the ultimate function of the jury. It is true that in determining whether an alleged confession is admissible or not the judge has the duty of deciding a contentious issue and he has to apply the same criteria as a jury would have to do; but this is an anomalous case deriving from its own special history and from considerations peculiar to confessions. It is perhaps worth noticing that if in regard to an alleged confession the question is not whether it is voluntary but whether it was made at all, that question is solely for the jury's determination; the trial judge has no part to play except to sum the matter up to them.

Although in the present case the objection was taken on the question of originality of the tape recordings the real gravamen of the objection was an attack on their authenticity. This larger issue is manifestly one for the jury in the same way as is the credibility of any witness although, of course, the jury's consideration must be confined to evidence which is in the first place admissible. However, for the purposes of this case, I accepted the proposition that I ought to conduct a comprehensive enquiry into not only the history of the tapes but also their nature and condition and that for this purpose I should hear evidence on both sides and decide the question on the balance of probabilities in the light of all the material before me. Accordingly I heard a mass of evidence beginning with a number of witnesses who, in support of the originality of the tapes, gave evidence of their history from the actual process of recording up to the time of their production in court. The testimony of those witnesses was unshaken, so it appeared to me, and undiminished by cross-examination. Indeed, as it eventually appeared, there was no evidence to refute their account of how the tapes first came into existence and how they had since been in safe and secure custody without opportunity for fabrication or tampering of any kind. At the conclusion of that evidence there was a strong *prima facie* case for the originality of the recordings. As I have already ventured to suggest, that was, as I see it, the apt and proper stage at which to rule on the fundamental question of admissibility. If I had then been called on to make a decision on the evidence adduced by the Crown I would have had no hesitation in overruling the objections, whether as a matter of strict law or as a matter of discretion. However, the matter proceeded and I listened to the evidence of four experts whose examination of the tapes had led them to form views adverse to their originality and indeed their authenticity. They were, of course, called on behalf of the defence. If their opinions were correct this evidence ran counter to the factual evidence as to the history of the tapes. The prosecution then called in rebuttal yet another expert who disagreed with the opinions expressed by the defence experts and maintained that there were no indications in the tapes themselves which tended to controvert the factual evidence of their origin. This exercise occupied some two weeks. A similar one was undertaken by MELFORD STEVENSON J in the case of *R v Maqsood Ali* (1), where not only the recordings but the translation into English of conversations recorded in Urdu and Punjabi was called into question. The learned judge was apparently reluctant to take the course he

(1) 129 JP 396; [1965] 2 All ER 464; [1966] 1 QB 688.

did, as appears from a passage in the report of the appeal in the Court of Criminal Appeal where MARSHALL J, giving the judgment of the court, said:

'Here the learned judge was pressed to undertake an inquiry into the weight of the evidence and, although reluctant at first, he ultimately agreed to do so. In the view of this court, the cases must be rare where the judge is justified in undertaking his own investigation into the weight of the evidence which, subject to proper directions from the judge, is really the province of the jury, but the court sees that there can be cases where the issues of admissibility and weight can overlay each other. We think that this was one of those rare cases in which the judge was justified in doing what he did.'

The judge's reluctance derived from the fact that it appeared to him that he was trespassing on the functions of the jury in deciding on credibility and the weight of the evidence and it may be added that the recordings and the transcripts, with the appropriate warnings to the jury, had in fact in that case been admitted. In the case of *R v Stevenson*, to which I have already referred, KILNER BROWN J felt himself obliged to hear evidence from both sides in order to decide whether evidence in the form of tape recordings should be excluded on the ground that they were copies. He too had misgivings as to where the line should be drawn between matters going to admissibility and matters which really went to weight and cogency. He said:

'Consequently in this case an extremely lengthy and detailed examination of the evidence has taken place on the voir dire. This examination has been conducted with very great care. It has been highly technical and very scientific at times and extremely burdensome for everybody engaged in this case. I interpolate to say that I have been greatly assisted by the way in which this examination has taken place, greatly assisted by those who had the technical duty of producing it, by those who have given evidence and by counsel who have probed that evidence before me. Nevertheless, as a general rule it seems to me to be highly undesirable, and indeed wrong for such an investigation to take place before the judge. If it is regarded as a general practice it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated the judge would be called on to usurp the functions of the jury. Notwithstanding the wide area over which this inquiry has ranged I intend to limit my approach to one single issue which in my view is legitimately within the province of admissibility. It may be alternatively, if I am wrong in that, a question of discretion. I decide this matter on the narrow but vital question whether or not the so-called original tapes are established as original.'

If I would venture to qualify at all what the learned judge was there saying I would add the words 'prima facie'; i.e. the judge is called on to decide the narrow but vital issue whether or not the so-called original tapes are shown prima facie to be original. It is difficult, if not impossible, to draw the philosophical or theoretical boundary between matters going to admissibility and matters going properly to weight and cogency; but, as I have already said, it is simple enough to make a practical demarcation and set practical limits to an enquiry as to admissibility if the correct principle is that the prosecution are required to do no more than set up a prima facie case in favour of it. If they should do so, the questioned evidence remains subject to the more stringent test the jury must apply in the context of the whole case, namely, that they must be sure of the authenticity of that evidence before they take any account of its content. There is, so it seems to me, no danger of injustice to an accused in such a procedure for nothing could be more damaging to, if not

destructive of, a prosecution case than to have part of the evidence on which it relies exposed in the face of the jury as fabricated and contrived.

In the present case, having heard evidence in great detail on both sides and having considered it in its totality, I have arrived at the clear view that on the balance of probabilities the tape recordings in question were originals and authentic. Among other considerations I was impressed by what appeared to me the manifest truthfulness and reliability of the two reporters on the staff of The Times who had arranged for the recordings to be made and for their subsequent safe custody. During the course of the evidence and argument on the issue of admissibility the recordings were played back many times. In the end I came to the view that in continuity, clarity and coherence their quality was, at the least, adequate to enable the jury to form a fair and reliable assessment of the conversations which were recorded and that with an appropriate warning the jury would not be led into an interpretation unjustifiably adverse to the accused. Accordingly, so far as the matter was one of discretion, I was satisfied that no injustice could arise from admitting the tapes in evidence and that they ought not to be excluded on this basis.

A further point taken on behalf of the accused was that because of the difficulties in identifying the words and expressions used by one or other of those whose voices were recorded in certain parts of the recordings the transcripts prepared by the prosecution should not be furnished to the jury. However I heard evidence that the transcripts reproduced 'so far as humanly possible' whatever the tapes contained that was at all intelligible. There were passages which defied all efforts to construe them and there were words and phrases differently heard by different listeners. However, as the jury would have their own opportunities (of which they availed themselves with marked interest, attention and care) of listening for themselves and as they would be, and were, duly warned to resolve any doubtful passage by giving it the construction most favourable to the accused, it seemed to me that any chance of prejudice arising from providing the jury with the transcripts was non-existent; on the other hand the inconvenience to everyone as well as, it seemed to me, the potential danger to the accused if the jury were left to recollect for themselves what was on the tape recordings arising from denying the use of the transcripts to the jury loomed large indeed. On my direction, therefore, the jury were provided with them.

*Ruling accordingly.*

*Solicitors: Director of Public Prosecutions; Kingsley, Napley & Co; Montague, Gardner & Howard.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

COURT OF APPEAL (CRIMINAL DIVISION)

(KARMINSKI AND ROSKILL, LJ AND LAWSON, J)

9th March 1972

R v JONES (R E W)

*Criminal Law—Trial—Trial in absence of defendant—Voluntarily waiver of right to be present in court—Defendant absconding during trial before giving evidence.*

As a general rule, a defendant has a right to be present in court throughout his trial unless he voluntarily waives that right, e.g., by obstructing the proceedings or absconding during the trial. In such circumstances the judge has a discretion to order the trial to proceed in the defendant's absence.

During his trial on charges of conspiracy to defraud, theft, and fraudulent conversion the applicant absconded before his turn to give evidence had arrived. The judge ordered that the applicant's trial should proceed together with the trial of his co-defendants, and the applicant was convicted of conspiracy to defraud and fraudulent conversion. Later the applicant was brought back to England from Denmark on an extradition warrant, and he applied for an extension of time to enable him to apply for leave to appeal against conviction and sentence, contending that by the continuance of the trial in his absence he had been deprived of the opportunity of giving evidence.

HELD: the judge had properly exercised his discretion in ordering the trial to proceed.

APPLICATION by Robert Edward Wynyard Jones for an extension of time to enable him to appeal against his conviction at the Central Criminal Court of conspiracy to defraud and fraudulent conversion, when he was sentenced to terms of three years' and five years' imprisonment to run concurrently.

*J Lloyd-Eley QC and R Sturgess for the applicant.*

*M D L Worsley for the Crown.*

**ROSKILL LJ** delivered this judgment of the court: Notwithstanding the careful argument of counsel for the applicant, it seems to this court plain that the application for an extension of time within which to apply for leave to appeal must fail. The case is a somewhat remarkable one. The applicant is a man named Robert Jones, and as long ago as 25th June 1970 at the Central Criminal Court, before Judge Gillis he pleaded not guilty to an indictment charging him on two counts with conspiracy to defraud, on one count with theft of a motor vehicle, and on eight counts respectively numbered 12 to 19 inclusive with fraudulent conversion of motor cars or the proceeds realised by the sale of motor cars of persons who had entrusted the cars to the applicant or one of the companies he controlled for the purpose of sale at a minimum price. There were seven others initially charged on one or other of the conspiracy charges, but counts 12 to 19, the fraudulent conversion counts, were charged against the applicant only. That trial proceeded with all the prisoners present until July 1970, that is over 18 months ago. Shortly before 27th July the case for the prosecution had been concluded, there were long and elaborate submissions by counsel, particularly I am sure from counsel for the applicant, in relation to counts 12 to 19 and whether or not the facts proved in evidence by the prosecution could constitute in law the then offence of fraudulent conversion. The judge overruled all those submissions, whereupon, when the trial was resumed the next day, 28th July, the applicant, who was the last but one defendant on the indictment and whose turn to give evidence, if he wished so to do, was not likely to arise for some time, to use a colloquialism, deliberately jumped his bail.

Questions then arose whether or not the trial should continue. Leading counsel for the applicant and his junior counsel who appeared for the applicant at the trial, as they



have in this court, sought to persuade the judge that although this was a case of deliberate jumping of bail, none the less the trial ought not to be allowed to go further, at least so far as the applicant was concerned. The judge was asked to discharge the jury from giving verdicts on the counts against the applicant. We have not got a transcript of what passed on that occasion, but we have had a very clear statement from counsel for the applicant of his recollection, no doubt accurate, of what passed. The judge overruled that submission and he ordered the trial to go on in the applicant's absence along with the trial of the other six prisoners.

Leading counsel for the applicant, his junior counsel and those instructing him, very properly remained in court to try and protect the applicant's interests, but when the time came to call the applicant or to call witnesses whom it had been intended to call on his behalf, they felt unable to place those witnesses before the court and jury, because they felt there must be some doubts as to their authority, to continue to represent the applicant in those circumstances. They properly withdrew from the trial. The trial went on. There was an immensely long summing-up by the judge. At the end the jury convicted the applicant not only on the main conspiracy charge against him, but also on counts 12 to 19. On the fraudulent conversion charges, counts 12 to 19, the judge sentenced him to five years' imprisonment, and on the conspiracy charge to a concurrent sentence of three years' imprisonment.

Thereupon the applicant's solicitors, again trying to do their utmost for him, filed Forms N and G on his behalf, on 8th September 1970. The documents say, and counsel for the applicant confirmed, that it had always been the applicant's intention to appeal if he were ultimately convicted, because it was to be argued that the facts proved did not constitute an offence or offences of fraudulent conversion. The filing of those forms raised the question whether the solicitors had authority to file them on the applicant's behalf. This matter appears to have been debated in part at the trial. It would seem that the judge, wrongly as it ultimately turned out, thought or may have thought that they would have such authority. As this was a somewhat novel point the matter was ordered to be set down for argument before LORD PARKER CJ, WIDGERY LJ and COOKE J on 7th March 1971. The applicant was given legal aid and solicitors and leading and junior counsel, and the court, in a reserved judgment delivered by COOKE J on 17th March, held that those forms had been filed without authority.

It is not unimportant to observe that at the end of the judgment COOKE J said:

'If the applicant should at any time surrender and should then decide that he wishes to apply for leave to appeal, it will be open to him if so advised to seek an extension of time, although it is of course obvious that in the circumstances of this case an application for extension of time would be subjected to a rigorous scrutiny.'

I do not think counsel for the applicant would complain that this application has not been subjected to such rigorous scrutiny.

The applicant was then traced to Denmark. He had apparently married a Danish woman with whom he had been living in England. Extradition proceedings were brought. It is to be observed that at no time did he return voluntarily; an extradition order was obtained, and finally just before 28th May 1971 he was brought back to this country from Denmark in custody. He having returned in this way in custody and not voluntarily, his solicitors again, most properly, in order to try and help him, filed new Forms N and G—on his instructions this time—seeking an extension of no less than ten months within which to apply for leave to appeal against conviction and sentence. On 2nd August 1971 COOKE J, who was of course acquainted with the whole story having been a member of the court in March

1971, referred to the full court, the applications both for extension of time and for leave to appeal. Again legal aid for solicitors and leading and junior counsel was granted.

It can hardly be said in those circumstances that the applicant has not had the maximum assistance, all at the expense of the State, in order to make sure that nothing untoward has happened. I should have mentioned that when the applicant failed to appear, this Danish lady, whose name I will not mention, apparently appeared in court to try and explain away the applicant's absence. According to counsel for the Crown—and if he says so it will be accurate—she said she had had a message from the applicant that the trial was 'going bad'. When the applicant's new notices seeking the ten months' extension were filed, they contained what I hope it is not harsh to call some unparticularised allegations about threats having been offered to him the night before he absconded. It was not until 6th March 1972 that more particulars were given of those alleged threats. These are said to have been made at about 1.00 a.m. on Tuesday, 28th July, at the door of the applicant's address by three men whose identities were not known to the applicant. That is said to be the reason why the applicant absconded and of itself to justify an extension ten months out of time for leave to appeal.

Although counsel for the applicant sought to place before this court in the first instance what the grounds would be for an appeal if the extension were granted, the court required him first to show why an extension of that length of time should be granted to a man who had absconded from his bail in the circumstances which I have described and who had not returned voluntarily but had put the authorities to the trouble and expense of extraditing him. Counsel for the applicant put in the forefront of his submission that a defendant must always be present in court throughout his trial with certain limited exceptions only. The first exception was intemperate behaviour in the presence of the court. The second was, if judge, Crown and defence consented, to continue, in the absence of the defendant with the case of the defendant, that consent being a true consent and not merely a consent to be implied from his absence; and, thirdly—and this is perhaps the most important point which counsel for the applicant argued—where an accused has absconded after giving evidence and after having had the opportunity to call witnesses then his trial can, in most cases justifiably continue in his absence unless there was later during the trial some material development in the evidence after the absconding had taken place. Since the present case did not fall within any of those exceptions, the judge, it was argued was wrong in allowing the case against the applicant to continue in his absence. Counsel for the applicant went so far as to submit that a judge had no discretion to refuse to discharge the jury when a defendant was absent before the time came for him to give evidence or to call his own witnesses.

I do not propose to go through all the authorities, which are many. Until 1967, as is well known, there was the division in English criminal law between felonies and misdemeanours. The cases show, as this court ventures to think without a shadow of doubt, that, whatever the case might be in a trial for felony, in a trial for misdemeanour the position was different and that it was a matter for the discretion of the presiding judge whether or not the trial should proceed in the absence of the prisoner.

Therefore this court is clearly of the view that there was in this case a discretion vested in the trial judge. Counsel for the applicant sought to rely on a passage in the seventh report of the Criminal Law Revision Committee dealing with felonies and misdemeanours where the distinguished members of that committee said:

In felony the accused must in general be in court throughout the trial, but this is not necessary in misdemeanour. Although each accused is nearly always

present even in misdemeanour, it is occasionally convenient that the trial should continue in the absence of one or more of them, especially if it is a long trial and there are several accused. We recommend that the misdemeanour rule should apply to all trials on indictment. Obviously the power to continue a trial in the absence of the accused would be used sparingly and only when this would not prejudice the defence.'

That, as one would expect, if I may respectfully say so, is an impeccable statement of the law, but it is difficult to think that those who formulated that paragraph had in mind a case such as the present where the question arose because the prisoner concerned had deliberately jumped his bail.

The position is admirably stated in a late 19th century case in the Australian courts, *R v Abrahams* (1). I would quote from two of the judgments, one of WILLIAMS J, the other of HOOD J. Although counsel for the applicant sought to find comfort from what those learned judges had said, it appears to this court that so far from supporting his submission these passages are consistent only with the view this court takes and not with his submission. WILLIAMS J said:

'... in cases of felony, not capital, and of misdemeanors where the accused is in custody, but represented by counsel, elects to waive his right to be present, the discretion would probably be exercised in the same way; but, on the other hand, in cases both of felony and misdemeanor where the accused is not represented by counsel, the judge would, in all probability, refuse to proceed with the trial in the absence of the accused, notwithstanding that he waives his right, unless the judge be satisfied that the prisoner elects to be absent, and absents himself through caprice or malice, or for the purpose of embarrassing the trial.'

Pausing there for one moment, it is not necessary to decide in the instant case whether the applicant's absence was due to caprice, malice or for the purpose of embarrassing the trial. It would certainly seem to have been one of them; it is not impossible that it was all three. The learned judge continued:

'It will thus be seen that in my opinion in all cases whether of felony or misdemeanor, whether the accused be on bail or in custody, whether he be represented by counsel or not, he has a right to be present, subject only to one qualification, and that is, that he does not abuse that right. If he abuses that right for the purpose of obstructing the proceedings of the court by unseemly, indecent, or outrageous behaviour, the judge may have him removed and proceed with the trial in his absence, or he may discharge the jury, but subject to that qualification the right of being present remains with the accused as long as he claims it. When he waives it, then the discretion of the judge comes into play. To take an extreme case by way of illustration: suppose an accused person to be out on bail, to appear and take his trial for either a felony or misdemeanor, and that when his trial comes on he is found to have absconded. By so doing, I take it, the accused has clearly waived his right to be present, and the Crown might elect to go on with the trial in the prisoner's absence, but then the presiding judge has to exercise his discretionary power; if in such a case the accused was not represented by counsel in court, or even if he were so represented, his presence was necessary for the proper conduct of his defence by his counsel, the judge would, I apprehend, certainly exercise his discretion by postponing the trial. In short, it seems to me that the judge's discretion is very much at the root of the whole matter, subject to the accused's right, when he has not forfeited the right, does nothing to forfeit it, or does not waive it, to be present.'

(1) (1895), 21 VLR 343.

Hood J said:

'I wish to say that while agreeing that as a matter of law trial for misdemeanor may proceed in the absence of the defendant, it must not be understood that such a course would in these days meet with approval. I think that not only has an accused person a right to be present during the hearing of any proceedings against him, but as a rule, which should never be departed from except under special circumstances, he is also bound to be there.'

The learned judge later went on:

'All that we are here deciding, in my opinion, is that the presiding judge *may* in misdemeanors proceed without the presence of the prisoner, where the absence is voluntary. He has in law a discretion, but that discretion should be exercised with great reluctance, and with a view rather to the due administration of justice than to the convenience or comfort of anyone.'

This court respectfully adopts that language as correctly stating the position. The only question this court has to decide is whether JUDGE GILLIS exercised his discretion properly. In the view of this court he plainly did so exercise it.

Counsel for the applicant has asked the court to hear the applicant and to let him give evidence why he absented himself; then he has asked the court to grant the extension and hear further evidence which he accepted was in fact available at the trial, evidence of accountants and others and then in the light of that evidence order a new trial. As LAWSON J pointed out during counsel for the applicant's argument, the applicant is really saying: 'Give me a ten months extension of time although I absconded deliberately and absented myself and made myself not available to give evidence or enable my witnesses to be called, and also notwithstanding the fact that I deliberately refused to come back and make this application earlier but put the authorities to the trouble and expense of bringing me back in custody by extradition proceedings in Denmark.'

To grant this application at this stage would, in the view of this court, be to put a premium on prisoners jumping bail; it may even have the effect of encouraging others to do so. It may also have as a side effect increasing the reluctance of a court in a very long trial to grant bail lest the applicant's conduct be repeated by others. To put a premium on jumping bail is something which this court is not for one moment prepared to countenance. This application is entirely without merit, notwithstanding the skill with which it has been advanced. There is no ground whatever for granting this extension of time. The applicant has brought this entirely on his own head, and he must now take the consequences. The application therefore is refused.

*Application refused.*

Solicitors: H C L Hanne, Crawley & Co; Solicitor, Metropolitan Police.

Reported by T R Fitzwalter Butler, Esq, Barrister.

QUEEN'S BENCH DIVISION

(ASHWORTH, MELFORD STEVENSON AND FORBES, JJ)

14th February 1972

LEATHLEY v DRUMMOND      LEATHLEY v IRVING

*Road Traffic—Insurance—Third-party insurance—Policy—Charges of using car and permitting use without insurance—Onus of proof of existence of valid cover on defendant—Road Traffic Act, 1960, s 201 (1).*

An information was preferred against the respondent D. charging him with using vehicles on a road without there being in force any policy of insurance or security in respect of third party risk, contrary to s 201 of the Road Traffic Act, 1960. An information was also preferred against the respondent I. charging him with permitting the use of the vehicles by D. At the hearing of the informations in both cases D. and I. produced certificates of insurance, but no policy, and no policy in either case was produced by the prosecution. The justices upheld a submission of no case to answer in respect of both respondents and dismissed the informations. On appeal by the prosecutor,

HELD: the appeals would be allowed and the cases remitted to the justices with a direction to continue the hearing because on a charge of driving a motor vehicle, or one of permitting such driving, without third-party risk insurance cover contrary to s 201 (1) of the Road Traffic Act, 1960, the prosecutor did not have to prove that there was no valid insurance, but the onus was on the accused to produce his policy and satisfy the court that he was effectively covered by such insurance when driving.

CASES STATED by Cumberland justices sitting at Whitehaven.

Informations were preferred by the appellant, Leathley, a police officer, against the respondents, Peter Drummond and Colin Irving, charging them with offences under s 201 of the Road Traffic Act, 1960.

LEATHLEY v DRUMMOND

In the first case it was alleged that the respondent on 18th December 1970 used a motor vehicle on a road without there being in relation to such user a policy of insurance or a security in respect of third-party risks which complied with the requirements of s 201, charging him with a similar offence on 23rd December 1972.

It was contended by the defendant that there was no case to answer on the ground that the certificate of insurance *ex facie* related to a policy of insurance which was in force in relation to the user of the vehicle. It was contended by the prosecutor that the certificate did not prove that there was such a policy of insurance in force.

The justices were of opinion that the certificate did prove that there was such a policy of insurance in force. The prosecutor did not produce any policy of insurance, and in the course of the evidence being given the justices announced their decision to adjourn the hearing for two weeks to enable the policy to be produced. The solicitor for the respondent objected to an adjournment on the ground that the prosecution had not been taken unawares. At the conclusion of the evidence the justices were of the opinion that there was no case to answer and accordingly they dismissed the charges. The prosecutor appealed.

LEATHLEY v IRVING

In the second case two informations were preferred by the appellant, Leathley, against the respondent, Irving, charging him with contravening s 201 (1) of the Road Traffic Act, 1960 by permitting the use on a road without third-party cover of the two cars involved in the first case. The facts found were substantially identical with those in the first case, but related mainly to the respondent and his insurance, and the



registration in his name as owner of the vehicles. The parties' contentions, justices' opinion, and question for the court were identical in both Cases Stated.

P G Smith for the appellant.  
Neither defendant appeared.

**ASHWORTH J:** These are two appeals arising out of proceedings in which the respondent Drummond and the respondent Irving were charged in a manner which I will indicate, the hearing of all four informations being taken together. The respondent Drummond was charged with using on 18th December a vehicle DAO without insurance, and on 23rd December a vehicle PAO without insurance, and his brother-in-law, the respondent Irving, was charged with permitting the respondent Drummond to drive the first mentioned vehicle without there being in force a policy of insurance, and correspondingly permitting him to drive the second mentioned vehicle, contrary to s 201 of the Road Traffic Act, 1960. Without meaning to be in any way harsh on those who settled these two Cases Stated, one cannot help expressing the feeling that there is all too much confusion in the statement of issues and the findings of fact. But at the end of the day, as appears plain from both Cases Stated, the issue on which the respondents succeeded was a submission by their solicitor that there was no case to answer. That depended, in my judgment, on the false premise that, when a person is charged with driving a vehicle without there being in force a policy of insurance, it is for the prosecution to prove that there was no valid insurance.

That indeed might have been one's own impression were it not for authority to the contrary. The offence is expressed in these words in s 201 (1):

'... it shall not be lawful for a person to use or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.'

There is no doubt whatever that on both the occasions in December 1970 the respondent Drummond was driving one or other of the vehicles mentioned. The situation therefore is, according to authority to which counsel for the appellant has referred us, that it was open to a police officer to require the respondent Drummond, as user of the vehicle, to show that he had a policy of insurance effectively covering his user of the vehicle on that date. There are various authorities, and the one which I find most helpful is *Philcox v Carberry* (1). In that case the respondent was charged with using a motorcycle when there was not in force a policy of insurance. In relation to that offence no evidence was given by the respondent nor were questions asked by the prosecutor in relation to the insurance. The justices were of the opinion that, although an offence of driving while disqualified had been proved, it did not follow, in the absence of some reference to the matter in the evidence called by the prosecution, that a policy of insurance was not in force at the time. They accordingly dismissed the information, and the prosecutor appealed. Allowing the appeal the court held that, although it was a case where one would have expected the prosecution to lead evidence as to whether or not a policy of insurance was in force, the case was concluded by *John v Humphreys* (2) which applied the principles of *R v Oliver* (3) to the Road Traffic Acts, and, applying those principles to that case, the onus of proving

(1) [1960] Crim LR 563.

(2) 119 JP 309; [1955] 1 All ER 793.

(3) 108 JP 30; [1943] 2 All ER 800; [1944] KB 68.

that a policy of insurance was in force was upon the defendant as it was a fact peculiarly within his knowledge. In those circumstances, as he had given no evidence with regard to the policy, the case must be remitted to the justices with the intimation that the offence was proved, leaving them to impose a suitable penalty.

There is the difference that in the present cases there was a submission of no case to answer, and, accordingly, it is impossible to send them back to the justices with a direction to find the offences proved. They must continue the hearing and at that continued hearing it should be made plain that it is for the respondents to satisfy the court that on the two dates in question the respondent Drummond when driving was effectively covered by a policy of insurance. It is impossible at this moment to explore the difficulties about ownership which are canvassed freely in the two Cases Stated. All that must be left for consideration when the policy itself is examined. No doubt it will be produced by one of the respondents. I would send both cases back with a direction to the justices to continue the hearing in the light of the principles laid down in *Philcox v Carberry*.

**MELFORD STEPHENSON J:** I agree.

**FORBES J:** I agree. I would just like to add that I observe that the case of *Philcox v Carberry* (1) was one in which nobody appeared for the respondent, the prosecutor alone was represented. If I were in any way concerned about that case, I would think that there is a difference between a case where the charge is one of driving without a licence, a fact peculiarly within the driver's knowledge, and a case of driving without insurance to cover that driving, which may be a matter of considerable complexity and not within one's knowledge. However, I agree that this case must go back to the justices with a direction to continue the hearing.

*Cases remitted.*

Solicitors: McKenna & Co for Gaitskill, Dodgson & Bleasdale, Whitehaven.

Reported by N P METCALFE, Esq, Barrister.

**QUEEN'S BENCH DIVISION**

(ASHWORTH, MELFORD STEVENSON AND JAMES, JJ)

28th March 1972

**R v LEEDS PRISON GOVERNOR AND ANOTHER.**

**Ex parte HUNTLEY**

*Magistrates—Warrant—Non-payment of fine and compensation order—Warrant for committal to prison—Defaulter already remanded in custody on other charges—No knowledge on part of justices—Warrant not executed during remand in custody—Acquittal of defaulter—Execution of warrant—Defaulter taken to prison to serve outstanding term in respect of original committal—Validity of execution in view of delay—Need for warrant to be delivered to governor of prison—Magistrates' Courts Rules, 1968, r 80 (5).*

The applicant was convicted at a magistrates' court of theft and was fined £50 and ordered to pay £182 compensation, the whole sum to be paid within 14 days with 90 days' imprisonment in default. At the end of the 14 days £108 of the sum ordered to be paid was still outstanding. The justices issued a warrant for the committal of the applicant to prison for 42 days in default of payment. In the meantime, unknown to the justices, the applicant had been arrested on other charges and remanded in custody. After the applicant had been in custody for 70 days awaiting trial he was brought to trial on the further charges and acquitted. Immediately after the trial the officer in possession of the warrant executed it, arresting the applicant and taking him to prison to serve 42 days. The applicant applied for a writ of habeas corpus directed to the governor of the prison.

**HELD:** the warrant was valid and was issued in circumstances which justified its issue, there was no abuse of power on the part of the officer who held the warrant through his failure to execute it earlier even if it were to be assumed that the officer could have executed it while the applicant was in detention on remand; accordingly, the application must be refused.

**PER CURIAM:** Rule 80 (5) of the Magistrates' Courts Rules, 1968, which provides that a warrant to commit to custody any person who to the justice's knowledge is already detained in prison should be delivered to the governor of the prison, is administrative in context and is intended to provide for a special situation in contrast with the normal case where a defaulter has to be arrested and conveyed to prison.

**MOTION** by Michael Thomas Huntley for a writ of habeas corpus directed to the governor of Leeds Prison to bring him up before the Queen's Bench Division.

*W M Adam* for the applicant.

*V R Hurwitz* for the second respondent, the chief officer of police, Dewsbury.

The governor of Leeds Prison did not appear.

**ASHWORTH J:** In these proceedings counsel moves on behalf of one Michael Thomas Huntley for a writ of habeas corpus directed to the governor of Her Majesty's prison at Leeds. The circumstances in which the application is made are as follows. Michael Thomas Huntley was convicted at the Clerkenwell Magistrates' Court on 15th November 1971 of stealing £182 in cash. For that offence he was fined £50 and was subjected to an order to pay compensation of £182. £15 in addition was asked for costs, and payment of the total amount was ordered to be made within 14 days. In the alternative, a sentence of 90 days' imprisonment was imposed. He made some effort to pay off the money which was due from him, and the warrant shows that he had paid £123.95, but there was a balance of £108.5 still due. The warrant, a copy of which is before the court, shows, in accordance with the provisions

dealing with the reduction of the term of imprisonment in proportion to any amount paid, a period of 42 days still be to be served in default. Accordingly, the warrant was issued on 14th January 1972 directing the arrest and conveyance of the applicant to prison to serve 42 days. That was on 14th January 1972. So far as I am aware nothing was intimated to the court at Clerkenwell that some nine days before the applicant had been arrested in connection with charges of housebreaking at Dewsbury in Yorkshire. He was remanded in custody in those proceedings from 5th January 1972 onwards so that on 14th January, when the warrant at Clerkenwell was issued, he was in custody on remand.

Counsel has said, and I accept it, that in contra-distinction from some cases a person on remand in custody in the area in question is detained in Leeds prison and not at a remand centre, but as everyone knows a person who is on remand in custody awaiting trial is not a person serving a prison sentence and his treatment is different.

Accordingly, the officer who was possessed of this warrant from the Clerkenwell court did not then execute it because the applicant was in custody for other matters. In due course the applicant appeared at Wakefield Crown Court on 20th and 21st March 1972; he was found not guilty of the charge or charges of housebreaking and immediately after that trial the officer who had possession of the warrant proceeded to execute it and arrested the applicant and conveyed him to Leeds prison to serve the sentence of 42 days. The applicant is now in Leeds prison, or was until these proceedings started, serving the period. He applied to the presiding judge at the north-eastern circuit or his deputy for leave to bring the present proceedings for habeas corpus and was granted bail, and now the motion comes on before this court.

What to my mind is absolutely vital to realise from the start, and was very properly conceded by counsel for the applicant, is that the warrant was a perfectly valid warrant; it was issued in circumstances which justified its issue. In no sense can it be called spent and it has not been withdrawn. Until his arrest in pursuance of it, no part of the period of 42 days had been served by the applicant; it was a valid warrant not yet executed. What is said by counsel for the applicant, and this is the whole basis of the present motion, is that in the circumstances the execution of the warrant on 21st and 22nd March was an abuse of power, and he contends that it was open to the officer who had charge of the warrant to execute it while the present applicant was on remand either by delivering it to the governor of Leeds prison or possibly by arresting the applicant in pursuance of it when he was making appearances, three in number, before the justices in Dewsbury awaiting committal for trial. It is said that his failure to do that is an abuse of power. He reinforces the argument by saying that the applicant has in fact spent over 70 days in custody awaiting trial and that he could have occupied his time usefully by concurrently serving the period indicated in the warrant, in which event he would have been free after his acquittal.

In my judgment, this case does not even begin to approach what is called an abuse of power. The warrant was perfectly valid. The officer might well have been in a position to execute it, although I would not wish for my part to give any authoritative ruling on that point having regard to the fact that the applicant was then in custody on remand and the combination of detention both on remand and in pursuance of a warrant for non-payment of a fine might not be feasible concurrently. At any rate, whether he could have done so or not, I am quite satisfied in my own mind that there was no abuse of power in his failing to do so.

That really disposes of the matter, but for one point which counsel for the second respondent, the chief officer of police, Dewsbury, has very properly mentioned. Under the Magistrates' Courts Rules 1968, r 80 deals with a warrant of commitment and in four sub-rules numbered (1) to (4) it deals with the procedure in normal cases

dealing with the arrest of the defaulter and his conveyance to prison. But then r 80 (5) has a provision for special circumstances. It provides:

'Notwithstanding the preceding provisions of this rule, a warrant of a justice of the peace to commit to custody any person who to the justice's knowledge is already detained in a prison or other place of detention shall be delivered to the governor or keeper of the prison or place of detention in which that person is detained.'

First, there is absolutely no evidence to suggest that the court at Clerkenwell by which this warrant was issued had any knowledge regarding the applicant's whereabouts at the time when the warrant was issued, and it is fundamental to any application of r 80 (5) that the justice or justices should have known that the person in question was then in custody in prison or a place of detention. But quite apart from that, in my judgment, r 80 (5) is, so to speak, administrative in content and is to provide for a special situation in contrast with the normal case where a defaulter has to be arrested and conveyed to prison; the circumstances of this case that the warrant was not there and then delivered to the governor of Leeds prison where the applicant was detained cannot, in my view, have the slightest effect on the eventual execution of the warrant, when the constable was in a position to do so after the trial at Wakefield. It is very right of counsel for the second respondent to call the court's attention to this sub-rule, but, in my judgment, it has no application to this case. I would refuse this motion.

**MELFORD STEVENSON J.** I agree.

**JAMES J.** I agree.

*Application refused.*

Solicitors: Barrington Black, Leeds; Hewitt, Woollacott & Chown, for Solicitor to Police Authority, Dewsbury.

Reported by T R Fitzwalter Butler, Esq, Barrister.



HOUSE OF LORDS

(LORD WILBERFORCE, VISCOUNT DILHORNE, LORD PEARSON, LORD CROSS OF CHELSEA AND LORD SALMON)

24th, 27th March, 3rd May 1972

LAMBIE v WOODAGE

*Road Traffic—Disqualification—Mitigating circumstances—Circumstances which may be considered—Gravity or triviality of previous convictions—Road Traffic Act, 1962, s 5 (3).*

By s 5 (3) of the Road Traffic Act, 1962: 'Where a person convicted of an offence specified in [Part I or Part II of sched I to this Act] has within the three years immediately preceding the commission of the offence . . . been convicted on not less than two occasions of an offence specified in those Parts . . . the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.'

In considering in any case whether or not there are grounds for mitigation the court is entitled to have regard to evidence of the gravity or comparative triviality of the previous offences, and is not confined to taking into account the particulars endorsed on the defendant's licence.

APPEAL by Robert Lambie against a decision of a Queen's Bench Divisional Court, reported 135 J.P. 595, remitting to Reading justices a Case stated by them after they had found that there were grounds, under s 5 (3) of the Road Traffic Act, 1962, for not disqualifying him on his conviction of a traffic 'speeding' offence after two previous convictions for similar offences during the preceding three years.

*D Morton-Jack* for the appellant.

*D H Farquharson* for the respondent.

Their Lordships took time for consideration.

3rd May. The following opinions were delivered.

**LORD WILBERFORCE:** I have had the advantage of reading in advance the opinions prepared by your Lordships. I agree with them and see no need to add any observations of my own. I would allow the appeal.

**VISCOUNT DILHORNE:** The only question raised in this appeal was whether the justices at Reading were right to admit evidence given by the appellant after he had pleaded guilty to driving in excess of the 30 m p h speed limit. He was said to have driven at 50 m p h.

There were two convictions on his driving licence, both for exceeding the 30 m p h limit, one on 15th May 1968 at Woolwich when he was fined £6 and the other on 26th July 1968 at Greenwich when he was fined £5. As these two convictions occurred within the three years immediately preceding the commission of the offence for which he was convicted at Reading, the court there was required by s 5 (3) of the Road Traffic Act 1962, to order him to be disqualified for holding a licence for not less than six months

'unless the court [was] satisfied, having regard to all the circumstances, that there [were] grounds for mitigating the normal consequences of the conviction and [thought] fit to order him to be disqualified for a shorter period or not to order him to be disqualified.'

Despite objection by the respondent, Harold Woodage, the appellant was allowed to give evidence, and according to the Case Stated, gave evidence

'of, inter alia, the circumstances attending his previous convictions... and in particular that the excessive speeds alleged against him on those occasions were 34 miles per hour and 37 miles per hour respectively.'

What circumstances there were, other than the excess over the speed limit, of which the appellant gave evidence the case does not reveal.

The justices held that the weight to be attached to the appellant's evidence was a matter for them and that there were grounds for mitigating the normal consequences of the conviction. What those grounds were the Case does not state but presumably they regarded the fact that the speed limit had only been slightly exceeded on the two previous occasions as the major factor. They thought fit not to order the appellant to be disqualified.

On behalf of the respondent it was argued at the magistrates' court that the court should not hear evidence from the appellant as to his two previous convictions; and that

'the only details of the previous convictions which [he] was entitled to adduce in evidence were those shown in the endorsements on the driving licence, and that the court could then be invited to infer from these formal particulars only, whether or not the offences were of a trivial nature.'

The question posed in the Case for the consideration of the High Court was whether the justices came to a correct conclusion in law in holding that the evidence of the circumstances attending the previous convictions was admissible. The Divisional Court by a majority (LORD WIDGERY CJ and LAWSON J, O'CONNOR J dissenting) held that it was not. They however certified that the question whether it was admissible involved a point of law of general public importance and granted leave to appeal to this House.

In my opinion, the evidence of the appellant was rightly admitted by the justices. Parliament might have provided that no evidence as to the previous convictions was admissible. It might have provided that the only information that a court could have as to those convictions was that endorsed on the licence. It did not do so. The subsection makes it clear that when considering whether or not to mitigate the normal consequences of the third conviction, the court is to have regard to 'all the circumstances'. I cannot read this as meaning that the court is only to have regard to the circumstances of the third conviction or is only to have regard to those circumstances and the particulars endorsed on the licence. If evidence of the trivial nature of the earlier convictions is excluded as inadmissible, or if, where those convictions were for exceeding the speed limit, evidence that it was only slightly exceeded is excluded, then the court cannot have regard to all the circumstances.

It does not, however, follow that where regard is had to all the circumstances, the court should or can exercise its power not to disqualify or to disqualify for less than six months. At the end of his judgment in *Baker v Cole* (1) LORD PARKER CJ said with reference to s 5 (3):

'I would like to observe that the justices in considering matters such as the offence being committed on the open road, should give little if any weight to such a consideration, bearing in mind that the mischief aimed at by this subsection is the man who commits maybe a series of offences all comparatively trivial in themselves.'

(1) (1966), 135 JP 592; [1971] 3 All ER 680.

In this case LORD WIDGERY CJ cited these observations and said that he agreed with them. He went on to say:

'the relative triviality of the first or the second or the third offence is not a matter to which weight should be given for the purposes of mitigation. Accordingly, in my judgment the evidence tendered in this case which sought to show the triviality of the earlier offences was not admissible.'

LORD PARKER in *Baker v Cole* (1) did not say that the evidence tendered in that case was inadmissible. He said that little if any weight should be given to it. LORD WIDGERY thus went further than LORD PARKER.

As I have said, the only question raised in this appeal was as to the admissibility of the evidence and it would seem that that was the only question raised in the Divisional Court. No argument was advanced in this House as to its weight. Whether or not there exists a 'special reason' for not disqualifying or for disqualifying for less than 12 months a person convicted of an offence specified in Part I of Sch 1 to the 1962 Act is a question of law. Whether or not there are grounds for mitigating the consequences of a third conviction may also be a question of law. That was not argued in this case. I therefore express no opinion on it, but, if it be a question of law, then it may be held that proof that the offences were of a trivial character, or proof, where the convictions were for exceeding the speed limit, that the limit was only slightly exceeded, does not of itself suffice to constitute a ground for mitigating the normal consequences.

It is conceivable, however, that such proof when taken with other circumstances might constitute a ground for doing so. To hold that it is not admissible means that its weight, however slight, cannot be put into the scales, and also that the court is not to have regard to all the circumstances.

While I recognise that the result of this appeal might well have been different if the question for decision had been: Was there on the appellant's evidence any ground for mitigating the normal consequences?, as the only issue was the admissibility of the evidence, in my opinion, this appeal should be allowed.

**LORD PEARSON:** The appellant had two previous convictions for the offence which may conveniently be called 'speeding' (driving a motor vehicle on a restricted road at a speed exceeding 30 m p h). The first of these convictions was on 15th May 1968 when he was fined the sum of £6 and his licence was ordered to be endorsed with particulars of the conviction. The second of these convictions was on 26th July 1968 when he was fined the sum of £5 and his licence was ordered to be endorsed with particulars of the conviction.

The endorsement of the licence with particulars of the conviction was provided for by s 7 of the Road Traffic Act 1962, and sub-ss (1) and (2) of that section are as follows:

'(1) Subject to subsection (2) of this section, where a person is convicted of an offence specified in Part I or Part II of the first schedule to this Act, the court shall order that particulars of the conviction, and, if the court orders him to be disqualified, particulars of the disqualification, shall be endorsed on any licence held by him; and particulars of any conviction or disqualification so endorsed may be produced as prima facie evidence of the conviction or disqualification.

'(2) If the court does not order the said person to be disqualified, the court need not order particulars of the conviction to be endorsed as aforesaid if for special reasons it thinks fit not to do so.'

On 5th January 1971 the appellant had a third conviction for speeding. He pleaded guilty. The justices were informed by the prosecution that the appellant had on this third occasion driven his vehicle at a speed of 50 m p h. In respect of this third offence he was fined the sum of £20 and his licence was ordered to be endorsed with particulars of the conviction, but disqualification was not ordered under s 5 (2) of the Road Traffic Act 1962.

There was, however, to be considered by the justices the question whether disqualification should be ordered under what is sometimes called the 'totting-up' procedure under s 5 (3) of that Act. The subsection provides as follows:

'Where a person convicted of an offence specified in the said Part I or the said Part II has within the three years immediately preceding the commission of the offence and since the commencement of this Act been convicted on not less than two occasions of an offence specified in those Parts and particulars of the convictions have been ordered to be endorsed in accordance with section seven of this Act, the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.'

Having regard to the context, I think that the expression 'the normal consequences of the conviction' must include disqualification under this subsection. Also I think that, as the penalty under this subsection is in substance for the series of offences, the expression 'all the circumstances' must include the circumstances of the earlier offences as well as those of the latest offence.

The court has to exercise a discretion in choosing between four possible courses of action, namely, (i) to disqualify for the standard period of six months, (ii) to disqualify for more than six months, (iii) to disqualify for less than six months, (iv) not to disqualify at all. To assist the court in exercising that discretion some information is required as to each of the offences in the series. Information can be gained from the endorsed particulars of the previous convictions, such particulars being admissible as *prima facie* evidence under s 7 (1) of the Act. These would show in the present case that for each of the two previous convictions on the one hand only a small fine was imposed and there was no disqualification and on the other hand the court did not see fit for special reasons to refrain from ordering endorsement of the particulars on the licence. These particulars could have been regarded as affording sufficient information, indicating that the previous offences were not very serious but there was no valid excuse for them. But the appellant wished, and was allowed by the justices, to give evidence of the exact speeds at which he had been driving when he committed the two earlier offences—34 m p h and 37 m p h. In my opinion, the evidence was rightly admitted. It could not be ruled out as irrelevant or as wholly immaterial inasmuch as it could not properly have any influence at all on the justices' decision.

I agree with the reasons given by O'CONNOR J, in his minority judgment in the Divisional Court, but I also agree with his last sentence, in which he said:

where the only matter relied on by a person such as the [appellant], convicted for the third time in three years of a speeding offence, are the circumstances of the three offences, it must be rare that a court should say that they are satisfied that in all the circumstances there are grounds for mitigating the normal consequences of the third conviction.'

I agree also with the view taken by LORD WIDGERY as to the general object of the enactment. He said:

"The road traffic legislation contains adequate powers to provide adequate periods of disqualification for those who commit serious traffic offences. I agree with LORD PARKER CJ in his view that s 5 (3) is primarily concerned with the man who does not commit serious offences but who commits offences very frequently. It is aimed not so much at the gravity of the offences committed but the repetition of those offences during a relatively short period."

I think it follows that, when the endorsed particulars show that the previous offences were of a relatively trivial character, evidence as to the details of the previous offences is not likely to be of much, if any, assistance to the court in coming to its decision under s 5 (3), but I do not think one can rule out such evidence as necessarily immaterial in every case. In principle the evidence is admissible, though in most cases not likely to be helpful.

In my opinion, the justices came to a correct decision in law in holding that the evidence was admissible. I would allow the appeal.

**LORD CROSS OF CHELSEA:** I think that in this case the majority of the Divisional Court was wrong not to draw a distinction between the question whether the evidence given by the appellant was admissible and the question of the weight which justices should give to such evidence in deciding whether or not to make a disqualification order.

When he had pleaded guilty on 5th January 1971 to the information charging him with 'speeding' on 15th November 1970 and admitted that he had twice been convicted of speeding within the last three years and that on each occasion his licence had been endorsed, the justices hearing the case had a dual function to perform. They had to decide what was the appropriate penalty to impose in respect of the offence to which he had pleaded guilty and they also had to decide whether or not to order him to be disqualified under s 5 (3) of the Road Traffic Act 1962. Although that subsection speaks of disqualification as a normal consequence 'of the conviction', i.e. of the third conviction, the penalty of disqualification if imposed is in truth a further penalty imposed on the occasion of the third conviction because the defendant has committed offences specified in Part I or Part II of the schedule three times within a period of three years. When, therefore, the subsection says that the court is to disqualify unless it 'is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction', the circumstances to which they are to pay regard must, as I see it, include the circumstances of all three offences. Further, it is impossible to say that the gravity or comparative triviality of each offence is not a circumstance to which regard may be had. The views of the judges who formed the majority in the Divisional Court were not identical on this point. LAWSON J thought that the circumstances to which regard could be paid did not include the circumstances of the two earlier offences at all. That, as I have said, is in my judgment wrong. LORD WIDGERY CJ, on the other hand, took the view—which had been urged by the prosecution before the justices—that the only sources of information as to the circumstances of the earlier offences to which the justices could pay regard were the particulars endorsed on the appellant's licence. With all respect to him I cannot agree that such a limitation is justifiable. The particulars of the endorsement would tell the justices to what sort of conduct the previous conviction related and the penalty imposed would enable them to make a guess (which might or might not be right) as to the comparative seriousness or triviality of the offence. If once one concedes that the justices can speculate to that extent as to the circumstances of the earlier offences I think that it should follow that any evidence which would, so to say, fill in the gaps left by the bare particulars of the endorsement must in principle be admissible. In this case I would



not think that the evidence given by the appellant in fact told the justices anything which they would not have guessed from the size of the fines imposed on him in respect of the earlier offences. The reasons why the prosecution objected to the appellant giving evidence was that he might make all sorts of statements with regard to the earlier offences, the truth of which they would not be able to check. There is undoubtedly some force in that argument. It is, however, to be borne in mind that these statements (unlike ordinary pleas in mitigation) will be made on oath and will relate to matters which—given time—can readily be checked. If the prosecution has not been notified in advance of the evidence which is going to be given, they can always ask for an adjournment if the facts sworn to appear to them to be unlikely to be true, and the knowledge that this may be the outcome of too much 'gilding of the lily' is likely to make most defendants who wish to give evidence chary of departing very widely from the truth. I think, therefore, that this appeal must be allowed. I wish, however, to make it clear that I agree wholeheartedly with the views expressed by LORD PARKER CJ in *Baker v Cole* (1) and by LORD WIDGERY CJ in this case as to the mischief aimed at by s 5 (3). The subsection is not aimed at the man who is guilty of grave motoring offences; he will have been disqualified under other provisions of the code. It is aimed at the man who does not commit any offence which taken by itself merits disqualification, but who shows himself by repeatedly committing offences not in themselves very serious to take a light-hearted view of the road traffic legislation. So when they have before them a man who has just been convicted for the third time in three years of exceeding the speed limit, justices should be chary of accepting as sufficient grounds for not disqualifying the bare fact that the offences—although not committed in mitigating circumstances—were nevertheless separately considered relatively trivial.

**LORD SALMON:** On 5th January 1971 the appellant pleaded guilty to having driven a motor vehicle on 15th November 1970 on certain restricted roads at a speed exceeding 30 m p h contrary to s 4 of the Road Traffic Act 1960. His speed had been 50 m p h. He admitted that on 15th May 1968 and on 16th July 1968 he had been convicted of similar offences and fined £6 in respect of the first offence and £5 in respect of the second. Accordingly, he was liable under s 5 (3) of the Road Traffic Act 1962 to be disqualified from holding or obtaining a driving licence for a period of not less than six months. [His LORDSHIP read s 5 (3)] It is to be observed that speeding is only one of 26 offences covered by Parts I and II of Sch 1 to the 1962 Act. Many of these offences are very grave.

The appellant gave evidence before the justices on 5th January 1970 that the speeds at which he had been driving when he committed the first two offences, nearly 2½ years earlier, had been respectively 34 and 37 m p h. This evidence was tendered with a view to showing that those first two offences had involved only trivial infringements of the speed limit. That evidence was clearly unnecessary because the amounts of the fines imposed in themselves made it obvious that those offences were only trivial. It was, however, submitted on behalf of the respondent that evidence of the circumstances relating to the earlier convictions was inadmissible. The justices having rejected that submission and heard the evidence to which I have referred fined the appellant £20 and announced 'In view of what you have told us about your two previous convictions, we find there are mitigating grounds and we shall not disqualify you.'

The respondent appealed by way of Case Stated. The question posed by the Case was whether the justices had come to a correct decision in law in holding that evidence of the circumstances relating to the first two convictions was admissible in

(1) (1966) 135, JP 592; [1971] 3 All ER 680.

determining whether under s 5 (3) there were grounds for mitigating the normal consequences of the commission of the third offence. The Divisional Court by a majority held that this evidence was inadmissible and remitted the case to the justices for reconsideration of their decision regarding disqualification in the light of the opinion of the majority of the court. Leave to appeal to your Lordships' House was granted and the court certified that the following point of law of general public importance was involved in its decision:

'Whether evidence of the circumstances attending previous convictions which brings section 5 (3) of the Road Traffic Act 1962 into operation is admissible after conviction of an instant offence within section 5 (3) as circumstances to which the court may have regard as mitigating the normal consequences of the instant conviction.'

It is apparent that this appeal relates solely to the admissibility of the evidence given by the appellant before the justices. This question turns on the effect of the words 'having regard to all the circumstances' in s 5 (3). All the circumstances must, in my view, include circumstances relating to the instant offence in respect of which an accused is convicted, as LORD PARKER CJ rightly held in *Baker v Cole* (1) in 1966. There is, however, nothing in my opinion, to justify confining the words 'all the circumstances' to the circumstances relating only to that offence and excluding from their ambit the circumstances relating to the first two offences. Indeed, the wide language of s 5 (3) is, in my view, quite inconsistent with the narrow construction for which the respondent contends. It seems plain to me that the legislature, looking at the wide spectrum of offences covered by the section, intended that if anyone committed more than two such offences within the space of three years, then normally he should be disqualified for at least six months. A discretion was, however, preserved in the justices to mitigate the normal consequences of the convictions if 'having regard to all the circumstances' they considered that there were grounds for doing so. If the circumstances relating to the last offence are relevant under the section, as they clearly are, I cannot understand why the circumstances relating to the other offences are not relevant also. Suppose that the evidence showed that in committing the last offence the appellant had been travelling at only 34 m p h on a clear road, would it not be a relevant circumstance under s 5 (3) that when committing the earlier offences he had been travelling at 74 m p h in a 30 m p h zone? In my opinion, the circumstances in all three offences are the circumstances referred to in s 5 (3). It follows, therefore, that evidence relating to those circumstances must be admissible. That is the only point with which this appeal is concerned. It has nothing to do with the weight which should be attached to that evidence. LORD PARKER thought little, if any, weight (see *Baker v Cole* (1)). I agree with him. That, however, is an entirely different question from that with which this appeal is concerned.

In the present case, Lord WIDGERY CJ said:

'the relative triviality of the first or the second or the third offence is not a matter to which weight should be given for the purposes of mitigation. Accordingly, in my judgment the evidence . . . which sought to show the triviality of the earlier offences was not admissible.'

I am afraid that I cannot agree. As LORD PARKER pointed out in *Baker v Cole* relevant evidence which should have little, if any, weight is nevertheless admissible. It is for the justices to assess its weight. And that is something which they can be relied on to do conscientiously and bearing in mind the salutary warning which had been

(1) (1966), 135 JP 592; [1971] 2 All ER 680.

given by the Divisional Court. In a case such as the present one of the relevant circumstances may be the prevalence of speeding offences in the area over which the justices have jurisdiction.

LORD WIDGERY went on to say that:

'Any possible concern which the justices may properly have on the third offence for the circumstances of the first and the second offences can be adequately met by the information which they obtain from the endorsement on the licence.'

No doubt as a rule, that is so. They cannot, however, properly have any concern for the circumstances of the first and second offences unless those circumstances are 'circumstances' within the meaning of the word in s 5 (3). The fact that, as a rule, the information about those circumstances can be obtained from the endorsement on the licence cannot make evidence of those circumstances inadmissible. Nor do I think that if an accused were to tender evidence about those circumstances, this would give rise to any of the practical difficulties suggested by counsel on behalf of the respondent. Even if it did, it would not make the evidence inadmissible. If an accused were to say in evidence that he had been guilty only of trivial infringements of the speed limit and the endorsements on his licence revealed swingeing fines, his evidence would probably be rejected. At any rate it would not be accepted without further enquiries being made; alternatively the justices might decide that, even assuming that the evidence were true, they should still disqualify the accused.

My Lords, I find it difficult to think of a case in which the question as to the admissibility of evidence relating to the circumstances of the previous speeding offences could be of any practical importance to the defence or the prosecution. As I have already indicated, the evidence was quite unnecessary in the present case. In spite of the way in which the justices expressed their decision it would, I think, have been the same even if no evidence had been called. Suppose the appellant without going into the witness box had said: 'These earlier offences occurred about 2½ years ago. You will know from your experience that £5 or £6 is the minimum fine imposed in such a case. It is obvious from the amount of the fine shown by the endorsement on my licence that these offences must have consisted of only trivial infringements of the speed limit without any member of the public being inconvenienced. And this, of course, is the case. Please exercise your discretion by deciding that, in all the circumstances, it would be just not to disqualify me.' I cannot think that the decision of these justices could have been any different from that at which they arrived having heard the evidence, which carried the matter no further.

My Lords, I would emphasise that no question arises on this appeal whether the justices exercised their discretion properly. The sole question is the narrow and perhaps academic one—was the evidence given by the appellant admissible in law? For the reasons which I have endeavoured to state, I consider that the answer to that question is plainly 'Yes'. I would, accordingly, allow the appeal with costs.

*Appeal allowed.*

Solicitors: Amery-Parkes & Co; Sharpe, Pritchard & Co, for J Malcolm Simons, Kidlington, Oxford.

Reported by G F L Bridgman Esq, Barrister

## QUEEN'S BENCH DIVISION

(ASHWORTH, JAMES AND BRISTOW, JJ)

14th, 21st March 1972

HOWKER v ROBINSON

*Licensing—Knowingly selling intoxicating liquor to person under 18—Sales by barman—Delegation by licensee of control of bar to barman—Licensee present in another bar on premises—No actual knowledge of sale on part of licensee—Liability of licensee—Licensing Act, 1964, s 169 (1).*

Where Parliament prohibits someone from doing something 'knowingly' it is clear that an absolute offence has not been created, but a canon of construction of the provisions of the Licensing Acts has grown up in the courts that where the statute provides that the licensee shall not do something knowingly, and he does not in fact know that the thing is being done, nevertheless, if he has delegated his control of the premises to the person who does the thing, he cannot get out of the responsibilities and duties attached to the licence, and the knowledge of his delegate is imputed to him. If a licensee has delegated his authority to someone else, delegating his own 'power to prevent', and the person left in charge commits the offence, the licensee is responsible.

By s 169 (1) of the Licensing Act, 1964: '... in licensed premises the holder of the licence or his servant shall not knowingly sell intoxicating liquor to a person under 18 ... nor shall the holder of the licence knowingly allow any person to sell intoxicating liquor to a person under 18.'

A barman in the lounge bar of licensed premises sold beer to a boy who was aged under 15. The licensee was in another bar on the premises at the time of the sale and had no knowledge of what took place in the lounge bar. Informations were preferred against both the barman and the licensee for knowingly selling intoxicating liquor to a person under the age of 18, contrary to s 169 (1). The justices found that at the material time the barman had complete control over the sale of intoxicating liquor in the lounge bar and that the responsibility of ensuring that intoxicating liquor was not sold to persons under 18 had been delegated to him by the licensee. They convicted both defendants and the licensee appealed.

HELD: the appeal must be dismissed, since a licensee who had no actual knowledge of the sale was liable as well as the seller for having 'knowingly' committed the offence where he had delegated his control of the part of the premises in which the sale took place to his servant; a licensee could effectively delegate to a servant his managerial functions and responsibilities in respect of part of the premises although he himself was present in another part of the premises; the court could not go behind the justices' finding of fact.

CASE STATED by justices for the city of Leicester.

On 28th June 1971 the respondent Clifford Wilfrid Robinson preferred informations against the appellant, John Thomas Howker, alleging (a) that he on 14th April 1971 in Leicester, being the holder of the licence in respect of the premises, the Leicestershire Yeoman, did therein knowingly sell certain intoxicating liquor, namely, beer, to Anthony Gary Boyall, a person under the age of 18 years, contrary to s 169 (1) of the Licensing Act 1964; (b) that he on 14th April 1971 in Leicester, being the holder of the licence in respect of the premises, the Leicestershire Yeoman, did therein knowingly sell certain intoxicating liquor, namely, beer, to David Wheeler, a person under the age of 18 years, contrary to s 169 (1) of the Licensing Act 1964. Informations were also preferred against Clarence Lionel Weston (a) that he on the said dates, being a barman at the premises, the Leicestershire Yeoman, did therein knowingly sell certain intoxicating liquor, namely, beer, to Anthony Gary Boyall and David Wheeler, persons under the age of 18 years, contrary to s 169 (1) of the Licensing Act 1964.

The justices were of opinion that in view of the wording of s 169 (1) of the Licensing Act, 1964, the appellant was not released from being criminally liable even though he had no actual knowledge of the commission of the offence, and that he had effectively delegated his managerial functions and responsibilities in respect of the lounge bar to Weston. The appellant was therefore convicted of the offence, fined £15, and ordered to pay £10 towards the costs of the prosecution. The appellant appealed.

*J J Finney for the appellant.*

*A T Smith for the respondent.*

*Cur adv vult*

21st March. The following judgments were read.

**BRISTOW J:** This is an appeal by way of Case Stated from the justices of the city of Leicester, who convicted the appellant, John Thomas Howker, licensee of the Leicestershire Yeoman, of knowingly selling beer to Anthony Gary Boyall, a person under the age of 18, contrary to s 169 (1) of the Licensing Act 1964. The appellant was fined £15 and ordered to pay £10 towards the costs of the prosecution.

The facts, as they appear from the case, are as follows. On 14th April 1971, the day in question, the appellant was the holder of the licence. Clarence Lionel Weston was acting as barman in the lounge. Mr Weston had complete control over the sale of intoxicating liquor in that room, and the responsibility of ensuring that persons under 18 years of age were not sold intoxicating liquor had been delegated to him by the appellant. Mr Weston sold beer in the lounge bar to Mr Boyall, who was not quite 15. The appellant was present in another bar on the premises at the time of the sale but not present in the lounge and he had no knowledge of what there took place. The sale by Mr Weston was contrary to s 169 of the 1964 Act, that is to say, Mr Weston knew Mr Boyall was under age.

The justices decided that the appellant did not escape criminal liability even though he had no actual knowledge of the facts constituting the offence. They held that he had effectively delegated his managerial functions and responsibilities in respect of the lounge bar to Mr Weston. They thought that the precautions taken to ensure that persons under 18 were not supplied with intoxicating liquor were inadequate.

The appeal turns on the construction of s 169 (1) of the 1964 Act, the consolidating Act in which s 169 re-enacts s 21 (1)-(7) of the Licensing Act, 1961. Section 169 (1) reads as follows:

'Subject to subsection (4) of this section, in licensed premises the holder of the licence or his servant shall not knowingly sell intoxicating liquor to a person under eighteen or knowingly allow a person under eighteen to consume intoxicating liquor in a bar nor shall the holder of the licence knowingly allow any person to sell intoxicating liquor to a person under eighteen.'

The exception in sub-s (4) is irrelevant for the purposes of this case.

It is a general rule of English law that an accused person cannot be convicted unless he has a guilty mind. An exception to this rule is where Parliament by statute creates an absolute offence. Whether Parliament has done so is to be decided on the construction of the statutory provision concerned. An example of such an absolute offence is s 13 of the Licensing Act 1872 which made it an offence for a licensee to supply liquor to an intoxicated person: see *Police Comrs v Cartman* (1).

Where Parliament, as in s 169 (1) of the 1964 Act, prohibits someone from doing



something 'knowingly' it is clear that an absolute offence has not been created, but a canon of construction of the provisions of the Licensing Acts has grown up in the courts that where the statute provides that the licensee shall not do something knowingly, and he does not, as the justices found in this case, in fact know that the thing is being done, nevertheless if he has delegated his control of the premises to the person who does the thing, he cannot get out of the responsibilities and duties attached to the licence, and the knowledge of his delegate is imputed to him. As LORD GODDARD CJ said in *Linnett v Metropolitan Police Comr* (1), a case of 'knowingly permitting disorderly conduct, contrary to s. 44, of the Metropolitan Police Act, 1839':

'The principle... depends on the fact that the person who is responsible in law, as for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers and authority to another.'

As LORD ALVERSTONE CJ put it in *Emery v Nolloth* (2), the principle to be extracted from the decisions is that if the licensee has delegated his authority to someone else, delegating his own 'power to prevent', and the person left in charge commits the offence, the licensee is responsible. If on the other hand there has been no delegation of authority and the licensee is himself controlling the business and the offence is committed by his servant behind his back and against his orders, then he is not responsible.

For the appellant it is submitted that the reason which lies behind this canon of construction is that relevant statutory provisions made it possible only to prosecute the licensee and not the servant who, for example, sold liquor to the persons prohibited under s 22 of the 1961 Act. If the licensee could simply defend himself by showing that he did not know his servant was doing what the section forbade, something for which the servant himself could not be prosecuted, the whole object of the section would be frustrated. Section 21 of the 1961 Act, now re-enacted in s 169 of the 1964 Act, had for the first time made it an offence for the servant knowingly to do the forbidden act, and so there was no reason to apply the canon of construction to the new provision.

For the respondent it is said that whatever the reason which gave rise to the canon of construction, it is now well established and must be invoked irrespective of the fact that the servant can be prosecuted as well. The only effect of extending the prohibition to the landlord or his servant is to enable both to be prosecuted.

For the appellant it is further argued that if the 'delegation' canon of construction must be applied to s 169 of the 1964 Act, on the facts found by the justices, to apply it in this case would be to extend it unjustifiably to circumstances to which it has never been applied before. It is said that, accepting that the justices have found as a fact that the appellant had delegated his managerial functions and responsibilities to Mr Weston in respect of the lounge bar yet, the appellant was on the premises and in general control of the business.

For the respondent it is said that the true question is: Has the appellant delegated the duty which the Act lays on him? This is a question of fact, and the justices found as a fact that Mr Weston had complete control over the sale of intoxicating liquor in the lounge bar and the responsibility of ensuring that persons under 18 years of age were not sold intoxicating liquor had been delegated to him by the appellant.

There was cited both to the justices and to us the case of *Vane v Yiannopoulos* (3),

(1) 110 JP 153; [1946] 1 All ER 380; [1946] KB 290.

(2) 67 JP 354; [1903] 2 KB 264; [1900-3] All ER Rep 606.

(3) 129 JP 50; [1964] 3 All ER 820; [1965] AC 486; affirming 128 JP 474; [1964] 2 All ER 820; [1964] 2 QB 739.

in which the House of Lords had to consider the application of the canon of construction to which I have referred in relation to s 22 (1) of the 1961 Act, which provides that the holder of a justices' licence shall be guilty of an offence if he knowingly supplies intoxicating liquor to persons to whom he is not allowed to sell by the terms of his licence. In that case the licensee of a restaurant had been granted a justices' on-licence subject to the condition that intoxicating liquor should be sold only to persons ordering meals. While he was in another part of the restaurant a waitress, whom he had instructed only to serve drinks to customers ordering meals, served drinks to two youths who did not order a meal. The licensee did not know of the sale, and the magistrate dismissed the information. This decision was upheld in the Divisional Court. The House of Lords decided that since the licensee had no knowledge of the offence the requirements of s 22 (1) had not been fulfilled. LORD REID in his opinion alluded to the difference between s 22 (1) and s 21 (1), which enabled the servant himself to be prosecuted if he was the guilty person, and doubted whether any authority, however strong, would justify the House in reaching a result so contrary to ordinary principles of construction and to the fundamental principle that an accused person cannot be convicted without proof of mens rea as that which would result from the prosecution's argument that the innocent licence holder could be convicted under that section as well as the guilty servant. But he agreed with the view of the Divisional Court that on the facts of that case there was not that 'delegation' by the accused person necessary, if the canon of construction was applied to s 22 (1), to make him answerable for the servant having acted against his orders. LORD EVERSHEDE alluded to s 21 (1) and observed that the words 'the holder of the licence or his servant shall not knowingly sell' might be said, as it is said for the respondent here, to impose liability on the licensee, himself innocent, if there be knowledge on the part of his servant. He gave his approval to the canon of construction being applied in relation to s 22, and thought the result in any given case would depend on the common sense of the jury or magistrate considering the question of delegation in the sense indicated in the examples to be found in the numerous decisions. LORD MORRIS OF BORTH-Y-GEST was not prepared to accept that there were any canons of construction specially applicable to licensing legislation, or that in that legislation the principle 'respondeat superior' commanded some exceptional yet general acceptance. He held that s 22 (1) required knowledge in the holder of the licence before he could be convicted. He did not refer to s 21 (1), but pointed out that s 22 (1) made no express mention of any servant or agent of the holder of the licence. LORD HODSON held that even if the delegation cases were to remain undisturbed so as to give the word knowingly, as applied to the licensee, a meaning which embraced licensee or his substitute, there was no justification for enlarging the ambit of the section so as to embrace the activities of a servant where no more than a partial delegation has occurred (when he is in breach of the provisions of a licence or the statutory requirement). He contrasted s 22 (1) with s 21 (1) where the words 'or his servant' appear. LORD DONOVAN agreed with LORD MORRIS OF BORTH-Y-GEST and held that the language of s 22 (1) was clear enough not to need elucidation by reference to the outside aids to which the prosecution had been obliged to resort, deciding that knowingly means knowingly.

*Vane v Yiannopoulos* was considered by the Court of Appeal in *R v Winson* (1), a case decided on s 161 (1) of the 1964 Act which re-enacted s 22 (1) of the 1961 Act. The judgment of the court was delivered by LORD PARKER CJ who, after analysing the division of opinion in *Vane v Yiannopoulos*, reviewed the authorities on delegation and concluded that in spite of the views expressed obiter in *Vane's* case by LORD MORRIS OF BORTH-Y-GEST and LORD DONOVAN the principle that a man cannot get

out of the responsibilities and duties attached to a justices' licence by absenting himself is part of the law of England although it forms no part of the law of Scotland, and applies to s 161 of the 1964 Act. LORD PARKER CJ went on to observe:

'The position of course is quite different if he remains in control. It would be only right that he should not be liable if a servant behind his back did something which contravened the terms of the licence. If, however, he wholly absents himself leaving somebody else in control, he cannot claim that what has happened has happened without his knowledge if the delegate has knowingly carried on in contravention of the licence.'

A certificate under s 1 (2) of the Administration of Justice Act 1960 that the case involved a point of law of general public importance and leave to appeal were granted, but there was no appeal.

*R v Winson* was a decision on s 161, not s 169. But the ratio decidendi applies, in my judgment, to s 169 and the effect of the addition of the words 'or his servant' in s 169 is simply to add the servant as an additional target for prosecution. Once a principle of law or canon of construction has been established and has become part of the law, it has to be applied even if the circumstances which appear to have led to its adoption do not exist in the particular case in which its application is in question. Accordingly, although there has been no previous decision on the terms of s 169 (1) or its predecessor in the 1961 Act, this court is, in my judgment, bound by the reasoning in *R v Winson* to decide that the appellant, although he did not know Mr Weston had sold beer to the 15 years old, was rightly found guilty of knowingly selling it to him, and is liable to a fine of up to £25 on a first conviction and a fine of up to £50 and the loss of his licence on a subsequent offence; unless there is an escape from the view of the justices that there had been an effective delegation of managerial functions and responsibilities in respect of the lounge bar to Mr Weston.

For my part I would like to think that if there had been an appeal in *Winson's* case it might have been discovered that the law after all did not really drive the court to a result, to borrow the words of LORD REID

'so contrary to the ordinary principles of construction and to the fundamental principle that an accused person cannot be convicted without proof of mens rea, unless from a consideration of the terms of the statute and other relevant circumstances it clearly appears that that must have been the intention of Parliament.

When Parliament says in s 169 that the holder of the licence or his servant shall not knowingly sell intoxicating liquor to a person under 18, can it really have been its intention that either should be convicted when it is proved that he did not know?

Is there then any escape from the view of the justices that there had been an effective delegation of managerial functions and responsibilities in respect of the lounge bar to Mr Weston? On the authorities whether or not there had been delegation is a matter of fact for decision by the jury or the justices. As can be seen from the observations of LORD PARKER CJ in *Winson's* case, to which I have referred, one of the elements which has been in the forefront of the decided cases has been absence of the licensee, when of course the whole of the managerial functions and responsibilities for the hour-to-hour conduct of the premises must fall on the man who is there. But no licensee can be in two places at once. In the village pub the licensee may be in the public bar and the barmaid on the other side of a door serving in the lounge. In a large modern city hostelry there may be several bars, each in charge of its own staff, with the licensee on the premises, as he was in this case. Each member of the staff is responsible under s 169 for ensuring that liquor is not sold to those under age. Once you predicate that the licensee is on the premises, where is the line to be drawn? Yet it is where the line is drawn when the justices or the jury have to deal with

what LORD REID has called a long-standing anomaly that determines whether or not the licensee who they find as a fact did not know will be convicted for that which he did know.

All this court knows of the facts which bear on that problem in this case is stated by the justices in this way. Mr Weston was acting as barman in the lounge. He had complete control over the sale of intoxicating liquor in that room, and the responsibility of ensuring that persons under 18 years of age were not sold intoxicating liquor had been delegated to him by the appellant. The appellant was present in another bar on the premises but was not present in the lounge at the time of the sale and had no knowledge of what took place.

These findings, however bald, are findings of fact and cannot be questioned in this court. It cannot be said that they do not support the opinion of the justices that the appellant had effectively delegated his managerial functions and responsibilities in respect of the lounge bar to Mr Weston. *Vane's* case (1) and *Winson's* case (2) were cited to the justices, who clearly addressed their minds to the proper application of the principle considered in these decisions.

It must follow, therefore, in my judgment, that on the facts that they found and the principle which they and this court are bound to apply, however anomalous it is and however difficult its application may be where the licensee is not absent from the premises, the justices were correct in law in convicting the appellant, and this appeal must be dismissed.

**JAMES J:** I am in doubt that on the findings of fact made by the justices this appeal should be dismissed. Those findings are briefly expressed. The crucial one is that:

'Weston had complete control over the sale of intoxicating liquor in that room [the lounge bar] and the responsibility of ensuring that persons under 18 years of age were not sold intoxicating liquor had been delegated to him by the Appellant.'

Faced with that finding I do not find it necessary to consider in detail the speeches in the House of Lords in *Vane's* case (1). Suffice it to say that it is clear from the speeches of LORD REID and LORD EVERSHED in that case and from the subsequent judgment of LORD PARKER CJ in *Winson's* case (2)—in which he considered the previous decisions including the decision in *Vane's* case—that the doctrine of delegation has become part of the established and settled law. Whatever dislike has been expressed of the doctrine and its inception it remains the law although the reputed reason for its origin no longer exists. Section 21 of the Licensing Act 1961 re-enacted in s 169 (1) of the Licensing Act 1964, in my judgment, does not alter that position.

I am unable to agree with the argument that it would be an extension of the doctrine of delegation to apply it in circumstances in which the licence holder is present on the premises. As LORD REID pointed out in *Vane's* case, the earlier decisions

'drew a distinction between acts done by a servant without the knowledge of the licence holder while the licence holder was on the premises and giving general supervision to his business, and acts done without the knowledge of the licence holder but with the knowledge of a person whom the licence holder had left in charge of the premises.'

For my part, although I have no doubt that the presence of the licence holder on the premises would be a pointer to the fact that he had not delegated, I cannot regard

(1) 129 JP 50; [1964] 3 All ER 820; [1965] AC 486; affirming 128 JP 474; [1964] 2 All ER 820; [1964] 2 QB 739.

(2) [1968] 1 All ER 197; [1969] 1 QB 371.

it as a conclusive factor. The present case may be exceptional but here there is a finding, which cannot be disturbed, that Mr Weston had been given complete control by the appellant. I would dismiss the appeal.

**ASHWORTH J:** In my judgment this appeal fails and I can state my reasons shortly. The justices found as a fact that the barman, Mr Weston

'had complete control over the sale of intoxicating liquor in [the lounge bar] and the responsibility of ensuring that persons under 18 years of age were not sold intoxicating liquor had been delegated to him by the appellant.'

No suggestion was made on behalf of the appellant that there was no evidence to support this finding, or that it was one that no reasonable tribunal would make. In these circumstances it seems to me that the principle applied in a large number of cases, of which the most recent is *R v Winson* (1), applies to this case too. A simple statement of the principle is to be found in *Linnett v Metropolitan Police Comr* (2), where LORD GODDARD CJ said:

'But if the manager chooses to delegate the carrying on of the business to another, whether or not that other is his servant, then what that other does or what he knows must be imputed to the person who put the other into that position.'

Cases in which a licensee, while remaining on the premises, will nonetheless be held to have effectively delegated responsibility to his servant, may not often occur, but when they do occur I do not for my part see any objection to his being held liable. After all, delegation is a matter for his decision and if he lacks confidence in the servant, he need not delegate. I do not therefore feel misgiving at the result of this appeal.

*Appeal dismissed.*

Solicitors: *Ward Bowie & Co*, for *Harding & Barnett*, Leicester; *Arthur H Headley & Co*, Leicester.

Reported by *T R Fitzwalter Butler Esq*, Barrister.

(1) [1968] 1 All ER 197; [1969] 1 QB 371.

(2) 110 JP 153; [1946] 1 All ER 380; [1946] KB 290.



## COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND LAWTON, LJ, AND SHAW, J)

17th March 1972

R v GREGORY

*Criminal Law—Handling stolen goods—Indictment—Need to name owner of goods—Property of common type.*

In some charges of handling stolen goods, where it is common knowledge that the goods belong to some person or institution, it may be unnecessary to name the owner in the particulars of offence, but where the property is of a common and indistinctive type it may well be necessary to name the owner in order that the defendant may be able fully to understand the nature of the case which he has to meet.

The appellant was charged with handling stolen goods, namely, a starter motor, the property of W.A.W. In the course of the trial it became apparent that the starter motor could not have been the property of W.A.W., and at the close of the evidence the recorder directed that the indictment be amended by striking out the words 'the property of W.A.W.' stating that those words were 'mere surplusage'. No objection was then made to the amendment by defending counsel. In the course of his summing-up the recorder directed the jury that, provided they were satisfied on other essential matters, it was open to them to convict the appellant of handling a starter motor, the property of some person unknown. Counsel for the defence then objected to the amendment on the ground that it amounted to a radical change of direction on the part of the prosecution, but the objection was overruled. The appellant was convicted. On appeal,

**HELD:** in the present case the allegation of ownership had not been mere surplusage and had been properly inserted to inform the defendant of the nature of the case he had to meet; as that case had completely disappeared in the course of the trial, the recorder was not justified in allowing the amendment at so late a stage or in directing the jury in the manner in which he did; the course adopted in allowing the amendment ran the risk of injustice being done, and the verdict could not be regarded as either safe or satisfactory; the conviction must be quashed.

**APPEAL** by Alan John Gregory against his conviction at Birmingham General Quarter Sessions of handling stolen goods contrary to s. 22 of the Theft Act, 1968, when he was sentenced to a suspended sentence of 12 months' imprisonment.

*R M Wakerley for the appellant.*

*A W Palmer for the Crown.*

**EDMUND DAVIES LJ** delivered this judgment of the court: This appeal must be allowed. It is brought by Alan John Gregory who, on 28th June 1971 at Birmingham General Quarter Sessions, was convicted on one count of handling and sentenced to 12 months' imprisonment, suspended for three years. He was a police constable of some three years' standing in the Birmingham City Police Force. Count 8 (the last in the indictment) was the only one on which he was convicted, and it charged him that between 1st October 1970 and 4th February 1971 he received a starter motor, the property of William Alan Wilkes. He was found not guilty on the preceding seven counts, by direction in the case of the first, fourth and sixth counts and by the verdict of the jury in relation to the second, third, fifth and seventh counts.

The indictment was based on four sets of alternative counts, the first of the pair in each case being one of stealing, the second an alternative count of handling. Count 8 was thus treated throughout as alternative to count 7 which charged the appellant with the theft of Mr Wilkes's starter motor, and the learned judge made this quite clear in directing the jury. Against the conviction on count 8 the single judge granted

the appellant leave to appeal. The articles the subject of the eight counts were all the property of Mr Wilkes and they were taken by someone from the garage of which he was the proprietor. The appellant was not only a police constable—he was a friend and a customer of Mr Wilkes, and furthermore he did some part-time work in the garage and accordingly had the run of the place.

The case for the prosecution was that he had ample opportunity to commit the offences charged against him. It was said by the Crown that articles identical with those taken from Mr Wilkes's garage were found by senior police officers in the appellant's car on 4th February 1971. The starter motor with which we are concerned in this appeal was a vital exhibit. The case opened by the prosecution was that this had been brought to Mr Wilkes's garage in October 1970 by a customer—a Mr Scott—and it appeared that Mr Scott, having brought it there because it did not fit his car, took another starter motor in exchange or part-exchange and left this particular starter motor in Mr Wilkes's garage.

Mr Wilkes and his head mechanic said that the starter motor found in the appellant's car was the one which Mr Scott had brought to the garage and that it had remained there until shortly before Christmas 1970. They claimed to be able to identify it for two reasons: (i) it was a new type of motor which had only recently been put into production by the firm of Lucas, and (ii) it was still fitted with an old nut which the mechanic at Mr Wilkes's garage had put on it. They asserted: 'This starter motor which was found in the [appellant's] car is the one which disappeared from Mr Wilkes's garage'.

But a flaw soon appeared in the Crown case, because Mr Scott testified that he had been in possession of the starter motor since October 1969, and he claimed to be quite sure of this. Now the Crown really were in trouble, for another witness they called, a Mr Hayes, who was employed by Lucas, the manufacturers, said that he had examined this starter motor and that its type had not been in production before the week beginning 12th April 1970. It is further to be observed that in his summing-up the learned recorder told the jury: 'nobody, I think, suggests that Mr. Hayes is wrong.'

The appellant was in due course naturally asked by the police about the various articles claimed by Mr Wilkes. He said to the inspector: 'Will you be retaining all this stuff?', to which the inspector replied: 'Yes, unless we have explanations for it'. Then the appellant said: 'Because I need the starter motor and the tools. My starter motor's dickie.' Then the inspector said to him: 'Where is the starter motor from?' and the appellant, according to the inspector, said this: 'Now that's a question. I can't really tell you, because if I do I'll get somebody in trouble.' The inspector said: 'Don't be a fool. Unless this motor is stolen then any explanation which you have to offer will be in your own interest, and I would advise you to do so, otherwise I am forced to the conclusion that this starter motor has been stolen.' The appellant then said to that: 'I can't tell you. It would mean dropping someone else in it, and I'm in enough trouble without getting him in it.' Then the inspector said: 'If this starter motor is straight, then surely you cannot get anybody in trouble unless, as I have said previously, it is stolen.' The appellant said: 'I gave two quid for it. It's no good. I can't give you his name.'

The inspector went on: 'You have given £2 for a starter motor which is worth eight quid, you refuse to tell me the man's name; you must know from what you yourself have said that this starter motor has been stolen.' He is there, in effect, putting the charge that I am dealing with now to the appellant, and what does the appellant reply? 'Well, that's it. You can think it, it's up to you. Things don't look very good for me at all, do they?' The inspector said: 'No, but I cannot understand why, if this starter motor is straight, you will not mention the name of the person from whom you got it, which would clear you completely of any suspicion.' The appellant

said: 'Well, there you are. You know how it is. That's it.' Then later on when the other officers came into the room he said again to them when they asked him about the starter motor: 'As I told Mr. Eddy, I bought it off a chap for £2 but I don't want to implicate him.'

The defence was that the appellant had gone to Mr Wilkes's garage to buy a starter motor but the garage did not have one and that he had done this in mid-January 1971. The point was urged: 'Why on earth should he in mid-January of 1971 be seeking to buy a starter motor for his car if he had been either the thief or the receiver of a perfectly satisfactory starter motor which had been taken criminally from the garage during the previous month of December?'

A Mr Kimber who worked at the garage corroborated the appellant's visit in January 1971 for the purpose we have already related. He said that he then looked around the garage and could not find a starter motor. The appellant testified that while Mr Kimber was still with him in the showroom a customer came in, heard what they were talking about, and said that he could get the appellant a new starter motor at a 50 per cent discount and a reconditioned starter motor at an even lower figure. The appellant added that he thereafter met that same customer in a public house, that he was then handed the starter motor which the police in due course recovered from his car, and that he paid this customer £2 10s and handed over his old starter motor in part-exchange.

Mr Kimber said he could not remember the customer arriving at the garage on the occasion when the appellant called there in mid-January 1971. In due course the judge told the jury that if Mr Kimber was right in giving 8th January 1971 as the date on which the appellant called at the garage for the purpose of buying a starter motor, then, since this was after the starter motor claimed by Mr Wilkes had disappeared from the garage, he must have stolen or received it before this visit to the garage. The jury were invited to consider whether, if the appellant had been either the thief or receiver of the starter motor, he would thereafter have had either the nerve or the need to seek out a second motor from that very same garage.

As to the most damaging evidence of the police inspector, the appellant asserted that he never told the police that he was afraid of getting anybody else into trouble, and that what he did say was that, although he would like to have been able to give the man's name, he could not do so because he did not know it. He claimed to have added that he would be better off by first getting proof of where he bought the items and that he would consider making a statement later.

The case run throughout by the Crown, as we have related, is that the appellant had criminally handled a starter motor which was the property of none other than Mr Wilkes. But at the close of all the evidence, count 8 was amended by the learned recorder by striking out from the particulars thereof the words, 'the property of William Alan Wilkes'. The recorder said that those words were mere surplusage and that a receiving charge need not and should not name the owner of the property involved.

It is highly regrettable that, by an oversight, this normally most punctilious recorder omitted to canvass the views of defending counsel before taking that step as should have been done. No authority is required for that obvious proposition, although were any needed it is to be found in *R v West* (1). This amendment having been made at such a very late stage, the learned recorder told the jury that if (in view of the difficulties which had manifested themselves in the way of the Crown case as originally framed and presented) they were not satisfied that the starter motor found in the possession of the appellant was the property of Mr Wilkes, it was nevertheless open to them, if they were completely satisfied of the other ingredients

(1) 112 JP 222; [1948] 1 All ER 718; [1948] 1 KB 709.

of the offence, to convict the appellant of handling a stolen starter motor which was the property of some unknown person. They were directed in terms that it was not necessary in order to bring the charge home against the appellant to prove that the starter motor found in the appellant's possession was the property of Mr Wilkes. Towards the end of the summing-up counsel for the appellant objected to the amendment of count 8 on the ground that it amounted to a radical change of direction on the part of the prosecution in that, having alleged that the property was the property of Mr Wilkes right up until the end of all the evidence, they were now saying that not only were those words surplusage but that the motor was, in fact, the property of an unknown person other than Mr Wilkes. But his objection was overruled. The learned recorder in terms told the jury that on the evidence the motor found in the possession of the appellant could not possibly be the property of Mr Wilkes. He nevertheless allowed the count to go forward and the jury convicted on it.

It is in respect of the conviction on that solitary count in the indictment that this appeal is now brought. Did the recorder act rightly? Was he correct in saying that it was mere surplusage in the charge with which we are presently concerned to specify the owner of the property? Section 3 (1) of the Indictments Act 1915 provides:

'Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.'

As to the rules made pursuant to the statute, r 4 (5) of the Indictments Rules is in these terms:

'The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case.'

It is to be observed that the form of a count in respect of receiving appended to those rules gives as particulars of the offence that:

'A.B., on the            day of           , in the county of           , did receive a bag, the property of C.D., knowing the same to have been stolen.'

Rule 6 (1) deals with the description of property in this way:

'The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.'

There is no doubt authority for the proposition that in many cases it is unnecessary in the particulars of a charge similar to the one with which we are now concerned to specify the owner of the property concerned: see the observations of LORD GODDARD CJ in *Hibbert v McKiernan* (1). But where the property is of a common and indistinctive type, in order that the accused person may know exactly that with which he is charged, it may well be necessary to name the owner. Cases can arise where, unless that ownership be assigned in the particulars of the charge, the accused may be at a loss to understand fully the nature of the case which he has to meet.

(1) 112 JP 287; [1948] 1 All ER 860; [1948] 2 KB 142.

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<b>CRIMINAL LAW</b> - Handling stolen goods - Indictment - Need to name owner of goods - Property of common type. <i>R v Gregory</i> .. .. .	CA	569
<b>CRIMINAL LAW</b> - Indecent exposure - Exposing person with intent to insult female - Meaning of 'person' - Limitation to penis - Vagrancy Act, 1824, s 4. <i>Evans v Ewels</i> .. .. .	QBD	394
<b>CRIMINAL LAW</b> - Indictment - Amendment - Amendment after arraignment - When permissible - Avoidance of injustice likely to be caused to defendant - Indictments Act, 1915, s 5 (1) <i>R v Johal. R v Ram</i> .. .. .	CA	519
<b>CRIMINAL LAW</b> - Insanity - Defence - Deprivation of power of reasoning - Retention of power, but failure to use it to the full. <i>R v Clarke</i> .. .. .	CA	184
<b>CRIMINAL LAW</b> - Joint charge - Acquittal of one defendant - Conviction of second defendant - Need for evidence of joint action. <i>R v Rowlands</i> .. .. .	CA	181
<b>CRIMINAL LAW</b> - Obscene publication - 'Obscene' - Sending postal packet containing indecent or obscene article - Conspiracy to corrupt public morals - Distinction between book and magazine containing obscene matter - Expert evidence - Admissibility on issue whether article tends to deprave or corrupt and issue whether publication of article, though obscene, is for public good - Defence that article would have aversive tendency rather than tendency to deprave or corrupt - Obscene Publications Act, 1959, s 4 - Post Office Act, 1953, s 11 (b). <i>R v Anderson</i> .. .. .	CA	97
<b>CRIMINAL LAW</b> - Obstructing constable in execution of duty - Distinction between refusal to act and positive act constituting obstruction - Act not unlawful per se - Defendant required to provide specimen of breath for breath test - Drinking whisky prior to test - Purpose and effect to prevent statutory laboratory test - Police Act, 1964, s 51 (3). <i>Ingleton v Dibble</i> .. .. .	QBD	155
<b>CRIMINAL LAW</b> - Obtaining pecuniary advantage by deception - Ingredients of offence - Dishonesty - Effect of absence of reasonable ground for belief - Incurring by defendant of personal liability - Obtaining of evasion, not creation, of debt of deception - Proof that pecuniary advantage was obtained by means of alleged deception essential - Theft Act, 1968, s 16 (2) (a). <i>R v Royle</i> .. .. .	CA	106
<b>CRIMINAL LAW</b> - Obtaining property by deception - Intention permanently to deprive owner - Dishonesty - Post office employee - Post office giro account - Knowledge of no right to overdraw - Cheque drawn when account known to be exhausted - No prospect of account being put in funds before presentation of cheque - Genuine intention to repay when funds became available - Theft Act, 1968, s 15. <i>Halstead v Patel</i> .. .. .	QBD	465
<b>CRIMINAL LAW</b> - Publicity of proceedings - Committal proceedings - Application by some defendants for order permitting publication of reports of proceedings - Application of order to all defendants including defendants joined later - Criminal Justice Act, 1967, s. 3 (2). <i>R v Blackpool Justices. Ex parte Beaverbrook Newspapers Ltd</i> .. .. .	QBD	225

<b>CRIMINAL LAW</b> - Publicity of proceedings - Committal proceedings - Application for order permitting publication of reports of proceedings - Application made before taking of depositions begun - Criminal Justice Act, 1967, s 3 (2) <i>R v Blackpool Justices. Ex parte Beaverbrook Newspapers Ltd.</i> . . . . .	<b>QBD</b>	<b>225</b>
<b>CRIMINAL LAW</b> - Sending obscene or indecent article through post - Issue of obscenity or indecency - Matter entirely for jury - Admissibility of evidence as to effect of article - Post Office Act, 1953, s 11 (1) (b). <i>R v Stamford</i> . . . . .	<b>CA</b>	<b>522</b>
<b>CRIMINAL LAW</b> - Sentence - Isolated act charged - Plea of guilty to that charge - Statement by prosecutrix - Allegation of other similar acts - Evidence of defendant and of prosecutrix heard by judge - Acceptance by judge of evidence of other similar acts - Sentence passed on that basis. <i>R v Hutchison</i> . . . . .	<b>CA</b>	<b>304</b>
<b>CRIMINAL LAW</b> - Sentence - Youthful offender - Suspended sentence - Conviction during period of suspension - Sentence of 12 months' imprisonment and suspended sentence activated to run consecutively - Overall term amounting to eighteen months - Criminal Justice Act, 1961, s 3 (1) (3). <i>R v Halse</i> . . . . .	<b>CA</b>	<b>77</b>
<b>CRIMINAL LAW</b> - Theft - Handling stolen goods - Mental element - Test to be applied a subjective one - Proof that circumstances would have put a reasonable man on enquiry insufficient - Theft Act, 1968, s 22 (1). <i>Atwal v Massey</i> . . . . .	<b>QBD</b>	<b>35</b>
<b>CRIMINAL LAW</b> - Trial - Shorthand note - Absence of official shorthand writer - Duty of judge, counsel and officers of court - Steps to ensure that unchallengeable record is made and judge's direction to jury is adequately recorded - Criminal Appeal Rules, 1968, r 18 (3). <i>R v Payne. R v Spillane</i> . . . . .	<b>CA</b>	<b>74</b>
<b>CRIMINAL LAW</b> - Trial - Trial in absence of defendant - Voluntarily waiver of right to be present in court - Defendant absconding during trial before giving evidence. <i>R v Jones</i> . . . . .	<b>CA</b>	<b>543</b>
<b>CUSTOMS AND EXCISE</b> - Importation of prohibited goods - Conspiracy to require possession knowingly and with intent to evade prohibition - Time and place of acquisition - Time and place distant from importation - Not relevant as a defence - No distinction between uncustomed goods and goods prohibited from importation - Customs and Excise Act, 1952, s 304 (a). <i>R v Ardalan</i> . . . . .	<b>CA</b>	<b>453</b>
<b>CUSTOMS AND EXCISE</b> - Importation of prohibited goods - Indecent or obscene photographs - 35 mm cinematograph films - Indecency not apparent on mere visual inspection - Customs Consolidation Act, 1876, s 42. <i>Derrick v Commissioners of Customs and Excise</i> . . . . .	<b>QBD</b>	<b>294</b>
<b>DANGEROUS DRUGS</b> - Possession - Lawful obtaining of drugs under doctor's prescription - Mistaken belief of defendant that drugs had been destroyed - Subsequent discovery by defendant of drugs originally supplied - Legality of possession - Drugs (Prevention of Misuse) Act, 1964, s 1 (1). <i>R v. Buswell</i> . . . . .	<b>CA</b>	<b>141</b>
<b>ELECTIONS</b> - Local government - Failure by returning officer to hold recount when requested - Irregularity not affecting result - Ballot papers - Validity - Paper marked with cross otherwise than in proper place - Paper with name of the candidate left standing and names of other candidates struck out - Representation of the People Act, 1949, s 37 (1) - Local Elections Rules, r 42, r 43 (3). <i>Levers v Morris</i> . . . . .	<b>QBD</b>	<b>62</b>
<b>EVIDENCE</b> - Document - Refusal to produce - Public interest - Gaming - Licence - Application to Gaming Board for certificate of consent - Character, reputation and financial standing of applicant - Right of Board to obtain fullest information - Refusal to produce document received in answer to request for information - Gaming Act, 1968, Sch. 2, paras 5, 6. <i>Rogers v Secretary of State for Home Department Gaming Board for Great Britain v Rogers</i> . . . . .	<b>HL</b>	<b>574</b>
<b>FOOD AND DRUGS</b> - Samples for analysis - Unwrapped meat pies - Purchase of six pies by sampling officer - Division into three lots each consisting of two pies - Submission of one lot to public analyst - Aggregate of meat in those two pies smaller percentage of their total content than that required under regulations - Liability of seller - Food and Drugs Act, 1955, s 93 (1), Sch VII, Part I, paras 1, 2. <i>Skeate v Moore</i> . . . . .	<b>QBD</b>	<b>82</b>
<b>FORCIBLE ENTRY.</b> See <b>CRIMINAL LAW.</b>		
<b>GAME</b> - Killing during close season - Exemption from liability - Deer - Killing on enclosed woodland - Action necessary for preventing serious damage to crops 'on that land' - Killing to prevent damage on adjoining land - Deer Act, 1963, s 10 (3). <i>Traill v Buckingham</i> . . . . .	<b>QBD</b>	<b>475</b>

<b>GAME</b> - Killing without licence - Exceptions and exemptions - Deer - Killing on enclosed lands - 'Enclosed lands' - Farmland as distinct from moorland - Deer hit on land with permission running to and dying on neighbouring land - Game Licences Act, 1860, s 4, s 5. <i>Jemmison v Priddle</i> .. .. .	QBD	230
<b>GAMING</b> - Betting office - Licence - Application - Notice advertising application - Inclusion of matter additional to that required by statute - Effect on validity of notice - Betting, Gaming and Lotteries Act, 1963, Sch 1, para 6. <i>R v Inner London Area (West Central Division) Betting Licensing Committee. Ex parte Pearcy</i> .. .. .	QBD	273
<b>GAMING</b> - Club - Licensing - Application - Notice - Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2). <i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	CA	71
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Appeal to quarter sessions - Finality of decision - Gaming Act, 1968, sched 7, para 4. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Grounds - Discretion of licensing authority - Gaming Act, 1968, sched 7, paras 8, 18. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Right of proprietary club to be registered - Gaming Act, 1968, Part III, sched 7. <i>Tehrani v Rostron</i> .. .. .	CA	40
<b>GAMING</b> - Lottery - Distribution of money by chance - Chain letter scheme - No identifiable prize fund - Betting, Gaming and Lotteries Act, 1963, s 42 (1) (f). <i>Atkinson v. Murrell</i> .. .. .	QBD	379
<b>HACKNEY CARRIAGE</b> - Licensing - Duty of licensing authority - Obligation to act fairly towards all persons whose interests are affected by decisions of authority - Town Police Clauses Act, 1847, s 37. <i>R v Liverpool Corporation. Ex parte Liverpool Taxi Owners Association</i> ..	CA	491
<b>HIGHWAY</b> - Obstruction - Nuisance - Parking of vehicle for long period - Removal of part of highway from public use - Collision between motor cycle and parked vehicle - Injury to pillion passenger - Collision due wholly to negligence of motor cyclist - Obstruction not a source of danger. <i>Dymond v. Pearce</i> .. .. .	CA	397
<b>HOUSING</b> - Obtaining possession of council property from trespassers - Competency of proceedings - Proceedings instituted by authorised committee - 'Management of housing accommodation' - Cost of proceedings - 'Blanket' decision to institute. <i>London Borough of Southwark v Peters</i> .. .. .	CA	187
<b>HUSBAND AND WIFE</b> - Maintenance of wife - Assessment of weekly payment - Consideration of husband's potential earning capacity - Jurisdiction of court. <i>McEwan v McEwan</i> .. .. .	PDA	527
<b>HUSBAND AND WIFE</b> - Maintenance of wife - Provisional maintenance order - Jurisdiction - Husband resident and matrimonial offences alleged to have been committed outside United Kingdom - Wife ordinarily resident in England - Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1) - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a). <i>Collister v Collister</i> .. .. .	Fam Div	163
<b>HUSBAND AND WIFE</b> - Matrimonial home - Rights of occupation - 'Regulation' of exercise by spouse of right to occupy dwelling-house - Right wholly to exclude spouse therefrom - Matrimonial Homes Act, 1967, s 1 (2). <i>Tarr v Tarr</i> .. .. .	HL	484
<b>HUSBAND AND WIFE</b> - Summary proceedings - Maintenance of child - 'Child of the family' - Acceptance - Objective test - Circumstances constituting acceptance - Time of acceptance - Withdrawal - Liability of another person - Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <i>Snow v Snow</i> .. .. .	CA	54
<b>INDECENT EXPOSURE.</b> See CRIMINAL LAW.		
<b>INDECENT PHOTOGRAPHS.</b> See CUSTOMS & EXCISE.		
<b>INDICTMENT.</b> See CRIMINAL LAW.		
<b>INFANT.</b> See ADOPTION; CHILD.		
<b>INSANITY</b> - See CRIMINAL LAW.		
<b>LANDLORD AND TENANT</b> - Small tenement - Recovery - Application to justices for warrant - Notice of application - Service - Substituted service - Need to prove due diligence by landlord in seeking tenant - Small Tenements Recovery Act, 1838, s 2. <i>Stoker v Stansfield</i> .. .. .	QBD	281
<b>LICENSING</b> - Club - Special hours certificate - Premises adapted for providing substantial refreshment for members - Licensing Act, 1964, s 78 (b). <i>Porter v Aberystwyth Justices</i> .. .. .	QBD	285

Undoubtedly in some cases, as LAWTON LJ said in the course of counsel's submissions, such as those concerning outstanding works of art which it is common knowledge belong to some person or institution, it may be unnecessary to particularise the ownership, but this is not one of those cases. This is a case about a perfectly ordinary starter motor, and from the outset it was conducted by the Crown on the basis that the motor belonged to Mr Wilkes and to no one else.

We do not agree with the view of the learned recorder that in the present case the assertion as to ownership contained in the particulars of count 8 was mere surplusage. It was desirable that they should have been inserted, they were properly inserted, and they informed the defence of the nature of the case and the only case that the Crown set out to establish, a case which (for the reasons we have already indicated) later dissolved into thin air.

Accordingly, we do not think that the learned recorder was justified in allowing the amendment to be made, although it is true that a very extensive power of amending is conferred on the court by s 5 of the Indictments Act 1915. But, quite apart from the question whether the amendment permitted in this case was a proper one or not, this court is strongly of the view that to allow it at so late a stage was to run the risk of injustice being done, although we know full well that nothing was further from the learned recorder's mind than that.

If the defence had known beforehand that the case they had to meet was one of handling a stolen starter motor, the property of a person unknown, their approach might well have been entirely different and the recorder in his turn would have been called on to deal with it differently. He would have had to direct the jury on the lines of such cases as *R v Sbarra* (1) and *R v Fuschillo* (2), cases which support the proposition that the possession of goods of unknown ownership may, in certain circumstances, give rise to an inference (a) that they were stolen by the possessor, or (b) that they were goods which the accused person received knowing them to be stolen. But such a state of affairs calls for a most careful direction. The learned recorder would have had to go on to remind the jury that, as is illustrated by such cases as *Cohen v March* (3), the fact that an accused person told what appears to be a lie or gave an unacceptable or unsatisfactory explanation to account for his possession of the property is not of itself conclusive of his guilt. In short, as we see it, the whole nature of the summing-up would have had to have been readjusted and put in a different form from that which was, in fact, adopted by the learned recorder. Furthermore, the task of defending counsel would have been wholly different from that which counsel for the appellant came prepared to perform in order to meet the charge contained in count 8 as originally framed.

In these circumstances, we are driven to the conclusion that the verdict of the jury cannot be regarded as either safe or satisfactory. This appeal must be allowed and the conviction quashed.

*Appeal allowed.*

Solicitors: *Carney-Smith & Co*, Birmingham; *D E Morgan*, Birmingham.

Reported by *T R Fitzwalter Butler, Esq.*, Barrister

(1) (1918), 82 JP 171.

(2) [1940] 2 All ER 489.

(3) [1951] 2 TLR 402.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD PEARSON, LORD SIMON OF GLAISDALE  
AND LORD SALMON)

11th, 12th, 13th, 17th April, 28th June 1972

ROGERS v SECRETARY OF STATE FOR THE HOME DEPARTMENT  
GAMING BOARD FOR GREAT BRITAIN v ROGERS

*Evidence—Gaming—Licence—Application to Gaming Board for certificate of consent—Character, reputation and financial standing of applicant—Right of Board to obtain fullest information—Refusal to produce document received in answer to request for information—Gaming Act, 1968, sched 2, paras 5, 6.*

By para 5 of sched 2 to the Gaming Act, 1968 "in determining whether to issue to an applicant a certificate consenting to his applying for the grant of a licence under this Act in respect of any premises, the [Gaming Board for Great Britain] shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance." By para 6 the board shall in particular take into consideration the character, reputation, and financial standing of the applicant and of any other person by whom the club would be managed or for whose benefit it would be carried on.

HELD: it was in the public interest that the board should be able to obtain the information which was essential to enable them properly to perform the task laid on them by the above provisions, and for that purpose they required the fullest information they could get; consequently, they were not as a general rule bound to produce any document they received which gave them information about the character and position of an applicant; Parliament must have expected that in order to perform their duties the board would be obliged to receive documents the contents of which no one would contemplate they would have to divulge.

PER CURIAM: In such a case the expression "Crown privilege" is wrong. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the document should not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence.

Decision of Queen's Bench Divisional Court, sub nom. *R v Lewes Justices. Ex parte Gaming Board of Great Britain* (1971), 135 JP 442, affirmed and varied.

APPEAL by the appellant, Henry Rogers, against a decision of the Queen's Bench Divisional Court, reported 135 JP 442, setting aside, on the application of the Home Secretary, two witness summonses issued by a justice of the peace for Lewes, East Sussex, on the application of the appellant calling on Arthur Brian Saunders, secretary to the Gaming Board for Great Britain, and Thomas Christopher Williams, the chief constable of Sussex, to appear before a magistrates' court at Lewes at the hearing of an information laid by the appellant against Patrick Ross, assistant chief constable of Sussex, to give evidence therein, and to produce certain documents specified in the summonses. The board cross-appealed from the refusal of the Divisional Court to make an order for certiorari to quash the witness summons relating to Mr. Saunders.

W T Williams QC and D A R Bradley for the appellant.

The Attorney-General (Sir Peter Rawlinson QC) and Gordon Slynm for the Crown.

Raymond Kidwell QC and L F Read for the board.

Their Lordships took time for consideration.

28th June. The following opinions were delivered.



**LORD REID:** By 1968 it had become notorious that the control of many gaming establishments was passing into the hands of very undesirable people. The Gaming Act 1968 provides for the licensing of premises used for gaming, and by s 10 it established the Gaming Board for Great Britain with a special duty to keep under review the extent and character of gaming. One of its duties is to deal with applications for its consent to apply for a gaming licence. No licences can be granted to any applicant unless he has obtained such consent from the board. The functions and duties of the board in this regard are set out in para 4 of sch 2 to the Act. The board are required to make unusually extensive enquiries not only into the capacity and diligence of all applicants but also into their character, reputation and financial standing and any other circumstances appearing to the board to be relevant. Applications were made by a company of which the appellant, Mr Rogers, was a director and by Mr Rogers himself. All were refused after Mr Rogers had been interviewed by the board.

It is the custom of the board to obtain confidential information about applicants from the police. Mr Rogers says that there came into his possession from an anonymous source a copy of a letter written about him to the board by Mr Ross, assistant chief constable of Sussex. Obviously this letter had been abstracted by improper means from the files of the board or of the police. Mr Rogers says that this letter contains highly damaging libellous statements about him and that he wishes to take proceedings to clear his reputation. The means he chose for doing that was to seek to prosecute Mr Ross for criminal libel. To succeed he must prove that the letter was sent so he applied for witness summonses against representatives of the board and the chief constable requiring them to produce, *inter alia*, this letter. The Attorney-General then sought an order of certiorari to quash the summonses on the ground that the documents called for were the subject of Crown privilege and he succeeded.

Mr Rogers's case may not seem to be very meritorious and there are obvious objections to the means which he has chosen for the vindication of his character. But it would be wrong to seek to dispose of this case on narrow grounds so I shall proceed on the footing that he is acting in good faith and has a legitimate interest in seeking production of the letter. If production is to be withheld it must be on grounds which have nothing to do with the merits or demerits of Mr Rogers.

The ground put forward has been said to be Crown privilege. I think that that expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence. A Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable. But in my view it must always be open to any person interested to raise the question and there may be cases where the trial judge should himself raise the question if no one else has done so. In the present case the question of public interest was raised by both the Attorney-General and the board. In my judgment both were entitled to raise the matter. Indeed I think that in the circumstances it was the duty of the board to do as they have done.

The claim in the present case is not based on the nature of the contents of this particular letter. It is based on the fact that the board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding the character, reputation or antecedents of applicants for their consent.

Claims for 'class privilege' were fully considered by this House in *Conway v Rimmer* (1). It was made clear that there is a heavy burden of proof on any authority which makes such a claim. But the possibility of establishing such a claim was not ruled out. I venture to quote what I said in that case:

"There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of LORD SIMON in [*Duncan v Cammell Laird & Co Ltd* (2)], whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service".

I do not think that 'the public service' should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties. If it is then we are enabling the will of Parliament to be carried out.

There are very unusual features about this case. The board require the fullest information they can get in order to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming establishment. There is no obligation on anyone to give any information to the board. No doubt many law abiding citizens would tell what they know even if there was some risk of their identity becoming known, although many perfectly honourable people do not want to be thought to be mixed up in such affairs. But it is obvious that the best source of information about dubious characters must often be persons of dubious character themselves. It has long been recognised that the identity of police informers must in the public interest be kept secret and the same considerations must apply to those who volunteer information to the board. Indeed it is in evidence that many refuse to speak unless assured of absolute secrecy.

The letter called for in this case came from the police. I feel sure that they would not be deterred from giving full information by any fear of consequences to themselves if there were any disclosure. But much of the information which they can give must come from sources which must be protected and they would rightly take this into account. Even if information were given without naming the source, the very nature of the information might, if it were communicated to the person concerned, at least give him a very shrewd idea from whom it had come.

It is possible that some documents coming to the board could be disclosed without fear of such consequences. But I would think it quite impracticable for the board or the court to be sure of this. So it appears to me that, if there is not to be very serious danger of the board being deprived of information essential for the proper performance of their difficult task, there must be a general rule that they are not bound to produce any document which gives information to them about an applicant.

We must then balance that fact against the public interest that the course of justice should not be impeded by the withholding of evidence. We must, I think, take into account that these documents only came into existence because the applicant is asking for a privilege and is submitting his character and reputation to scrutiny. The documents are not used to deprive him of any legal right. The board have a wide discretion. Not only can they refuse his application on the ground of bad reputation although he may say that he has not deserved that reputation; it is not denied that the board can also take into account any unfavourable impression which he has made during an interview with the board. Natural justice requires that the board should act in good faith and that they should so far as possible tell him the gist

(1) [1968] 1 All ER 874; [1968] AC 910; rvsg [1967] 2 All ER 1260.

(2) [1942] 1 All ER 587; [1942] AC 624.

of any grounds on which they propose to refuse his application so that he may show such grounds to be unfounded in fact. But the board must be trusted to do that; we have been referred to their practice in this matter and I see nothing wrong in it.

In the present case the board told Mr Rogers nothing about the contents of this letter because they say that they had sufficient grounds for refusing his application without any need to rely on anything in the letter. Their good faith in this matter is not subject to any substantial challenge. If Mr Rogers had not by someone's wrongful act obtained a copy of the letter there was no reason why he should ever have known anything about it.

In my judgment on balance the public interest clearly requires that documents of this kind should not be disclosed, and that public interest is not affected by the fact that by some wrongful means a copy of such a document had been obtained and published by some person. I would therefore dismiss Mr Rogers's appeal.

There is a cross-appeal by the board because the Divisional Court refused to make in favour of the board an order similar to that which they made in favour of the Home Secretary. The point of law certified was:

'Whether the Divisional Court were right in refusing to make an order upholding the claim by the Gaming Board for Great Britain to privilege in respect of the production of the letters of 7th July and 15th September 1969 referred to in the said witness summonses.'

For the reasons which I have given I do not think that the right to withhold the documents depends on or flows from any privilege. It arises from the public interest and the board are entitled to assert that public interest. I would therefore allow the cross-appeal.

**LORD MORRIS OF BORTH-Y-GEST:** The issue in the present appeals arose under quite exceptional circumstances. When in 1969 a company called RHD (Eastbourne) Ltd, of which the appellant Rogers was a director and shareholder, wished to make application for the grant of licences under the Gaming Act 1968 in respect of certain bingo halls it became necessary to make application to the Gaming Board for certificates of consent. The bingo halls were to be managed by and they would be carried on for the benefit of Mr Rogers. The board made certain enquiries. These included enquiries of the police. As a result the assistant chief constable of Sussex wrote a letter to the board dated 15th September 1969. At a later date (which was in July 1970) Mr Rogers in some wholly unexplained way became possessed of a copy of the letter which the assistant chief constable had written and thereafter (on 20th October 1970) Mr Rogers laid an information against the assistant chief constable alleging criminal libel (contrary to s 5 of the Libel Act 1843), and a summons was issued which was served on 21st October 1970. The present proceedings relate to two witness summonses each dated 7th January 1971. One was to the chief constable of Sussex summoning him to the magistrates' court to produce a copy of the letter of 15th September 1969. The other was to the secretary of the board summoning him to the magistrates' court to give evidence and to produce certain documents which included the letter of 15th September 1969.

Both the Secretary of State for the Home Department and the board made applications to the Divisional Court for order of certiorari. The relief sought by the Secretary of State was an order of certiorari so that both witness summonses should be quashed. The relief was sought on the grounds set out in a certificate given by the Secretary of State (dated 11th February 1971) and also on the grounds that the various documents

'contained information sought prepared or given in confidence to the Gaming Board of Great Britain for the performance of its functions under the Gaming Act 1968 which it would be contrary to the public interest to produce.'

The separate application of the board related only to the witness summons issued to the secretary of the board. The grounds on which the relief was sought not only included the ground:

'That it is necessary in the public interest that the letter of the 15th September, 1969, and some of the other documents referred to in the said witness summons should not be disclosed and therefore are privileged from production',

but also the grounds that apart from the letter of 15th September 1969 the other documents were not material and further that the witness could give no material evidence and that in the premises the witness summons was issued in excess of jurisdiction.

It may here be stated that before your Lordships it was made clear that it was only the documents which now need be considered and of them only the letter of 15th September 1969 (and a copy of it), and the letter of enquiry of 7th July 1969, to which the letter of 15th September was a reply.

In the Divisional Court the court thought it appropriate first to hear the application of the Attorney-General who was appearing for the Secretary of State. It may be that this was because the application of the Secretary of State related to both witness summonses. In the result the court on that application ordered that the two witness summonses should be set aside in so far as they required the production of documents (including the copy of the letter of 15th September). In regard to the separate application of the board the court made no order. Inasmuch as it was made clear to your Lordships that effectively there is no issue save in regard to the production of the letter of 15th September (the original of which is in the possession of the board) and of the copy of that letter (which presumably is in the possession of the chief constable) I think it follows that if the appeal of Mr Rogers fails the board are entitled to an order unconditionally quashing and setting aside the witness summonses issued to the secretary of the board.

By passing the Gaming Act 1968 Parliament decided that it is in the public interest that there should be certain measures of control of supervision and of restriction of gaming activities. Part II of the Act relates to gaming on premises which are licensed or registered. A gaming board was established (see s 10). It consists of a chairman and of members appointed by the Secretary of State. Amongst the duties of the board are those of keeping under review not only the extent but the character of gaming in Great Britain. Furthermore, it must keep under review the extent, the character, and the location of gaming facilities which are provided on premises in respect of which licences are in force. In this connection it is provided (see s 11 and sch 2) that certain authorities are to be the licensing authorities (responsible for the grant, renewal, cancellation and transfer of licences) and furthermore that an application for the grant of a licence in respect of premises is to be of no effect unless the board have issued to the applicant a certificate consenting to his applying for such licence. Schedule 2 makes detailed provisions in regard to applications for a certificate of consent.

If the provision of gaming facilities may be highly profitable it is manifest that the success or failure of a consent application is a matter of great consequence to the applicant. It is equally manifest that it is highly desirable in the public interest that those who provide and control gaming facilities should be dependable and trustworthy. It follows that in discharging its duty, as assigned to it by Parliament, of deciding whether to issue a certificate of consent to an applicant, the board have responsibilities which demand not only a careful regard to the public interest but for

reasons of fairness a careful regard to the interests of an applicant. But certain directions are positively given. Amongst them (see para 4 (5) of sch 2) is that the board shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of the Act (and of any regulations made under it) will be complied with and that gaming on the premises will be fairly and properly conducted and that the premises will be conducted without disorder or disturbance. It is abundantly clear that only by making certain enquiries and investigations could the board perform that statutory duty. But the statutory provision is even more detailed. The board must (see para 4 (6) of sch 2) take into consideration the character, the reputation and the financial standing of the applicant and of any person by whom a club would be managed or for whose benefit it would be carried on. Beyond all that the board may take into consideration any other circumstances appearing to them to be relevant in determining whether an applicant would be likely to be both capable of and also diligent in securing compliance with the provisions of the Act and in securing that gaming will be properly conducted and that the premises will be conducted without disorder or disturbance.

If the board must take into consideration, *inter alia*, both the character and the reputation (for Parliament has recognised the distinction) of an applicant the board obviously must take proper steps to ascertain what is the character and what is the reputation of an applicant. It could not rationally be suggested that to make enquiry of the police was other than reasonable. An applicant will not ordinarily know (whatever he might surmise) whether an enquiry has been made of the police. If it has and if a letter is received from the police, whether it be commendatory of an applicant or otherwise, is the board under any obligation to send a copy of such letter to the applicant? I think not. But suppose the communication tells against an applicant and is likely to influence the board—what course should then be followed? Some statement or suggestion which is adverse to an applicant may be based on inaccurate information: it may be one which could readily be refuted. In other circumstances the board might receive some unsolicited information which reflected on the reputation or the character of the applicant or which without being seriously derogatory reflected on his abilities and competence. In other circumstances there might be a communication adverse to the applicant which was inspired by wrong or indirect motives. That these are possibilities to be reckoned with serves to emphasise that Parliament has assigned responsibilities to the members of the board which for their discharge demand the highest standards of integrity. We were informed that the board have in fact evolved procedures calculated to ensure that an applicant is fairly treated: if the board is minded to refuse an application then an applicant is given an opportunity of making representations (before a final decision is reached); in giving such opportunity the board, so far as they are able, consistently with the due and efficient discharge of their statutory duty and with the public interest, give an applicant the best indication reasonably possible of the matters that are troubling them. Though the board consider that there might be cases where not only the source but also the content of some information could not, in the public interest, be disclosed, we were informed that so far the board had not had a case in which their decision was in fact based on matter with which an applicant could not be given an opportunity to deal.

We are not in the present proceedings immediately and directly concerned with any question whether the board have acted other than fairly and in accordance with the principles of natural justice. I see no ground for any criticism of the board. Nor was any made in these proceedings. In the present proceedings the issue is whether for reasons of public interest the production of the letter of 15th September should be withheld. It is sufficient to mention that the general and wider issues



to which I have referred received consideration in the Court of Appeal in *R v Gaming Board for Great Britain, ex parte Benaim* (1). Furthermore, we were informed that there have in fact been other proceedings (by way of applications for certiorari or mandamus) in which the applicants unsuccessfully challenged the refusal of the board to issue consents and we were also told that in such proceedings it was stated that in fact the material contained in the letter of 15th September was not taken into account by the board in reaching decision in regard to the application for consent.

I return, then, to the question whether the letter of 15th September—or any copy of it—should be excluded from production. This, in my view, is a question which depends for its determination on considerations of the public interest.

It has never been doubted that there are certain documents and certain classes of documents the production of which for reasons of the public interest should not be ordered by a court. The approach of the court in considering whether to order production was laid down in the case of *Conway v Rimmer* (2). The court will sometimes have to assess where the balance lies as between competing aspects of the public interest. There will often be cases where a Minister of the Crown has very special knowledge concerning the public interest and a court can as a result be greatly helped if it is informed of the views of the Minister. There will be many situations in which some aspect of the public interest can most helpfully be drawn to the attention of a court by a Law Officer.

In the present case the Divisional Court, assisted by having the views of the Secretary of State, came to the clear conclusion that it was not in the public interest that the letter in question (or a copy of it) should be produced. I entirely agree with their conclusion. I have referred to the duties which Parliament has imposed on the board. It seems to me that Parliament must have expected that in order to perform those duties the board would be obliged to receive certain documents which no one would contemplate that they would have to divulge. It is not that the contents of the documents would necessarily or even probably contain material which it would be damaging to the national interests to divulge but rather that the documents would be of a class which demanded protection. Parliament has imposed a duty on the board to make enquiries concerning reputation, character and financial standing. It seems to me that in making such enquiries the board would contemplate and expect that the answers to their enquiries would be protected from disclosure. Certainly those answering the enquiries would so expect. However honourable and public spirited a person might be he would undoubtedly feel somewhat inhibited in the future if he found that as a result of his last response to a request for information he had himself become a defendant or an accused. The test, however, is not in personal terms. It rests on a consideration of the necessities of the public service arising out of the rather special duties and functions imposed and recognised by Parliament. In my view, the letter of 15th September and its terms and contents should be protected from production or being given in evidence in the proceedings now in question because it is within a class of communications which in the public interest should be protected from production.

I would therefore dismiss the appeal of Mr Rogers and allow the appeal of the board.

**LORD PEARSON ON:** I agree, for the reasons given by my noble and learned friends, that the letter of 15th September 1969 belongs to a class of documents and information which in the public interest should be protected from disclosure. I wish to add a few words as to the procedure, on which there has been some discussion.

(1) 134 JP 513; [1970] 2 All ER 528; [1970] 2 QB 417.

(2) [1968] 1 All ER 874; [1968] AC 910; rvsg [1967] 2 All ER 1260.

It seems to me that the proper procedure is that which has been followed, I think consistently, in recent times. The objection to disclosure of the document or information is taken by the Attorney-General or his representative on behalf of the appropriate Minister, that is to say, the political head of the government department within whose sphere of responsibility the matter arises, and the objection is expressed in or supported by a certificate from the appropriate Minister. This procedure has several advantages: (i) the question whether or not the disclosure of the document or information would be detrimental to the public interest on the administrative or executive side is considered at a high level; (ii) the court has the assistance of a carefully considered and authoritative opinion on that question; (iii) the Attorney-General is consulted and has opportunities of promoting uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken. The court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, although naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed.

Although that established procedure is the proper procedure, it is not essential as a matter of law. It is not always practicable. If the appropriate Minister is not available, some other Minister or some highly-placed official must act in his stead. If it becomes evident in the course of a trial or in interlocutory proceedings that perhaps some document or information ought in the public interest to be protected from disclosure, it must be open to the party or witness concerned or the court itself to raise the question. If such a situation arises in the course of a trial, the court can adjourn the trial for the appropriate Minister or the Attorney-General to be consulted, but the court will be reluctant to adjourn the trial unless it is really necessary to do so, and in some cases that will be unnecessary because the court is able to give an immediate answer.

The expression 'Crown privilege' is not accurate, although sometimes convenient. The Crown has no privilege in the matter. The appropriate Minister has the function of deciding, with the assistance of the Attorney-General, whether or not the public interest on the administrative or executive side requires that he should object to the disclosure of the document or information, but a negative decision cannot properly be described as a waiver of a privilege.

In this case the objection was taken both by the appropriate Minister and by the board. The Minister's application was granted. The board's application, in so far as it was based on the same ground, was an unnecessary duplication but well-founded in law. It ought to have been granted.

I would dismiss the appeal of the appellant Rogers and allow the appeal of the board.

**LORD SIMON OF GLAISDALE:** 'Crown privilege' is a misnomer and apt to be misleading. It refers to the rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest. It is true that the public interest which demands that the evidence be withheld has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material (*R v Hardy* (1); *Marks v Beyfus* (2); *Conway v Rimmer* (3)); but once the former public interest is held to outweigh the

(1) (1794), 24 State Tr 199.

(2) (1890), 55 JP 182; 25 QBD 494.

(3) [1968] 1 All ER 874; [1968] AC 910; rvsq [1967] 2 All ER 1260.

latter, the evidence cannot in any circumstances be admitted. It is not a privilege which may be waived—by the Crown (see *Marks v Beyfus*) or by anyone else. The Crown has prerogatives, not privilege. The right to demand that admissible evidence be withheld from, or inadmissible evidence adduced to, the courts is not one of the prerogatives of the Crown.

Where the Crown comes into the picture is that some of the matters of public interest which demand that evidence be withheld are peculiarly within the knowledge of servants of the Crown. The evidence, for example, may be of acts of state (see A L SMITH LJ in *Chatterton v Secretary of State for India in Council* (1)) or have a bearing on national security. Any litigant or witness may draw attention to the nature of the evidence with a view to its being excluded. The court will proprio motu exclude evidence the production of which it sees is contrary to public interest (see WILLS J in *Hennessy v Wright* (2); *Chatterton's* case; VISCOUNT SIMON LC in *Duncan v Cammell Laird & Co Ltd* (3), particularly where it falls into a class the exclusion of which has already received judicial recognition, like sources of police information (*R v Hardy*; *Hennessy v Wright*; *Marks v Beyfus*). But the evidence may fall into a class which has not previously received judicial recognition; or it may be questionably of a previously recognised class; or it may fall outside any class of evidence which should be excluded in the public interest, yet still itself as an individual item be excluded in the public interest. In all these cases a Minister of the Crown is likely to be in a peculiarly favourable position to form a judgment as to the public prejudice of forensic publication; and the communication of his view is likely to be of assistance to the court in performing its duty of ruling on the admissibility of evidence. Moreover, for the reasons stated by my noble and learned friend, LORD PEARSON, there are advantages in processing the matter through the Law Officers' Department, and the Attorney-General is traditionally the person entitled to intervene in a suit where the prerogatives of the Crown are affected (see *Adams v Adams* (Attorney-General intervening) (4)); although there is no prerogative in itself to exclude evidence, certain evidence may affect the prerogative (e.g. of diplomatic relations or as the fount of honour).

In his affidavit of 11th February 1971, Sir Stanley Raymond, chairman of the Gaming Board for Great Britain, affirmed that 'the letter of the 15th September, 1969, from Patrick Ross . . . refers to a source of information'. This was at no time challenged. Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy, unless the production is required to establish innocence in a criminal trial (*R v Hardy*; *Hennessy v Wright*; *Marks v Beyfus*). This suffices, in my view, to conclude the appeals against Mr Rogers and in favour of the board respectively. But I agree with the opinions of my noble and learned friends who heard these appeals that the provisions and purposes of the Gaming Act 1968 also cause the documents in question in these appeals to fall into a class of evidence the exclusion of which is demanded by the public interest. As LORD LYNDHURST LC said in *Smith v East India Co* (5).

'... looking to the Act of Parliament, it is quite clear that the legislature intended, that most unreserved communication should take place . . . but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications . . . they cannot be

(1) 59 JP 596; [1895] 2 QB 189; [1895-99] All ER Rep 1035.

(2) (1888), 53 JP 52; 21 QBD 509.

(3) [1942] 1 All ER 587; [1942] AC 624.

(4) [1970] 3 All ER 572; [1971] P 188.

(5) (1841), 1 Ph 50.

subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.'

There is, in the context of the instant case, no other public interest which could conceivably outweigh this one, thus calling for the forensic adduction of the documents. There would, therefore, be no purpose in inspecting the documents, as your Lordships were requested on behalf of Mr Rogers.

In addition to claiming that the documents were inadmissible because their production would be against the public interest ('Crown privilege'), the board claimed that they were privileged from production because the information contained therein was imparted in confidence. I am not, for myself, convinced that there is any general privilege protecting communications given in confidence (see *Smith v East India Co*; but cf *Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise* (1))—though, no doubt, the circumstances may be such that certain confidential communications will be privileged—for example, communications for the purpose of marriage conciliation (*McTaggart v McTaggart* (2); *Mole v Mole* (3); *Henley v Henley* (4)), where the law may itself infer confidentiality (*Theodoropoulos v Theodoropoulos* (5)). But, if this is a correct classification, it would suggest that the privilege (a true privilege, being waivable) is that of the impartor of the information and not that of the recipient. It is, however, unnecessary to investigate further the board's claim to privilege based on the confidentiality of the communications since the documents in question are in any event inadmissible by reason of the fact that they fall into a class of evidence which the public interest makes inadmissible and that there is no public interest which outweighs this.

I would therefore dismiss the appeal of Mr Rogers and allow that of the board.

**LORD SALMON:** Prior to the Betting, Gaming and Lotteries Act 1963 it was illegal to own or take part in the management of a gaming club. That statute relaxed the law in a number of respects, e.g. by enacting in clear terms that games of chance, including bingo as well as chemin de fer, roulette, black jack and the like, might be played in a gaming club providing that the proprietors made no profit out of the gaming. Many ingenious devices were, however, successfully resorted to in order to defeat the law. Experience showed that it was apparently impossible to enforce it. At any rate the law was not successfully enforced. A vast number of gaming clubs carried on for profit, sprang up all over the country. A few of these were decently run but the great majority were disreputable and brought in their train corruption, extortion, crimes of violence and what are popularly known as protection rackets. Huge fortunes were made out of illegal gaming with comparative impunity by those who were prepared to evade or defy the law. This became a public scandal which was ultimately exposed in the courts; see *R v Metropolitan Police Comr, ex parte Blackburn* (6). Accordingly, the law was changed by the Gaming Act 1968. The policy underlying that Act was stringently to restrict the number of gaming clubs but to allow a comparative few to exist; these would be entitled to make reasonable profits out of gaming providing that they were run by respectable and competent persons. Thus, the evils to which I have referred and which so often were associated with gaming clubs would, it was hoped, be eliminated.

For the purposes of this appeal it is necessary to refer only to s 10 of, and sch 2 to,

(1) [1972] 2 All ER 353.

(2) [1948] 2 All ER 754; [1949] P 94.

(3) [1950] 2 All ER 328; [1951] P 21.

(4) 119 JP 215; [1955] 1 All ER 590; [1955] P 202.

(5) [1963] 2 All ER 772; [1964] P 311.

(6) [1968] 1 All ER 763; [1968] 2 QB 118.

the Act of 1968. Section 10 establishes a gaming board consisting of a chairman and other members to be appointed by the Secretary of State. The function of the board is generally to keep under review the extent and character of gaming in Great Britain. Schedule 2, paras 1 and 3, provides amongst other things that a licence may be granted to an applicant by the licensing authority in the petty sessions area in which the applicant proposes to carry on a gaming club; the application for the granting of such a licence is, however, of no effect unless the board has issued a certificate to the applicant consenting to his applying for such a licence. Then come the important sub-paragraphs of para 4 which, so far as relevant, provide:

'(5) the board shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance.

'(6) For the purposes of sub-paragraph (5) . . . the board shall in particular take into consideration the character, reputation and financial standing—(a) of the applicant, and (b) of any person (other than the applicant) by whom . . . the club . . . would be managed, or for whose benefit . . . that club would be carried on, but may also take into consideration any other circumstances appearing to them to be relevant in determining whether the applicant is likely to be capable of, and diligent in, securing the matters mentioned in that sub-paragraph.'

It is plain that the responsibility rests fairly and squarely on the board to keep gaming clean in this country by ensuring that it does not get into the hands or come under the influence of any undesirable person or of anyone unless the board can be completely satisfied that he is beyond reproach. It is of the greatest public importance that the board shall succeed in its task for if it were to fail, we should be faced with the insidious evils to which I have already referred. The task is clearly extremely difficult because there are so many disreputable and resourceful characters—gangsters from this country and all over the world—who under one disguise or another are continually trying to infiltrate into this lucrative trade. Accordingly, it is essential for the board to tap every possible source of information by making the most searching enquiries and also by considering any communication volunteered by anyone relating to any applicant. No doubt much material will come before the board which, after it has been sifted and evaluated, will be discarded as unreliable and useless. From what remains, however, the board will be able to decide whether or not it is safe to grant a certificate. The questions which arise in this appeal are whether the board can be compelled to disclose any document relating to an applicant which has come into its possession and whether a copy of that document can be prised from the source from whence it came.

The appellant, Mr Rogers, and RHD (Eastbourne) Ltd, a company in which he had been a large shareholder, were refused certificates of consent. No question of natural justice arises on the present appeal. The board made enquiries from the police about Mr Rogers. The assistant chief constable of Sussex, Mr Ross, wrote a letter in reply dated 15th September 1969. Mr Rogers alleges that in July 1970 he was sent anonymously what purported to be a copy of the letter of 15th September 1969. We have not seen this copy. We know, however, from Mr Rogers's affidavit that this copy (to which, oddly enough, Mr Rogers himself gave the widest publicity) by inference made the most serious allegations against him based on information which the police had received from certain sources. Applicants for a certificate from the board have no right to take part in the games of chance in their own clubs for their own profit:



'What they are really seeking is a privilege—almost, I might say, a franchise—to carry on gaming for profit, a thing never hitherto allowed in this country. It is for them to show that they are fit to be trusted with it.'

*R v Gaming Board for Great Britain, ex parte Benaim* (1) per LORD DENNING MR. The board certainly has a duty to act fairly. They must give the applicant a chance of dealing with any matter which is troubling them to the greatest extent to which that is consistent with the board's statutory duty and the public interest. The board recognise this obligation and indeed have made provision for it in the regulations which they have laid down for their own procedure pursuant to para 7 of Sch 1 to the Act of 1968.

We have been asked on behalf of the board to express a view as to what they should do in a case in which they feel that on the apparently credible information before them it would be very dangerous to grant a certificate, but the information is of such an exceptional nature that it would be impossible to ask the applicant any questions about it without revealing the sources from which it had been derived. No such case has yet occurred and the point certainly does not now arise for decision. I therefore express no concluded view about it. As at present advised, however, I consider that the public interest demands that in the circumstances postulated the certificate should be refused and the board should not imperil the safety of the informant by asking any questions of the applicant through which the identity of the informant might be revealed.

Applications for certiorari and mandamus were made against the board in respect of their refusal to grant certificates to Mr Rogers and RHD (Eastbourne) Ltd. These applications were based mainly on the ground that the board had not given Mr Rogers any opportunity of dealing with, or asked him any questions relating to, the matters to which the letter of 15th September 1969 is supposed to have referred. The board conceded that no such opportunity had been afforded or questions asked. The chairman, however, deposed to the fact that the board, in arriving at its decision, had attached no weight to any of the matters referred to in the letter. The board had relied on other grounds to which the chairman referred and with all of which the board had given the applicant an opportunity of dealing. The board considered that these other matters made it necessary in the public interest to refuse the certificates for which the applicant had applied. No request was made to cross-examine the chairman and certiorari and mandamus were duly refused. There was no appeal to this House from that refusal. This is why no question of natural justice or of the propriety of the board's refusal to grant certificates to Mr Rogers and RHD (Eastbourne) Ltd arise on the present appeal.

The sole question is whether Mr Rogers can subpoena an officer of the board to produce the letter of 15th September 1969, or the police to produce the office copy of that letter in the proceedings for criminal libel which Mr Rogers has launched against Mr Ross, the assistant chief constable of Sussex. Mr Rogers says that he has brought this prosecution to clear his reputation of the imputations contained in the letter. The letter was sent by Mr Ross to the board. That is the extent of its publication and the board's view of Mr Rogers's character was not affected by its contents. Apparently a copy of the letter was improperly extracted by someone from the board's files or the police files and sent anonymously to Mr Rogers. It was Mr Rogers himself who gave the widest publicity to this copy; otherwise its contents would have been known only to the board and whoever it was who stole it. Mr Rogers asserts that unless he can obtain the letter or the office copy of it, he will be prevented from going on with the criminal proceedings brought, as he says, solely to clear his character. I doubt whether any issue involving his character would be likely to be

raised in these criminal proceedings brought against a police officer who was only doing his duty in passing on to the board such information as he had in his possession. It would be for the prosecution to prove express malice. It is not difficult to think of a number of formidable points available to the defence without any question of justification being raised. However that may be, the principles involved in this appeal are of far greater general importance than the merits of the criminal proceedings or the sense of grievance under which Mr Rogers is labouring.

There can be no doubt that the letter of 15th September 1969 was written in confidence. There is equally little doubt that that fact alone does not confer immunity either from production of the letter or the disclosure of its contents: *Wheeler v Le Marchant* (1) per JESSEL MR; *Attorney-General v Clough* (2). On the other hand, when it is in the public interest that confidentiality shall be safeguarded, then the party from whom the confidential document or the confidential information is being sought may lawfully refuse it. In such a case the Crown may also intervene to prevent production or disclosure of that which in the public interest ought to be protected. Such an intervention goes under the misleading name of Crown privilege. When a document or information of the kind to which I have referred is in the possession of a government department it is the duty rather than the privilege of the Minister to refuse its disclosure. When such a document or information is in the possession of a third party, again it is the duty rather than the privilege of the executive through the Attorney-General to intervene in the public interest to prevent its disclosure. In either case it is ultimately for the court to decide whether or not it is in the public interest for the document or information to be disclosed. Clearly any evidence by a Minister of State commands the highest respect. If protection is claimed on the ground that disclosure of the contents of a document would imperil the safety of the state or diplomatic relations then the courts would without question normally allow the claim. These are topics particularly within the province of the executive but of which the courts have little if any experience. What might appear innocuous to the uninitiated may in reality reveal important defence secrets or cause diplomatic difficulties. There are also classes of documents and information which for years have been recognised by the law as entitled in the public interest to be immune from disclosure. In such cases the affidavit or certificate of a Minister is hardly necessary. I refer to such documents as Cabinet minutes, minutes of discussions between heads of government departments and despatches from ambassadors abroad. Although different in nature, any evidence as to the sources from which the police obtain their information has always been recognised by the courts as entitled to the same immunity.

This immunity should not lightly be extended to any other class of document or information, but its boundaries are not to be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document or information to be disclosed, then it is in law immune from disclosure. If a new class comes into existence to which this principle applies then that class enjoys the same immunity. When the Gaming Board sprang to life a new class of documents and information came into existence, namely, all such documents and information as was supplied to the board and related to the

'character, reputation and financial standing ... of the applicant, and ... of any person ... by whom ... the club ... would be managed, or for whose benefit ... that club would be carried on.'

No doubt some of this material is supplied in answer to enquiries by the board and

(1) (1881), 45 JP 728; 17 ChD 675.

(2) [1963] 1 All ER 420; [1963] 1 QB 773.

some of it is volunteered. Some of it comes from the police and a variety of persons of good repute; some of it no doubt comes from the underworld. The importance of the board obtaining every scrap of information they can about an applicant for a certificate and those who stand behind him cannot be exaggerated. It is of course for the board to evaluate the material after making such enquiries about it as they can. One piece of tenuous information by itself may be of little value but will sometimes lead to vital intelligence reaching the board.

When one considers the grievous social evils which will undoubtedly be caused by gaming clubs if they get into the wrong hands it is obviously of the greatest public importance that the law should give the board all its support to ensure that this does not occur. In my view, any document or information that comes to the board from whatever source and by whatever means should be immune from discovery. It is only thus that the board will obtain all the material it requires in order to carry out its task efficiently. Unless this immunity exists many persons, reputable or disreputable, would be discouraged from communicating all they know to the board. They might well be in fear not only of libel actions or prosecutions for libel but also for their safety and maybe their lives. It must be remembered that if an applicant who has never or seldom been convicted happens to be a crony of gangsters, it is from the underworld that the information may come which will enable the true facts about him to be discovered. No doubt false information about an applicant may come from jealous rivals. The board must be trusted to investigate it and evaluate it correctly. If I have to weigh in the balance the risk of gaming clubs getting into the wrong hands against the risk of a respectable citizen occasionally being denied the privilege of running a gaming club, I have no doubt that in the public interest the latter rather than the former risk ought to be accepted.

Even without the certificate by the Secretary of State for the Home Office, I should have had no doubt that this appeal should be dismissed. I cannot, however, agree with the view expressed in the Divisional Court that but for the immunity for which the Attorney-General contended, the police might refuse to give any information to the board. To my mind, this is unthinkable. It smacks of the old fallacy that any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing which he wrote could ever be exposed to the light of day. I am certain that even without the immunity the police would do their duty undeterred by fear of actions or even prosecution for libel. I think, however, that whereas now they may well reveal the sources of their information to the board they would quite rightly refuse to do so if the board could be compelled to disclose all that has been revealed to them by the police. The board might thus be denied information which could be of great value in pursuing their enquiries. I do not, however, in any way base my opinion on the fact that in this case the information came from the police. In my view, that is irrelevant. I have already indicated that, in my opinion, any information received by the board from whoever it comes is covered by immunity from disclosure.

I must refer shortly to the argument that *Conway v Rimmer* (1) is an authority for the proposition that production of the letter of 15th September 1969 can be compelled by subpoena. *Conway v Rimmer* dealt with an entirely different class of document from that with which we are here concerned, and, in my view, is irrelevant to this appeal. For some 23 years after *Duncan v Cammell Laird & Co Ltd* (2) an obiter dictum in the speech of VISCOUNT SIMON LC was accepted as meaning that if a Minister certified (as in those days he often did) that it was contrary to the public interest that anything, however commonplace, that passed between one civil servant and

(1) [1968] 1 All ER 874; [1961] AC 910; rvsg [1967] 2 All ER 1260.

(2) [1942] 1 All ER 587; [1942] AC 624.

another behind the departmental screen should ever be disclosed, the courts were bound in every case to act on the Minister's certificate—notwithstanding that disclosure of the communication could not conceivably do any harm and might be vital to the proper administration of justice. The Court of Appeal in *Re Grosvenor Hotel London (No 2)* (1) held that this was not the law, and for nearly four years that decision was accepted and acted on until in *Conway v Rimmer* another Division of that court by a majority refused to follow the *Grosvenor Hotel* case. This House, however, in *Conway v Rimmer* allowed the appeal and finally and authoritatively decided that in circumstances such as existed in that case the court might examine the document in question before deciding whether or not the view expressed in the Minister's certificate should be accepted.

For the reasons I have explained in this speech there is clearly all the difference in the world between the question whether the public interest requires that mundane communications between all persons in the government service should be immune from discovery and the question whether the public interest requires that communications received by the board should be immune from discovery.

My Lords, I would dismiss the appeal by Mr Rogers and allow the board's appeal, for in my view both the Crown and the board were entitled to the orders for which they asked.

Orders accordingly.

Solicitors: Joyson-Hicks & Co, for Gates & Co, Brighton; Treasury Solicitor; Gregory, Rowcliffe & Co

Reported by G F L Bridgman, Esq, Barrister.

(1) [1964] 3 All ER 354; [1965] Ch 1210.

- LICENSING** - Gaming licence. See EVIDENCE; GAMING.
- LICENSING** - Knowingly selling intoxicating liquor to person under 18 - Sales by barman - Delegation by licensee of control of bar to barman - Licensee present in another bar on premises - No actual knowledge of sale on part of licensee - Liability of licensee - Licensing Act, 1964, s 169 (1).  
*Howker v Robinson* . . . . . QBD 562
- LICENSING** - Licensing planning area - Certificate of non-objection - Application for grant - 'Equation of barrelage' policy adopted by committee - Need for applicant to acquire licence in suspense - Purchase from current owner - Refusal of certificate on ground that applicant had not purchased licence - Validity - Licensing Act, 1964, s 119 (2).  
*R v Birmingham Licensing Planning Committee. Ex parte Kennedy* . . . . . CA 459
- LICENSING** - Permitted hours - Exemption order - Special occasion - Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions - Function to be held by outside local organisation - Licensing Act, 1964, s 74 (4).  
*R v Metropolitan Police Commissioner Ex parte Ruxton* . . . . . QBD 175
- LICENSING** - Permitted hours - Exemption order - Special occasion - Local football match - Match occurring nearly every week - Discretion of justices - Licensing Act 1964 (c 26), s 74 (4).  
*R v Llandiloes (Lower) Justices. Ex parte Thorogood* . . . . . QBD 67
- LOCAL AUTHORITY** - Declaration - Registration by defendant of claims to properties under Commons Registration Act, 1965 - Declarations sought by authority that defendants' claims not valid - Jurisdiction of court.  
*Thorne Rural District Council v. Bunting* . . . . . ChD 355
- LOCAL AUTHORITY** - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner.  
*Dutton v Bognor Regis United Building Co Ltd* . . . . . CA 201
- LOCAL GOVERNMENT** - Elections. See ELECTIONS.
- LOTTERY.** See GAMING.
- MAGISTRATES** - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1).  
*R v Coleshill Justices. Ex parte Davies* . . . . . QBD 51
- MAGISTRATES** - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine.  
*R v Southampton Justices. Ex parte Briggs* . . . . . QBD 237
- MAGISTRATES** - Warrant - Non-payment of fine and compensation order - Warrant for committal to prison - Defaulter already remanded in custody on other charges - No knowledge on part of justices - Warrant not executed during remand in custody - Acquittal of defaulter - Execution of warrant - Defaulter taken to prison to serve outstanding term in respect of original committal - Validity of execution in view of delay - Need for warrant to be delivered to governor of prison - Magistrates' Courts Rules, 1968, r 80 (5).  
*R v Leeds Governor. Ex parte Huntley* . . . . . QBD 551
- MARKET** - Statutory monopoly - Injunction to restrain unlicensed person holding market - Birmingham Corporation (Consolidation) Act, 1883, s 89.  
*Birmingham Corporation v. Perry Bar Stadium Ltd* . . . . . ChD 359
- NUISANCE** - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2).  
*Northern Ireland Trailers Ltd v County Borough of Preston* . . . . . QBD 149
- NUISANCE** - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42.  
*Northern Ireland Trailers Ltd v County Borough of Preston* . . . . . QBD 149
- OBSCENITY.** See CRIMINAL LAW; CUSTOMS AND EXCISE.
- PILOT.** See SHIPPING.
- POLICE** - Obstruction. See CRIMINAL LAW.
- POLLUTION.** See RIVER.
- POST.** Sending obscene article through. See CRIMINAL LAW.
- PUBLIC ORDER** - Insulting behaviour conducive to breach of peace - 'Insulting' - Behaviour affronting other people and evidencing disrespect or contempt for their rights - Behaviour foreseen by reasonable person as likely to cause resentment or protest - Public tennis match - Disruption of match by defendant jumping over barrier and running on court - Public Order Act, 1936, s 5, as replaced by Race Relations Act, 1965, s 7.  
*Cozens v. Brutus* . . . . . QBD 390



<b>PUBLIC ORDER</b> - Public place - Open space to which public have access - Tennis court - Grounds consisting of courts, administrative buildings, and partly covered stands around one court - Match disrupted on that court - Public Order Act, 1936, s 9. <i>Cozens v Brutus</i> .....	QBD	390
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs. <i>Riggall v Hereford County Council</i> .....	QBD	172
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declaration by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (2) (10). <i>London Borough of Ealing v Race Relations Board</i> .....	HL	112
<b>RACE RELATIONS</b> - Provision of facilities - Discrimination - Members' club - Refusal to admit coloured man as member - Members of club 'section of public' - Impersonal quality distinguishing them from public at large - Clubs where admission by invitation - Race Relations Act, 1968, s 2 (1). <i>Race Relations Board v Charter</i> .....	CA	249
<b>RATING</b> - Rateable occupation - Unoccupied premises - House held for eleven months by church available for occupation by minister - General Rate Act, 1967, sched 1, para 2 (f). <i>Bexley Congregational Church Treasurer v London Borough of Bexley</i> .....	CA	532
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Capricious, frivolous, or vexatious action - Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .....	CA	367
<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Need of tenants' consent to reference - Reference of number of contracts together - Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .....	QBD	11
<b>RIGHT OF WAY</b> - Land sold by Secretary for Air - Conveyance of land 'freed from rights' - Application to rights of way - Defence Act, 1842, s 14. <i>Attorney-General v Shonleigh Nominees Ltd</i> .....	CA	407
<b>RIVER</b> - Pollution - 'Causes' - Common sense meaning - Liability in absence of negligence or knowledge - Novus actus interveniens - Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a). <i>Alphacell Ltd v Woodward</i> .....	HL	505
<b>ROAD TRAFFIC</b> - Causing death by dangerous driving - Evidence - Previous drinking - Admissibility - Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit - Evidence of substantial excess rightly admitted on major charge - Road Traffic Act, 1960, s 1. <i>R v Thorpe</i> .....	CA	301
<b>ROAD TRAFFIC</b> - Disqualification - Mitigating circumstances - Circumstances which may be considered - Gravity or triviality of previous convictions - Road Traffic Act, 1962, s 5 (3). <i>Lamble v Woodage</i> .....	HL	554
<b>ROAD TRAFFIC</b> - Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit - Breath test - Requirement to provide specimen - 'Person driving or attempting to drive' - Pursuit by constable after suspicion - Requirement when person no longer driving or attempting to drive - Road Safety Act, 1967, s 2 (1). <i>Sakhuja v. Allen</i> .....	HL	414
<b>ROAD TRAFFIC</b> - Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit - Specimen of blood for laboratory test - Analyst's certificate of proportion of alcohol - Admissibility in evidence - Failure to serve copy on defendant - Waiver - No objection to evidence before close of case for prosecution - Road Traffic Act, 1962, s 2 (2). <i>R v Banks</i> .....	CA	306
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - 'Accident' - Broken down car pushed by other car - Interlocking of bumpers - Breath test - Damage to both cars - Road Safety Act, 1967, s 2 (2). <i>R v Morris</i> .....	CA	194
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Breath specimen - Requirement to provide - Defendant in hospital - Words spoken by constable in honest and reasonable belief that they would be understood - Failure by defendant to hear or comprehend request - Validity of requirement - Road Safety Act, 1967, s 3 (2) (b). <i>R v Nicholls</i> .....	CA	481
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Disqualification - Special reasons - Vehicle parked on highway - Driving of vehicle few yards from highway to private parking place - Road Traffic Act, 1962, s 5 (1). <i>James v Hall</i> .....	QBD	385

<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion exceeding prescribed limit – Disqualification – Special reasons – Vehicle parked on highway – Vehicle driven from one parking place to another – Route covering 200 yards along busy street – Potential source of danger to other road users – Road Traffic Act, 1962, s 5 (1).		
<i>Coombs v Kehoe</i> .. .. .	QBD	387
<b>ROAD TRAFFIC</b> – Insurance – Third-party insurance – Policy – Charges of using car and permitting use without insurance – Onus of proof of existence of valid cover on defendant – Road Traffic Act, 1960, s 201 (1).		
<i>Leathley v Drummond. Leathley v Irving</i> .. .. .	QBD	548
<b>ROAD TRAFFIC</b> – Motorway – Hard shoulder – Part of verge – Marginal strip – Part of carriageway – Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f).		
<i>Wallwork v Rowland</i> .. .. .	QBD	137
<b>ROAD TRAFFIC</b> – Motorway – Prohibition against stopping on verge – Stopping permitted 'by reason of any accident, illness or other emergency' – 'Emergency' – Need for element of suddenness – Danger alleged to constitute emergency not apparent before driver got on motorway – Drowsiness – Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9.		
<i>Higgins v Bernard</i> .. .. .	QBD	314
<b>ROAD TRAFFIC</b> – Regulations relating to construction, etc., of vehicles – Using vehicle on road in contravention of regulations – 'Using' – Vehicle driven by person other than owner's servant at owner's request – Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64.		
<i>Crawford v Houghton</i> .. .. .	QBD	234
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Pilotage by unlicensed pilot after offer – Ship moving from one mooring to another – Pilotage district byelaws – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws Part IX, byelaw 2.		
<i>Crouch v McMillan</i> .. .. .	QBD	179
<b>SHIPPING</b> – Pilot – Pilotage district – Offer by licensed pilot – Ship moving from mooring to discharge berth – Pilotage by unlicensed pilot after offer – General offer insufficient – Need of specific offer communicated in relation to particular movement of ship – Pilotage Act, 1913, s 30 (3), s 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2.		
<i>Montague v Babbs</i> .. .. .	QBD	144
<b>TOWN AND COUNTRY PLANNING</b> – Advertisements – Control – Display on walls of public houses – Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height – Advertisements showing cigarette packet, man holding glass of beer, and beer glass – Objects shown all above permitted height – Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).		
<i>McDonald v Howard Cook Advertising Ltd</i> .. .. .	QBD	79
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Land in area zoned for residential building – No prospect of permission being given for that use – Land Compensation Act, 1961, s 16 (2).		
<i>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</i> .. .. .	CA	93
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Mining operations – Notice specifying substantial area – Actual working only in two smaller areas within specified area – Some operations more than four years before service of notice – Town and Country Planning Act, 1962, s 45 (1) (2).		
<i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Notice to be served within four years from carrying out of development – Mining operations – Initial working of area more than four years prior to notice – Subsequent working of area within four-year period – Whether new development or continuation of original development – Validity of notice – Town and Country Planning Act, 1962, s 12 (1), s 45 (2).		
<i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Service on occupier of land affected – 'Occupier' – Licensee of caravan site – Right to be served with notice – Control over site – Duration of enjoyment – Town and Country Planning Act, 1962, s 45 (3).		
<i>Stevens v London Borough of Bromley</i> .. .. .	CA	261
<b>TRADE DESCRIPTIONS</b> – False description – Motor car – False mileage recorded on odometer – Sale by motor dealer – Defence of reasonable precautions and due diligence – Dealer ignorant of alteration of odometer – Condition of car consistent with mileage recorded on odometer – Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3).		
<i>Naish v Gore</i> .. .. .	QBD	1
<b>TRADE DESCRIPTIONS</b> – False description – Price – Misleading – 4d refund label on bottle – Refusal of refund – Trade descriptions Act, 1968, s 11 (2).		
<i>Doble v David Greig Ltd</i> .. .. .	QBD	469
<b>YOUTHFUL OFFENDER, See CRIMINAL LAW; MAGISTRATES.</b>		



**COURT OF APPEAL (CRIMINAL DIVISION)**

(PHILLIMORE, LJ, BRABIN AND TALBOT, JJ)

20th, 21st April 1972

R v HESTER

*Criminal Law—Evidence—Child—Corroboration—Sworn evidence by child—Unsworn evidence by another child—Unsworn evidence not capable of amounting to corroboration—Children and Young Persons Act, 1933, s 38.*

Where a child has given sworn evidence, the unsworn evidence of another child, admitted under s 38 (1) of the Children and Young Persons Act, 1933, and by the proviso to that subsection requiring some other material evidence in support of it implicating the defendant before the defendant can be convicted, cannot amount to corroboration of the sworn evidence.

APPEAL by John James Joseph Martin Patrick Hester against his conviction at Durham County Quarter Sessions of indecently assaulting Valerie Stirling, a girl aged 12 years, contrary to s 14 (1) of the Sexual Offences Act 1956 when he was sentenced to 12 months' imprisonment.

Oliver Wrightson for the appellant.

R H A Denny for the Crown.

PHILLIMORE LJ delivered this judgment of the court: The appellant appeared at Durham County Quarter Sessions on an indictment charging him on three separate counts with indecently assaulting a girl called Valerie Stirling who was aged 12. He was acquitted on the first two counts, the assaults in question being said to have occurred on 6th and 9th September 1971, but he was convicted on the third count where the assault was said to have occurred about 1.30 a.m. on 10th September.

The appeal arises in this way. The single judge observed that in regard to the first two assaults there was no suggestion of corroboration, and he said this:

'As the jury were not prepared to act on the uncorroborated evidence of Valerie on counts 1 and 2, I think that the verdict on count 3, where she is corroborated by June's unsworn evidence, is unsatisfactory.'

That does not in terms raise the real point of law in this appeal, which is a point of considerable importance. It is whether the child June, aged nine, having given her evidence unsworn, could be treated as corroborating her sister Valerie who had given her evidence on oath—in other words whether the direction to the jury ought not to have been that there was no corroboration of Valerie on the third count either, instead of, as was the case, a direction that they could treat the evidence of June as corroborating that of Valerie.

It appears that at the time the appellant had been living with a Mrs Stirling at a house in Consett. Mrs Stirling had a number of children, and amongst them was this girl Valerie and another, June, and there were others, Carol, Yvonne and also a boy. It is right to say that it is perfectly clear that Mrs Stirling had got extremely tired of the appellant's company, and would have liked him to depart. That feeling appears to have been shared by her daughters. The evidence of Valerie on the first count was not very reliable. She had clearly altered the story which she had previously given to the police, and it seemed rather difficult to account for an assault in the circumstances which she described, but that does not matter very much.

The evidence of June treated as corroboration was in itself very strange. She spoke

of seeing this man put his hand under the bedclothes and on the private parts of Valerie at a time when she (June) was lying with her face to the wall in the same bed as Valerie, another child, Carol, being in between them, and a child, Yvonne, being somewhere else in the bed. Not very satisfactory evidence, but this court would prefer to deal with this matter on the pure point of law.

The learned judge, in giving the direction that he did give, that the jury could treat the evidence of June as corroborating Valerie, stated in terms that he was relying on the decision of the court in *R v Campbell* (1). That was a decision of the Court of Criminal Appeal in which the court was concerned with an indictment containing seven counts alleging indecent assault on a number of boys. All the children gave evidence on oath, but the court nevertheless proceeded to deal with circumstances where evidence was given by children otherwise than on oath. It is clear that the judgment of LORD GODDARD CJ was largely obiter, and certainly in respect to the evidence of children given otherwise than on oath.

The court thinks that the passages in Archbold's Criminal Pleading, Evidence and Practice (37th edn, 1969, paras 1289, 2917) citing *R v Campbell*, passages on which the deputy chairman in the present case relied, are in fact inaccurate and do not represent the true position in law. In the first place it does appear from the judgment of LORD GODDARD CJ that the court misunderstood the judgment in *R v Manser* (2), and further and this is perhaps more important, was never referred to *R v Davies* (3) in which the judgment was given by LORD READING CJ and is the real start of the authorities, a decision which seems to have been overlooked again and again.

As Professor Cross points out in his book on Evidence (3rd edn, p 165) dealing with unsworn evidence of children:

'a child is allowed to give unsworn evidence in criminal cases (and criminal cases only) provided it is of sufficient intelligence and understands the duty of speaking the truth. This is the effect of s. 38 of the Children and Young Persons Act, 1933. It is subject to the proviso that: "where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."'

This was a case where the evidence admitted on behalf of the prosecution, namely, the evidence of June, was unsworn, and accordingly the appellant was not liable to be convicted of the offence on her evidence unless her evidence was corroborated.

Going back to *R v Davies* (3), that was a case where the appellant had been charged with and convicted of rape of the mother of two boys, Wilfred and Stanley. Reference was made to the provisions of s 30 of the Children Act 1908 and to the proviso contained in that section. It is clear that the provisions in question were the same as those in s 38 of the 1933 Act to which the court has referred. LORD READING CJ, giving judgment, referred to the fact that the evidence of Stanley, who was a boy of tender years (he was aged eight), had been given unsworn and therefore required corroboration. He said this:

"The judge failed to direct the jury that this was evidence by a boy of tender years, and that under the statute "a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused". That is by s. 30 (a) of the Children

(1) 120 JP 359; [1956] 2 All ER 272; [1956] 2 QB 432.

(2) (1934), 25 Cr App Rep 18.

(3) (1915), 79 JP 556.



Act 1908, which has been applied to all offences by s. 28 (2) of the Criminal Justice Administration Act 1914; it therefore applied to this case. Where evidence is given by a child not on oath, in pursuance of these two statutes it is necessary that the judge should direct the jury not to convict the prisoner on that evidence unless it is corroborated by some other material evidence in support thereof implicating the accused.'

It is to be observed that nobody suggested in that case that the evidence of the mother, who was of course the complainant, could be treated as corroborating the evidence of Stanley so that in the result the evidence of Stanley could be treated as corroborating his mother and thus affording the necessary corroboration to support a conviction.

That takes us to the next case, *R v Manser* (1). That case came before the Court of Criminal Appeal, LORD HEWART CJ presiding. It was a case where the appellant was charged with carnal knowledge of a girl under 13 years of age, named Barbara Wickenden, and the evidence of her sister Doris was called to support the case for the Crown. It appears to this court entirely clear on a full reading of the report that Barbara's evidence was sworn evidence, she being a girl of 12 or thereabouts, whereas that of Doris who was only nine was unsworn. In the course of the argument, a submission was put forward for the Crown to the effect that the jury were entitled to regard the evidence of the two girls as being mutually corroborative, that is to say, in relation to that of Doris that it was corroborated by the evidence of the complainant, Barbara. Nobody seems to have questioned whether Barbara could be regarded as an entirely independent witness. However, LORD HEWART CJ dealt with it as follows:

'There is one further matter which is the most important of all and may indeed be regarded as conclusive. The story of the little child Doris, who was nine years of age and had given evidence without taking the oath, was treated as corroborative of the evidence of the girl Barbara. Now by statute the evidence of the little child who had not been sworn was not to be accepted as evidence at all, unless it was corroborated. The argument for the prosecution is therefore an argument in a circle. Let it be granted that the evidence of Barbara has to be corroborated; it is corroborated by the evidence of Doris. She, however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbara, and that is called "mutual corroboration". In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. It clearly was not corroborated by the evidence of the girl Barbara.'

Those words are directly in point in the present case, and indeed they were directly in point, or would have been, in *R v Campbell* (2) if one of the witnesses there treated as corroborative had been unsworn. It is quite clear from the reference to *R v Manser* (1) in *R v Campbell* that the court misunderstood the effect of that decision in stating that unsworn evidence cannot be corroborated by other unsworn evidence, and later on in the judgment of LORD GODDARD CJ where he said:

'The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given.'

This court thinks that that passage in particular, which was entirely obiter, is directly contrary to the authority of *R v Manser*.

(1) (1934), 25 Cr App Rep 18.

(2) 120 JP 359; [1956] 2 All ER 272; [1956] 2 QB 432.

It is perhaps worth referring also, despite the fact that it was not a considered judgment, to the decision of BRABIN J in *R v E* (1) where, relying on *R v Manser*, he refused to allow the unsworn evidence of a child to be treated as corroborative of the evidence of another child, albeit sworn.

Professor Cross points out that in a sense the situation may be anomalous, but of course that is sometimes the result of statutory interference with the common law. It is, however, clear that to treat the evidence of June, unsworn evidence, as corroborative because it coincided with the evidence of her sister Valerie, who was sworn, and who was incidentally the complainant and therefore could hardly be regarded as an independent source, was directly contrary to the provisions of the proviso, and indeed would make absolute nonsense of the statute. The court notes that the matter is put very succinctly in 10 Halsbury's Laws, (3rd edn., p. 462) as follows:

'No person can be convicted on the unsworn evidence of a child, unless the child's evidence is corroborated by some other material evidence implicating the accused. Corroboration of the unsworn evidence of a child must not only connect the accused with the crime with which he is charged, but must come from an independent source. The unsworn testimony of other children of tender years does not, however, constitute sufficient corroboration. The judge should direct the jury that the child's unsworn evidence must be corroborated before they can consider its effect at all.'

This court has no doubt that in the present case the direction based on *R v Campbell* as reproduced in Archbold (*supra*) was wrong. The jury ought to have been told that in regard to the third count, as in regard to the first two counts, on which they acquitted, the evidence of Valerie was without corroboration, and that they could only convict if after receiving the proper warning they were completely convinced of the truth of the story told by Valerie. If they had not been so convinced in the case of counts 1 and 2, there seems no reason to suppose that they would have adopted a different view in regard to count 3 in the face of a warning in such terms.

This court accordingly, in the absence of any suggestion that it is a case where the proviso to s 2 (1) of the Criminal Appeal Act 1968, could apply, and in the light of the concession by counsel for the Crown that this conviction cannot be supported, allows this appeal and the appellant is entitled to be discharged.

*Conviction quashed.*

Solicitors: *Swinburne & Jackson*, Durham; *A J Olson*, Durham.

Reported by T R Fitzwalter Butler Esq, Barrister.

(1) [1964] 1 All EF 205.

**COURT OF APPEAL (CRIMINAL DIVISION)**

(EDMUND DAVIES AND STEPHENSON, LJJ AND BOREHAM, J)

2nd, 3rd May 1972

R v HALL

*Criminal Law—Theft—Property received from or on account of another—Obligation to retain and deal with property in a particular way—Need to prove dishonesty and undertaking of obligation by defendant—Travel agent—Money received from customers for air trips—Money paid into general account of firm—No flights materialising—No money refunded—Theft Act, 1968, s 5 (3).*

By s 5 (3) of the Theft Act, 1968: 'Where a person receives property from or on account of another and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.'

On a trial under this subsection the judge should in his summing-up give a careful exposition of the subsection and should emphasise that, to establish the offence, the prosecution must prove dishonesty on the part of the defendant at the time of the appropriation by him of the property and that an 'obligation' of the kind mentioned in the subsection was undertaken by the defendant.

The appellant, who traded with two other persons as travel agents, received money from customers as deposits and payments for air trips to America. He paid the money received into the firm's general account. None of the projected flights materialised, and no money was refunded. The appellant was convicted of the theft of the sums received by him, contrary to s 1 of the Theft Act, 1968. On appeal,

HELD: although a customer could impose on a travel agent an 'obligation' within the meaning of s 5 (3), in the present case it had not been established that the customers made any special arrangement requiring the appellant to 'retain and deal with' the moneys received by him 'in a particular way' or that an 'obligation' to do so was undertaken by the appellant; accordingly, the offence of theft had not been established, and the conviction must be quashed.

APPEAL by Geoffrey Hall against his conviction at Manchester Crown Court on seven counts of theft contrary to s 1 of the Theft Act 1968, when he was sentenced to concurrent sentences totalling two years' imprisonment.

A C Jolly for the appellant.

W H W Jalland for the Crown.

*Cur adv vult*

5th May. **EDMUND DAVIES LJ** read this judgment of the court: During 1968 the appellant and two others started trading in Manchester as travel agents under the title of 'People to People.' The other partners received no remuneration, played purely insignificant parts, and were called as Crown witnesses. Each of the seven counts related to money received by the appellant as deposits and payments for air trips to America. In some instances a lump sum was paid by schoolmasters in respect of charter flights for their pupils; in other instances individuals made payments in respect of their own projected flights. In none of the seven cases covered by the indictment did the flights materialise, in none of them was there any refund of the moneys paid, and in each case the appellant admitted that he was unable to make any repayment. In some cases he disputed all liability on the grounds that the other parties had unjustifiably cancelled the proposed trips, in others he denied dishonesty. He claimed to have paid into the firm's general trading account all the sums received by him, asserted that those moneys had become his own property and had been applied by him in the conduct of the firm's

business, and submitted that he could not be convicted of theft simply because the firm had not prospered and that in consequence not a penny remained in the bank.

Two points were presented and persuasively developed by the appellant's counsel: (i) that, while the appellant has testified that all moneys received had been used for business purposes, even had he been completely profligate in its expenditure he could not in any of the seven cases be convicted of 'theft' as defined by the Theft Act 1968, there being no allegation in any of the cases of his having obtained any payments by deception; counsel for the appellant submitted that, having received from a client, say, £500 in respect of a projected flight, as far as the criminal law is concerned he would be quite free to go off immediately and expend the entire sum at the races and forget all about his client; (ii) that s 1 (1) of the Theft Act 1968 dealing with a person who 'dishonestly appropriates', it is essential that the Crown establish that the appellant was acting dishonestly at the time he appropriated. In accordance with *R v Pulham* (1), this necessitates an express direction to that effect to be given to the jury. While it was accepted that the necessity for 'dishonesty' being proved and the appellant's assertion that he had acted throughout in the honest belief that he was entitled to use for the general business of the firm sums so received by him were all clearly brought out in the summing-up, such directions as were given were criticised as being in quite general terms and were not focussed in any way on the time when appropriation occurred. We dispose of point (ii) by simply saying that, although the summing-up could with advantage have made the legal position clearer, we have come to the conclusion that it dealt adequately with this aspect of the offence charged, and had there been no other ground of criticism we should have been constrained to dismiss the appeal. But it did not stand alone, and the first point taken is far more formidable from the Crown's point of view.

Point (i) turns on the application of s 5 (3) of the Theft Act 1968, which provides:

'Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.'

Counsel for the appellant submitted that in the circumstances arising in these seven cases there arose no such 'obligation' on the appellant. He referred us to a passage in the Eighth Report of the Criminal Law Revision Committee (Cmnd 2977, p 127) which reads as follows:

'Subsection (3) [of s 5 'Belonging to Another'] provides for the special case where property is transferred to a person to retain and deal with for a particular purpose and he misapplies it or its proceeds. An example would be the treasurer of a holiday fund. The person in question is in law the owner of the property; but the subsection treats the property, as against him, as belonging to the persons to whom he owes the duty to retain and deal with the property as agreed. He will therefore be guilty of stealing from them if he misapplies the property or its proceeds.'

Counsel for the appellant submitted that the example there given is, for all practical purposes, identical with the actual facts in *R v Pulham*, where, incidentally, s 5 (3) was not discussed, the convictions there being quashed, as we have already indicated, owing to the lack of a proper direction as to the accused's state of mind at the time he appropriated. But he submits that the position of a treasurer of a solitary fund is quite different from that of a person like the appellant, who was in general (and genuine) business as a travel agent and to whom people paid money in order to

(1) (15th June 1971) unreported.

achieve a certain object—in the present cases, to obtain charter flights to America. It is true, he concedes, that thereby the travel agent undertakes a contractual obligation in relation to arranging flights and at the proper time paying the airline and any other expenses. Indeed, the appellant throughout acknowledged that this was so, although contending that in some of the seven cases it was the other party who was in breach. But what counsel for the appellant resists is that in such circumstances the travel agent 'is under an obligation' to the client 'to retain and deal with . . . in a particular way' sums paid to him in such circumstances.

What cannot of itself be decisive of the matter is the fact that the appellant paid the money into the firm's general trading account. As WIDGERY J said in *R v Yule* (1), decided under s 20 (1) (iv) of the Larceny Act 1916:

'The fact that a particular sum is paid into a particular banking account . . . does not affect the right of persons interested in that sum or any duty of the solicitor either towards his client or towards third parties with regard to disposal of that sum.'

Nevertheless, when a client goes to a firm carrying on the business of travel agents and pays them money, he expects that in return he will, in due course, receive the tickets and other documents necessary for him to accomplish the trip for which he is paying, and the firm are 'under an obligation' to perform their part to fulfil his expectation and are liable to pay him damages if they do not. But, in our judgment, what was not here established was that these clients expected them 'to retain and deal with that property or its proceeds in a particular way', and that an 'obligation' to do so was undertaken by the appellant. We must make clear, however, that each case turns on its own facts. Cases could, we suppose, conceivably arise where by some special arrangement (preferably evidenced by documents), the client could impose on the travel agent an 'obligation' falling within s 5 (3). But no such special arrangement was made in any of the seven cases here being considered. It is true that in some of them documents were signed by the parties. Thus, in respect of counts 1 and 3 there was a clause to the effect that the People to People organisation did not guarantee to refund deposits if withdrawals were made later than a certain date; and in respect of counts 6, 7 and 8 the appellant wrote promising 'a full refund' after the flights paid for failed to materialise. But neither in those nor in the remaining two cases (in relation to which there was no documentary evidence of any kind) was there, in our judgment, such a special arrangement as would give rise to an obligation within s 5 (3).

It follows from this that, despite what on any view must be condemned as scandalous conduct by the appellant, in our judgment on this ground alone this appeal must be allowed and the convictions quashed. But as, to the best of our knowledge, this is one of the earliest cases involving s 5 (3), we venture to add some observations.

(A) Although in *R v Pulham* (2), s 5 (3) was not referred to and the case turned on s 2 (1) (b) of the Act, it is equally essential for the purposes of the former provision that dishonesty should be present at the time of appropriation. We are alive to the fact that to establish this could present great (and maybe insuperable) difficulties when sums are on different dates drawn from a general account. Nevertheless, they must be overcome if the Crown is to succeed.

(B) Where the case turns, wholly or in part, on s 5 (3) a careful exposition of the subsection is called for. Although it was canvassed by counsel in the present case, it was nowhere quoted or even paraphrased by the commissioner in his summing-up.

(1) 127 JP 469; [1963] 2 All ER 780; [1964] 1 QB 5.

(2) (15th June 1971) unreported.



Instead he unfortunately ignored it and proceeded on the assumption that, as the appellant acknowledged the purpose for which clients had paid him money, ipso facto there arose an 'obligation . . . to retain and deal with' it for that purpose. He therefore told the jury:

'The sole issue to be determined in each count is this. Has it been proved that the money was stolen in the sense I have described, dishonestly appropriated by him for purposes other than the purpose for which the moneys were handed over? Bear in mind that this is not a civil claim to recover money that has been lost.'

We have to say respectfully that this will not do, as cases under s 20 (1) (iv) of the Larceny Act 1916 illustrate. Thus in *R v Sheaf* (1) it was held that whether money had been 'entrusted' to the defendant for and on account of other persons was a question of fact for the jury and must therefore be the subject of an express direction, AVORY J saying:

'It is not sufficient to say that if the question had been left they might have determined it against the appellant. When we once arrive at the conclusion that a vital question of fact has not been left to the jury the only ground on which we can affirm a conviction is that we can say that there has been no miscarriage of justice . . .'

The same point was made in *R v Bryce* (2).

(C) Whether in a particular case the Crown has succeeded in establishing an 'obligation' of the kind coming within s 5 (3) of the new Act may be a difficult question. Happily, we are not called on to anticipate or solve for the purposes of the present case the sort of difficulties that can arise. But, to illustrate what we have in mind, mixed questions of law and fact may call for consideration. For example, if the transaction between the parties is wholly in writing, is it for the judge to direct the jury that, as a matter of law, the defendant had thereby undertaken an 'obligation' within s 5 (3)? On the other hand, if it is wholly (or partly) oral, it would appear that it is for the judge to direct them that, if they find certain facts proved, it would be open to them to find that an 'obligation' within s 5 (3) had been undertaken—but presumably not that they must so find, for so to direct them would be to invade their territory. In effect, however, the commissioner unhappily did something closely resembling that in the present case by his above-quoted direction that the only issue for their consideration was whether the appellant was proved to have been actuated by dishonesty.

We have only to add that counsel for the Crown submitted that, even if the commissioner's failure to deal with s 5 (3) amounted to a misdirection, this was a fitting case to apply the proviso. But point (i), successfully taken by defence counsel, is clearly of such a nature as to render that course impossible. We are only too aware that, in the result, there will be many clients of the appellant who, regarding themselves as cheated out of their money by him, will think little of a law which permits him to go unpunished. But such we believe it to be, and it is for this court to apply it.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; D S Gandy, Manchester.

Reported by T R Fitzwalter Butler Esq, Barrister.

(1) (1925), 89 JP 207.

(2) (1955), 40 Cr App Rep 62.

## COURT OF APPEAL (CRIMINAL DIVISION)

(STEPHENSON, LJ, CUSACK AND FORBES, JJ)

27th, 28th March, 5th May 1972

R v DOOT AND OTHERS

*Criminal Law—Conspiracy—Offence complete when agreement made—Acts in performance not essential part of offence—Entire agreement made abroad—Jurisdiction of English court—Acts in pursuance of agreement performed in England.*

The essence of the offence of conspiracy is the agreement to do the unlawful act, and the offence is complete when the agreement is made, whether or not it is ever carried out. Acts in performance of the agreement are evidence of the offence, but are not constituent or essential parts of it. If the agreement has been made by the conspirators abroad and is such that the whole scheme of the agreement has been worked out in detail abroad, leaving nothing to be worked out or agreed in England, the fact that during the existence of the agreement the conspirators came to England and there carried out acts in performance of the agreement does not give an English court jurisdiction to try the offence of conspiracy, because that offence has been wholly committed abroad.

APPEALS by Robert Leroy Doot, Thomas Shannahan, Jeffrey Richard Loving, James Wesley Watts and Michael Augustus Fay against their convictions on their own confessions at Hampshire Assizes of conspiracy to import dangerous drugs, without prejudice to their contention that the court had no jurisdiction to try them on that charge when they were sentenced to imprisonment and recommended for deportation.

*I S Hill QC and I A Kennedy for the appellants, Doot, Fay, Loving and Watts.*

*G B Best for the appellant Shannahan.*

*Sir Joseph Molony QC and Martin Tucker for the Crown.*

*Cur adv vult*

5th May. **STEPHENSON LJ** read the following judgment of the court: At the Hampshire Assizes holden at Winchester in December 1971, these five appellants were charged in an indictment containing four counts. On the first count all five were charged with 'conspiring to import dangerous drugs', the particulars of which were that they

'on divers days between the 1st day of January and the 15th day of August, 1971, in Hampshire and elsewhere conspired together with J. B. Evans and with other persons unknown fraudulently to evade the prohibition imposed by the Dangerous Drugs Act, 1965, on the importation of a dangerous drug, namely cannabis resin, into the United Kingdom.'

A second count charged the appellant Loving with

'importing prohibited goods, contrary to section 304 of the Customs and Excise Act, 1952 [the particulars of which were that he] on the 6th day of August 1971, in Hampshire, was in relation to certain goods, namely 64 kilogrammes of cannabis resin knowingly concerned in a fraudulent evasion of the prohibition on importation imposed by the Dangerous Drugs Act 1965.'

A third count charged the appellants Watts and Fay with an exactly similar offence, except that the number of kilogrammes of cannabis resin was 65. A fourth count charged the appellants Doot and Shannahan with a similar offence committed between 1st and 15th August 1971, in the county of Kent in relation to a much smaller

amount of dangerous drugs, namely, 138 grams of cannabis resin and 247 grams of cannabis.

On 8th December the appellant Loving pleaded guilty to the second count and the appellants Watts and Fay to the third count. On 13th December the appellant Doot pleaded guilty to the fourth count. On 14th December, after LAWSON J had ruled against all the appellants that the court had jurisdiction to try the first count, all the appellants, except the appellant Shannahan, pleaded guilty to that count without prejudice to their contention that the court had no jurisdiction to try it. On 15th December the jury convicted the appellant Shannahan on the first and fourth counts. All were sentenced to imprisonment, except the appellant Fay who was fined, and all were recommended for deportation.

All (including the appellant Shannahan) appeal against their convictions on the first count on a ground which involved a question of mixed law and fact on which the trial judge certified under s 1 (2) of the Criminal Appeal Act 1968 that the case was fit for appeal, namely 'whether upon the facts proved by the prosecution there was any offence of conspiracy within the jurisdiction of the court of trial'. The appellant Shannahan appeals against his conviction on the fourth count also on grounds only one of which was pursued on his behalf by his counsel: 'that the learned judge failed to explain to the jury the meaning of the phrase "knowingly concerned in a fraudulent evasion of the prohibition on importation ...".' He also applies for leave to appeal against sentence.

On 27th and 28th March we heard counsel's submissions on behalf of the last four appellants, which were adopted by counsel for the appellant Shannahan, on the question of jurisdiction, counsel's submissions for the Crown and counsel's submission in support of the appellant Shannahan's appeal against conviction on the fourth count and of his application. We allowed all the appeals against conviction on the first count, dismissed the appellant Shannahan's appeal against his conviction on the fourth count and refused his application for leave to appeal against his sentence on that count. The sentences of imprisonment and the appellant Fay's fine on the first count had also to be quashed. The appellant Fay has paid his fines and returned to the United States of America. All the remaining sentences of imprisonment on the substantive counts have already been served and the recommendations for deportation to the United States of America will, we hope, soon be put into effect. We now give our reasons for holding that the judge's ruling was wrong, for answering the question certified by the judge in the negative, and for quashing the convictions and sentences for conspiracy, and for dismissing the appellant Shannahan's further appeal and application. We also intimated that we were of opinion that our decision on the certified question involved a point of law of general public importance which ought to be considered by the House of Lords and that we would grant leave to appeal under s 33 (2) of the Criminal Appeal Act 1968.

All the subjects are American citizens, but, if they had been British subjects, our decision would have been no different. For the question of law raised by this appeal is whether a conspiracy entered into outside England to commit a crime in England is triable by an English court, or whether those who make an agreement outside English territory to do something unlawful in English territory cannot be tried in England when they come here, even if they do something unlawful here in pursuance of the agreement. It was admitted by the Crown and by all the appellants, except the appellant Shannahan—and there was ample evidence against him which the jury accepted—that the conspiracy charged in the first count was formed outside England, either in Belgium or in Morocco, and that all (including J B Evans) who were named in the indictment were parties to the agreement constituting the conspiracy, at latest when the appellants Loving, Watts and Fay left Tangier with their loads of cannabis resin on 3rd August by car ferry for the port of Southampton.

The statement made by all the appellants except the appellant Shannahan—who said that his experience as a legal stenographer had led him to believe that people got themselves into trouble by answering questions and making statements, and so kept silent—indicated that their plan was to procure cannabis in Morocco and import it into the United States of America through England and Canada secreted in the wooden bases of sleeping beds specially constructed inside Volkswagen vans. Recruited by the appellant Doot in the United States of America and joined by J B Evans in Europe on the other side of the English Channel, they bought vans there and got a carpenter in Belgium to make the beds, the appellant Shannahan playing a leading part in getting them made and paying for them. They travelled to Morocco separately, keeping in touch by messages left at American Express offices en route. They met in Morocco where they collected the cannabis, packed it in cellophane, sprayed it with varnish to suppress the smell and concealed it in vans run by the appellant Loving and by the appellants Watts and Fay. How many other vans there were was in doubt; certainly others were planned and J B Evans succeeded in getting one other into Southampton and out of Liverpool towards the end of July without being discovered. The appellant Loving with 64 kilogrammes of cannabis resin concealed in the bed in his van (the subject of the second count), and the appellants Watts and Fay with 65 kilogrammes concealed in the bed in theirs (the subject of the third count), arrived at Southampton on 5th August. The appellants Watts and Fay cleared their van through the customs, called at the American Express office in London for a message and left one there for the appellant Loving, and went to Liverpool intending to embark there for Canada.

But on 6th August customs officers at Southampton examined the appellant Loving's van, discovered the 64 kilogrammes of cannabis resin, suspected that the appellants Watts and Fay's van might also have imported cannabis, traced it to Liverpool and there examined it when about to be shipped on 10th August and discovered the further consignment of cannabis resin. As a result of their enquiries, customs officers kept a watch at the American Express office in the Haymarket in London, and on 14th August interviewed the appellants Doot and Shannahan there, examined their van and, although they found nothing in the wooden bed, they discovered 138 grams of cannabis resin and 247 grams of cannabis in a polythene container and a tobacco pouch under the bed just in front of the engine and in a carrier bag on the passenger's side of the cab. These two had arrived at Dover from Ostend on 13th August. This cannabis (the subject of the fourth count), was not alleged to be imported in pursuance of the conspiracy charged in the first count.

The submissions made on behalf of the appellants to the judge and to us was that the criminal jurisdiction of the courts of this country is confined to offences which are completed within its borders; that the offence of conspiracy consists in making an unlawful agreement and is both committed and completed at the time of making, forming or entering into the agreement; and that the offence alleged in the first count was accordingly committed at latest in Tangier outside the jurisdiction of the courts of this country. Alternatively, if the conspiracy charge was a continuing offence, it was completed when the cannabis was imported (that is to say, when the ship carrying the cannabis came within the limits of the port of Southampton: Customs and Excise Act 1952, s 79 (2) (a)) and so was then spent, with the result that it could not be revived or regarded as continuing simply by particularising the conspiracy as a conspiracy fraudulently to evade the prohibition on importation of the cannabis.

On behalf of the Crown it was conceded (as has been said) that the agreement was made outside the jurisdiction; but it was submitted that a conspiracy continues in existence until it is discharged or terminated by performance or impossibility of performance or by agreement or perhaps until it lapses; that this conspiracy was

not discharged or terminated until the vans carrying the larger amounts of cannabis entered the port of Southampton at earliest, and at latest until the fraudulent evasion of the prohibition on importation was completed by the export of the cannabis from Liverpool; and that any party to the conspiracy could be indicted and tried as a conspirator if and when he arrived within the jurisdiction, certainly if he took any steps to carry it out here, probably if he came here to carry it out and perhaps even if he arrived here on a visit unconnected with it.

The trial judge appears to have accepted the Crown's submission in its least extreme form. He said to the jury:

'My ruling is this. I reject the submissions of the accused that this court has no jurisdiction to try the offence charged in count 1 which is a conspiracy to import dangerous drugs in breach of the prohibition imposed by the Dangerous Drugs Act 1965. The prohibition imposed by that Act is a prohibition on the importation of cannabis resin in the United Kingdom. The grounds, briefly, upon which I so ruled are, first of all, that I am satisfied on the evidence adduced by the prosecution that there was an agreement between these accused and others (I will deal with the case of Shannahan separately in a moment) to import dangerous drugs into England in breach of the Dangerous Drugs Act, and that the English element in that agreement consisted in conduct on the part of one or more of these accused who were party to the agreement, of conduct in England which was conduct in furtherance or implementation of the agreement to import illegally into England. For those reasons, therefore, I hold that I have jurisdiction to try count 1.'

He repeated this language in his direction to the jury on the first count against the appellant Shannahan.

We think that this ruling assumes that conspiracy is a continuing offence and that this particular conspiracy was not completed as long as anything remained to be done in furtherance or implementation of it. But, in our judgment, the ruling ignores the peculiar nature of the offence of conspiracy and the distinction between two kinds of conspiratorial agreement to which we shall refer, and confuses the offence itself and its essential elements with overt acts in furtherance of it and with acts which are merely evidence of its existence. The essence of the offence is the agreement to do the unlawful act. The offence is completed when the agreement is made. It matters not that it is never carried out. Acts in performance of it go to prove the offence but are not constituent or essential parts of it. They may be substantive offences committed in England and so triable in England; but they do not make the agreement to commit them itself triable in England. The agreement does, of course, continue until ended and the conspiracy remains in existence and may be joined by others or be varied, or lose some of its participants, as long as it continues to exist. If the conspirators come within the jurisdiction while their agreement still exists and then do acts in furtherance of it there is much to be said for the English courts having jurisdiction to try them for the conspiracy, as the judge held. Perhaps that ought to be the law, but in our view, it is not the law and, if it is to be the law, Parliament or the House of Lords, not this court, must declare it to be so.

Counsel were agreed that there was no authority which is directly in point, although the Crown relied, and the judge may have relied, on *R v Briscoe* (1). There the issue was whether a conspiracy between British subjects on the high seas to defraud the Admiralty was triable by the King's commission exercising Admiralty jurisdiction under the Offences at Sea Acts of 1536 and 1799 over crimes on the high seas or by the courts at Westminster, and the courts at Westminster decided that they had

(1) (1803), 4 East 164.



jurisdiction to try it. But old decisions on venue are only of marginal relevance to deciding the question whether the facts alleged and proved amount to a criminal offence by English law: *Treacy v Director of Public Prosecutions* (1), per LORD DIPLOCK; and in *Brisac's* case the counts of the information charged not only conspiracy but also certain overt acts committed in Middlesex, and the court clearly based its decision on the overt acts set out in the counts of the information.

It is unnecessary to allege overt acts in a conspiracy count and none was alleged in the first count of this indictment. GROSE J in giving the judgment of the court did, however, state:

'that from analogy, there seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason'

and this and *R v Bowes* (2), which was cited in *Brisac's* case, have been treated as possibly authority for the proposition that 'if there was a conspiracy on land abroad, a jury might try it in any place in England where an overt act in pursuance of it was done': Russell on Crime.

Our attention has been drawn to recent cases in which the territorial principle on which English criminal law is applied has been considered: *Treacy v Director of Public Prosecutions* (making a demand), *R v Robert Millar (Contractors) Ltd and Millar* (3) (aiding and abetting) and *R v Baxter* (4) (attempt); but none of these throws light on the unique offence of conspiracy which the trial judge in the present case said, we believe correctly, is an offence known only to Anglo-Saxon countries. The only authorities on that offence to which we were referred were the decisions of the House of Lords in *Board of Trade v Owen* (5), a New Zealand case of *R v McKay* (6), and the summing-up of BROWNE J in *R v Pender* (7). *Board of Trade v Owen* was the converse case where the court had to consider an agreement made in this country to commit an offence out of it (cf s 13 (d) of the Dangerous Drugs Act 1965), but we find the observations of LORD TUCKER as helpful, indicating that it is for the legislature to determine that it is in the public interest that such a conspiracy as this, of which (as far as we know) no one has ever been convicted, should be triable and punishable in this country. More helpful still are the observations of BROWNE J in *Pender's* case, where four men named Pender, Michael Thompson, Peter Thompson and Jassal were charged that

'they on divers dates between the 1st December 1968 and the 15th March 1969 in the county of Dorset and at other places unknown conspired together and with persons unknown to enable Commonwealth citizens to enter the United Kingdom unlawfully.'

The judge directed the jury, in our view correctly, as follows:

'The general rule of our criminal law is that our courts have no power to try crimes which are committed entirely abroad, and the Channel Islands, and, of course, France, are abroad for this purpose. The crime of conspiracy, as I have told you, consists of making an agreement to do an unlawful act, so if you are satisfied that all or any of these defendants did enter into an agreement

(1) 135 JP 12; [1971] 1 All ER 110; [1971] AC 537.

(2) (1787), cited in 4 East 171.

(3) 134 JP 240; [1970] 1 All ER 577; [1970] 2 QB 54.

(4) 135 JP 345; [1971] 2 All ER 359; [1972] 1 QB 1.

(5) 121 JP 177; [1957] 1 All ER 411; [1957] AC 602.

(6) [1939] NZLR 454.

(7) (19th May 1969, Winchester Assizes), unreported.

to do the unlawful act charged, you must also be satisfied, as a matter of fact, that each defendant made his agreement at least in part in England.'

He then pointed out that agreements were of two kinds, those in which 'the whole scheme is completely agreed at the first meeting', and those in which 'you first make some sort of general agreement as to what is going to be done, leaving the details to be worked out and agreed later'. In the second kind of agreement he who makes the general agreement commits the crime of conspiracy as soon as he makes it but he continues to commit it as he continues to make further agreements on the details of carrying it out. The jury were then directed to consider the prosecution case that Pender made the general agreement at Poole with another Indian, that Michael Thompson joined the conspiracy before he left England or after he left England in the Channel Islands or in Paris, that Peter Thompson joined it in the Channel Islands and that Jassal must have joined the conspiracy in England; if they came to the conclusion that either of the Thompsons had joined it in the Channel Islands or in France, they could only convict him if the conspiracy were a continuing agreement of the second kind and he remained a party to it after he got back to England and then agreed the details of how it was to be worked out. He then asked the jury to answer questions when and where each of the four defendants joined the conspiracy.

BROWNE J's direction to the jury was based, in our judgment correctly, on the principle that unless there was some agreement made in this country there was no offence triable here. We accept his distinction (which had already been drawn by FAIR J in *McKay's case* (1)) between two kinds of agreement as a helpful guide to a jury in considering whether there was any room for an agreement to be made in this country in a case where an agreement had already been made outside it, although we are told that his direction was never tested in this court as the applications of Pender and his co-defendants for leave to appeal against their convictions were not pursued beyond the refusal of the single judge. But we think that BROWNE J's direction (which was contrary to that given by the trial judge in this case) is as far as the law can go in giving the court jurisdiction over a conspiracy formed out of the jurisdiction and that it does not go far enough to cover the conspiracy with which this appeal is concerned. This conspiracy was clearly an agreement of the first kind in which no detail of importance in its carrying out remained to be agreed in this country; nor was there any question of any appellant joining or rejoining it after arriving in this country. All the appellants agreed before they left Tangier that the cannabis was to be imported via Southampton concealed in the beds of the vans, and nothing remained to be done thereafter in execution of the conspiracy to import it into the United Kingdom except actually to import it. All that was done thereafter, such as reporting to the American Express office and transporting the cannabis to Liverpool, had already been agreed; but even if it had not, it was done in execution of the conspiracy not to import the cannabis into the United Kingdom, but to export it into the United States of America, a larger conspiracy or series of conspiracies of which the conspiracy to import it into the United Kingdom was only a part; conspiracies of which some were not conspiracies to break the law of this country and none was the conspiracy charged in the indictment. It has to be mentioned that England was only a staging-point (as it was put) for the cannabis on its way from Morocco to the United States of America and it was only its importation into this country which contravened s 2 of the Dangerous Drugs Act 1965, although to export it from this country contravened s 3. No agreement to import into this country was ever made by these conspirators 'in Hampshire' or 'elsewhere' in this country; the whole scheme was agreed 'elsewhere' but outside this country.

We have not ignored the use of what counsel for the Crown called 'quasi-statutory

phraseology' introduced from s 304 (b) of the Customs and Excise Act 1952 into the particulars of the offence of 'conspiring to import dangerous drugs', by which that conspiracy purports to be made into a conspiracy

'fraudulently to evade the prohibition imposed by the Dangerous Drugs Act 1965, on the importation of a dangerous drug, namely cannabis resin, into the United Kingdom';

or the argument based on those particulars that the five conspirators continued to commit the offence of common law conspiracy charged in the indictment not only by importing the cannabis but by maintaining fraudulent efforts to preserve the evasion of the prohibition and even by transporting it after importation. At first sight it might seem difficult to evade a prohibition on importation of a dangerous drug after its importation—as difficult perhaps as to enable a Commonwealth citizen to enter the United Kingdom after his entry. The agreement made abroad might be thought to have been spent at Southampton when the cannabis got past the Customs. However that may be, counsel for the appellant Shannahan conceded that the substantive offence charged against the appellant Shannahan in the fourth count could be committed after importation on the authority of the decision of this court in *R v Williams* (1). In that case it was held that the appellant's agreement to sell cannabis after it had been imported into this country was sufficiently close to the actual importation to constitute his being knowingly concerned in a fraudulent evasion of the restriction on the importation of cannabis imposed by the Dangerous Drugs Act 1965. But it seems that the appellant's agreement to sell cannabis after it had been imported was first made before it was imported and it may be that it was that antecedent agreement which this court considered close enough to the importation to constitute the offence.

Even if it was the subsequent agreement which constituted the substantive offence, that decision does not help us to decide whether the offence of conspiracy was committed by the act of importing the prohibited cannabis or by a subsequent evasion of the prohibition, because, as we have already said, any subsequent acts of these appellants, including the substantive offences admitted by three of them, were not further agreements but overt acts evidencing the conspiracy to import into this country, or (it may be more correct to say) evidencing the conspiracy to import into the United States of America.

Admittedly the distinction between acts evidencing a continuing conspiracy and acts constituting further agreements or fresh conspiracies is a fine one (and the law might be better without it); but we think that there was in this case no evidence of any acts of this latter character performed in this country and that the judge was wrong in holding that acts of the former character were an English element in this agreement sufficient to give an English court jurisdiction to try the appellants on the first count.

We have considered the views expressed (or implied) by R S WRIGHT J in his book, *Criminal Conspiracies* at pp 73, 74, and by Professor Glanville Williams in an article on 'Venue and the Ambit of the Criminal Law' (81 *Law Quarterly Review* 518, 534). The former was clearly of opinion that if aliens agree abroad to do or procure to be done here an act which will be in violation of English law their agreement is so far no crime against our law, but any of them who does an overt act here has broken our law. He does not, however, say that any of them who does an overt act here has thereby committed the offence of criminal conspiracy, although his reference to *Brisac's* case (2) probably implies it. The latter's view is this:

(1) 135 JP 359; [1971] 2 All ER 444.

(2) (1803), 4 East 164.

'The general principle seems to be that jurisdiction over an inchoate crime [like conspiracy] appertains to the State that would have had jurisdiction had the crime been consummated [and he goes no further than to say:] It seems to follow from Owen (1) as a logical corollary that our courts will assume jurisdiction to punish a conspiracy entered into abroad to commit a crime here. Although the general principle is that crimes committed abroad do not become punishable here merely because their evil effects occur here, there may well be an exception for inchoate crimes aimed against persons in this country,'

citing McKay's case (2) as 'only partially in favour of this view'.

The judge did not think that that exception followed from *Board of Trade v Owen* (1) as a logical corollary, nor we understand does counsel for the Crown. Nor do we. We agree with the judge that such a statutory provision as s 3 of the Explosive Substances Act 1883 indicates that the position at common law is as we have stated it, and as BROWNE J stated it in *Pender's* case (3), and that it requires a statute to make it an offence for a person, even a British subject, without Her Majesty's dominions, to conspire there to do an act within the United Kingdom.

We would add two things. First, there was no motion to quash the first count or application to amend it. But we think that the particulars of offence should have followed the statement of offence and not have attempted—without success—to introduce an unnecessary and undesirable complication. If the particulars were to depart from the statement of offence, as, in our opinion, they did and should not have done, they should have specified clearly the provision of the Customs and Excise Act 1952 which the importation was alleged to contravene. The trial judge seems to have thought at different times that conspiracies to contravene s 45 of that Act and s 2 of the Dangerous Drugs Act 1965 were alleged; and indeed he summed up to the jury, correctly in our opinion, on the basis that the conspiracy was to contravene s 2. But it was agreed that the language of the first count was derived from s 304 (b) of the 1952 Act.

We do not, however, think it matters whether the conspiracy was simply to import or to do acts in aid of past importation, because importation and subsequent acts were equally overt acts in furtherance of an already made agreement and were unnecessary to create or complete the offence of conspiracy as charged in both statement and particulars of offence in the first count. Secondly, this case illustrates once more the dangers and difficulties which lie in wait for those who persist in framing indictments containing the popular offence of conspiracy in addition to substantive offences.

Here the appellant Doot was described by the judge as the chief man or 'no 1 man' in the conspiracy and the appellant Shannahan as 'very close to the no 1 man' and an important member of it. Yet their van contained relatively small quantities of cannabis which were not the subject of the conspiracy charge, their substantive offence was not an act in furtherance of the conspiracy, their acts in furtherance of the conspiracy, such as calling at the American Express office, were not, and perhaps could not be, the subject of any charges, and their sentences on the fourth count alone were properly even lighter than the sentences of imprisonment passed on the second and third counts in respect of much larger quantities of cannabis which were the subject of the conspiracy charge. We can therefore understand why it was thought necessary to burden the jury with a conspiracy count and so prolong the trial by legal submissions which have occupied the time of this court as well.

(1) 121 JP 177; [1957] 1 All ER 411; [1957] AC 602.

(2) [1939] NZLR 454.

(3) (19th May 1969, Winchester Assizes), unreported.

But we think that the appellants Doot and Shannahan, if counsel for the appellant Shannahan's concession is right, might well have been guilty of being knowingly concerned in a fraudulent evasion of the prohibition on importation imposed by the Dangerous Drugs Act 1965, in relation to the 64 kilogrammes and 65 kilogrammes of cannabis resin illegally imported by the other three appellants. We hope that conspiracy will only be charged when justice cannot be done by charging persons with substantive offences and perhaps with aiding and abetting them. Such charges will, we think, usually fill the gap left by our decision that a conspiracy of this kind formed outside the jurisdiction is not triable here, but if they do not it is for Parliament to close the gap by appropriate legislation.

[His LORDSHIP then gave the reasons of the court for approving the judge's directions to the jury on the fourth count against the appellant Shannahan and for upholding the jury's verdict on it.]

Order accordingly.

Solicitors: Registrar of Criminal Appeals; Trower, Still & Keeling; Solicitor, Customs and Excise.

Reported by T R Fitzwalter Butler Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND STEPHENSON LJ AND BOREHAM, J)

5th May 1972

R v COLLINS

*Criminal Law—Burglary—Entry of building as a trespasser—Mens rea—Need to prove that at time of entry defendant knew he was a trespasser or was reckless whether or not he had owner's consent—Application of common law doctrine of trespass ab initio—Theft Act, 1968, s 9 (1).*

By s 9 (1) of the Theft Act, 1968: 'A person is guilty of burglary if (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in sub-s (2) below', i.e. offences which include theft and rape.

To establish the offence of burglary contrary to s 9 (1) the prosecution must prove that the defendant at the time of entry knew that he was a trespasser and nevertheless deliberately entered, or, at the very least, was reckless whether or not he was entering the premises without the owner's consent.

The common law doctrine of trespass ab initio has no application to burglary contrary to s 9 (1).

APPEAL by Stephen William George Collins, against his conviction at Essex Assizes, of burglary with intent to rape contrary to s 9 (1) (a) of the Theft Act 1968, when he was sentenced to 21 months' imprisonment.

P Perrins for the appellant.

F Irwin for the Crown.

EDMUND DAVIES LJ delivered this judgment of the court: This is about as extraordinary a case as my brethren and I have ever heard either on the Bench or



while at the Bar. Stephen William George Collins was convicted on 29th October 1971 at Essex Assizes of burglary with intent to commit rape and he was sentenced to 21 months' imprisonment. He is a 19 years old youth, and he appeals against that conviction by the certificate of the trial judge.

Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce. At about two o'clock in the early morning of Saturday, 24th July 1971, a young lady of 18 went to bed at her mother's home in Colchester. She had spent the evening with her boy friend. She had taken a certain amount of drink, and it may be that this fact affords some explanation of her inability to answer satisfactorily certain crucial questions put to her. She has the habit of sleeping without wearing night apparel in a bed which is very near the lattice-type window of her room. At one stage in her evidence she seemed to be saying that the bed was close up against the window which, in accordance with her practice, was wide open. In the photographs which we have before us, however, there appears to be a gap of some sort between the two, but the bed was clearly quite near the window. At about 3.30 or 4.00 a.m. she awoke and she then saw in the moonlight a vague form crouched in the open window. She was unable to remember, and this is important, whether the form was on the outside of the window sill or on that part of the sill which was inside the room, and for reasons which will later become clear, that seemingly narrow point is of crucial importance. The young lady then realised several things—first of all that the form in the window was that of a male; secondly that he was a naked male; and thirdly that he was a naked male with an erect penis. She also saw in the moonlight that his hair was blond. She thereupon leapt to the conclusion that her boy friend, with whom for some time she had been on terms of regular and frequent sexual intimacy, was paying her an ardent nocturnal visit. She promptly sat up in bed, and the man descended from the sill and joined her in bed and they had full sexual intercourse. But there was something about him which made her think that things were not as they usually were between her and her boy friend. The length of his hair, his voice as they had exchanged what was described as 'love talk', and other features led her to the conclusion that somehow there was something different. So she turned on the bed-side light, saw that her companion was not her boy friend, and slapped the face of the intruder, who was none other than the appellant. He said to her: 'Give me a good time tonight', and got hold of her arm, but she bit him and told him to go. She then went into the bathroom and he promptly vanished.

The complainant said that she would not have agreed to intercourse if she had known that the person entering her room was not her boy friend. But there was no suggestion of any force having been used on her, and the intercourse which took place was undoubtedly effected with no resistance on her part.

The appellant was seen by the police at about 10.30 a.m. later that same morning. According to the police, the conversation which took place then elicited these points: He was very lustful the previous night. He had taken a lot of drink, and we may here note that drink (which to him is a very real problem) had brought this young man into trouble several times before, but never for an offence of this kind. He went on to say that he knew the complainant because he had worked around her house. On this occasion, desiring sexual intercourse—and according to the police evidence he had added that he was determined to have a girl, by force if necessary, although that part of the police evidence he challenged—he went on to say that he walked around the house, saw a light in an upstairs bedroom, and he knew that this was the girl's bedroom. He found a step ladder, leaned it against the wall and climbed up and looked into the bedroom. What he could see inside through the wide open window was a girl who was naked and asleep. So he descended the ladder and

stripped off all his clothes, with the exception of his socks, because apparently he took the view that if the girl's mother entered the bedroom it would be easier to effect a rapid escape if he had his socks on than if he was in his bare feet. That is a matter about which we are not called on to express any view, and would in any event find ourselves unable to express one. Having undressed, he then climbed the ladder and pulled himself up on to the window sill. His version of the matter is that he was pulling himself in when she awoke. She then got up and knelt on the bed, she put her arms around his neck and body, and she seemed to pull him into the bed. He went on:

'I was rather dazed, because I didn't think she would want to know me. We kissed and cuddled for about ten or fifteen minutes and then I had it away with her but found it hard because I had had so much to drink.'

The police officer said to the appellant:

'It appears that it was your intention to have intercourse with this girl by force if necessary and it was only pure coincidence that this girl was under the impression that you were her boy friend and apparently that is why she consented to allowing you to have sexual intercourse with her.'

It was alleged that he then said:

'Yes, I feel awful about this. It is the worst day of my life, but I know it could have been worse.'

Thereupon the officer said to him—and the appellant challenges this: 'What do you mean, you know it could have been worse?' to which he is alleged to have replied:

'Well, my trouble is drink and I got very frustrated. As I've told you I only wanted to have it away with a girl and I'm only glad I haven't really hurt her.'

Then he made a statement under caution, in the course of which he said:

'When I stripped off and got up the ladder I made my mind up that I was going to try and have it away with this girl. I feel terrible about this now, but I had too much to drink. I am sorry for what I have done.'

In the course of his testimony, the appellant said that he would not have gone into the room if the girl had not knelt on the bed and beckoned him into the room. He said that, if she had objected immediately to his being there or to his having intercourse, he would not have persisted. While he was keen on having sexual intercourse that night, it was only if he could find someone who was willing. He strongly denied having told the police that he would, if necessary, have pushed over some girl for the purpose of having intercourse.

There was a submission of no case to answer on the ground that the evidence did not support the charge, particularly that ingredient of it which had reference to entry into the house 'as a trespasser'. But the submission was overruled, and, as we have already related, he gave evidence.

Now, one feature of the case which remained at the conclusion of the evidence in great obscurity is where exactly the appellant was at the moment when, according to him, the girl manifested that she was welcoming him. Was he kneeling on the sill outside the window or was he already inside the room, having climbed through the window frame, and kneeling on the inner sill? It was a crucial matter, for there were certainly three ingredients that it was incumbent on the Crown to establish. Under s 9 of the Theft Act 1968, which renders a person guilty of burglary if he enters any building or part of a building as a trespasser and with the intention of

committing rape, the entry of the appellant into the building must first be proved. There is no doubt about that, for it is common ground that he did enter this girl's bedroom. Secondly, it must be proved that he entered as a trespasser. Thirdly, it must be proved that he entered as a trespasser with intent at the time of entry to commit rape therein.

The second ingredient of the offence—the entry must be as a trespasser—is one which has not, to the best of our knowledge, been previously canvassed in the courts. Views as to its ambit have naturally been canvassed by the textbook writers, and it is perhaps not wholly irrelevant to recall that those who were advising the Home Secretary before the Theft Bill was presented to Parliament had it in mind to get rid of some of the frequently absurd technical rules which had been built up in relation to the old requirement in burglary of a 'breaking and entering'. The cases are legion as to what this did or did not amount to, and happily it is not now necessary for us to consider them. But it was in order to get rid of those technical rules that a new test was introduced, namely, that the entry must be 'as a trespasser'.

What does that involve? According to the learned editors of Archbold (37 edn, p 572, para 1505):

'Any intentional, reckless or negligent entry into a building will, it would appear, constitute a trespass if the building is in the possession of another person who does not consent to the entry. Nor will it make any difference that the entry was the result of a reasonable mistake on the part of the defendant, so far as trespass is concerned.'

If that be right, then it would be no defence for this man to say (and even were he believed in saying): 'Well, I honestly thought that this girl was welcoming me into the room and I therefore entered, fully believing that I had her consent to go in'. If Archbold is right, he would nevertheless be a trespasser, since the apparent consent of the girl was unreal, she being mistaken as to who was at her window. We disagree. We hold that, for the purposes of s 9 of the Theft Act 1968, a person entering a building is not guilty of trespass if he enters without knowledge that he is trespassing or at least without acting recklessly as to whether or not he is unlawfully entering.

A view contrary to that of the learned editors of Archbold was expressed in Professor J C Smith's book on *The Law of Theft* (1968), pp 123, 124, para 462 where, having given an illustration of an entry into premises, the learned author comments:

'It is submitted that . . . D should be acquitted on the ground of lack of mens rea. Though, under the civil law, he entered as a trespasser, it is submitted that he cannot be convicted of the criminal offence unless he knew of the facts which caused him to be a trespasser or, at least, was reckless.'

The matter has also been dealt with by Professor Grieve who in *The Theft Act, 1968*, (pp 52, 53, para 405) states:

'What if D wrongly believes that he is not trespassing? His belief may rest on facts which, if true, would mean that he was not trespassing: for instance, he may enter a building by mistake, thinking that it is the one he has been invited to enter. Or his belief may be based on a false view of the legal effect of the known facts: for instance, he may misunderstand the effect of a contract granting him a right of passage through a building. Neither kind of mistake will protect him from tort liability for trespass. In either case, then, D satisfies the literal terms of section 9 (1): he "enters . . . as a trespasser." But for the purposes of criminal liability a man should be judged on the basis of the facts as he believed them to be, and this should include making allowances for a mistake as to rights under the civil law. This is another way of saying that a

serious offence like burglary should be held to require mens rea in the fullest sense of the phrase: D should be liable for burglary only if he knowingly trespasses or is reckless as to whether he trespasses or not. Unhappily it is common for Parliament to omit to make clear whether mens rea is intended to be an element in a statutory offence. It is also, though not equally, common for the courts to supply the mental element by construction of the statute.'

We prefer the view expressed by Professor Smith and Professor Grieve to that of the learned editors of Archbold. In the judgment of this court, there cannot be a conviction for entering premises 'as a trespasser' within the meaning of s 9 of the Theft Act 1968 unless the person entering does so knowing that he is a trespasser and nevertheless deliberately enters, or, at the very least, is reckless whether or not he is entering the premises of another without the other party's consent.

Having so held, the pivotal point of this appeal is whether the Crown established that the appellant at the moment when he entered the bedroom knew perfectly well that he was not welcome there, or, being reckless whether he was welcome or not, was nevertheless determined to enter. That in turn involves consideration as to where he was at the time when the complainant indicated that she was welcoming him into her bedroom. If, to take an example that was put in the course of argument, her bed had been, not near the window, but on the other side of the bedroom, and he (being determined to have her sexually even against her will) climbed through the window and crossed the bedroom to reach her bed, then the offence charged would have been established. But in this case, as we have related, the layout of the room was different, and it became a point of nicety which had to be conclusively established by the Crown as to where he was when the girl made welcoming signs as she unquestionably at some stage did.

How did the learned judge deal with this matter? We have to say regretfully that there was a flaw in his treatment of it. Referring to s 9, he said:

'there are three ingredients. First is the question of entry. Did he enter into that house? Did he enter as a trespasser? That is to say, was the entry, if you are satisfied there was an entry, intentional or reckless? And, finally, and you may think this is the crux of the case as opened to you by [counsel for the Crown], if you are satisfied that he entered as a trespasser, did he have the intention to rape this girl?'

The judge then went on to deal in turn with each of these three ingredients. He first explained what was involved in 'entry' into a building. He then dealt with the second ingredient. But he here unfortunately repeated his earlier observation that the question of entry as a trespasser depended on: 'Was the entry intentional or reckless?' We have to say that this was putting the matter inaccurately. This mistake may have been derived from a passage in the speech of counsel for the Crown when replying to the submission of 'no case'. Counsel for the Crown at one stage said:

'Therefore, the first thing that the Crown have got to prove, my Lord, is that there has been a trespass which may be an intentional trespass, or it may be a reckless trespass.'

Unfortunately the trial judge regarded the matter as though the second ingredient in the burglary charged was whether there had been an intentional or reckless entry, and when he came to develop this topic in his summing-up that error was unfortunately perpetuated. The trial judge told the jury:

'He had no right to be in that house, as you know, certainly from the point of view of [the girl's mother], but if you are satisfied about entry, did he enter

intentionally or recklessly? What the prosecution say about that is, you do not really have to consider recklessness because when you consider his own evidence he intended to enter that house, and if you accept the evidence I have just pointed out to you, he, in fact, did so. So, at least, you may think, it was intentional. At the least, you may think it was reckless because, as he told you, he did not know whether the girl would accept him.'

We are compelled to say that we do not think the trial judge by these observations made it sufficiently clear to the jury the nature of the second test about which they had to be satisfied before the appellant could be convicted of the offence charged. There was no doubt that his entry into the bedroom was 'intentional'. But what the appellant had said was: 'She knelt on the bed, she put her arms around me and then I went in'. If the jury thought he might be truthful in that assertion, they would need to consider whether or not, although entirely surprised by such a reception being accorded to him, this young man might not have been entitled reasonably to regard her action as amounting to an invitation to him to enter. If she in fact appeared to be welcoming him, the Crown do not suggest that he should have realised or even suspected that she was so behaving because, despite the moonlight, she thought he was someone else. Unless the jury were entirely satisfied that the appellant made an effective and substantial entry into the bedroom without the complainant doing or saying anything to cause him to believe that she was consenting to his entering it, he ought not to be convicted of the offence charged. The point is a narrow one, as narrow maybe as the window sill which is crucial to this case. But this is a criminal charge of gravity and, even though one may suspect that his intention was to commit the offence charged, unless the facts show with clarity that he in fact committed it he ought not to remain convicted.

Some question arose whether or not the appellant can be regarded as a trespasser *ab initio*. But we are entirely in agreement with the view expressed in Archbold (37th edn, 1969, p 572, para 1505) that the common law doctrine of trespass *ab initio* has no application to burglary under the Theft Act 1968. One further matter that was canvassed ought perhaps to be mentioned. The point was raised that, the complainant not being the tenant or occupier of the dwelling-house and her mother being apparently in occupation, this girl herself could not in any event have extended an effective invitation to enter, so that even if she had expressly and with full knowledge of all material facts invited the appellant in, he would nevertheless be a trespasser. Whatever be the position in the law of tort, to regard such a proposition as acceptable in the criminal law would be unthinkable.

We have to say that this appeal must be allowed on the basis that the jury were never invited to consider the vital question whether the appellant did enter the premises as a trespasser, that is to say, knowing perfectly well that he had no invitation to enter or reckless whether or not his entry was with permission. The certificate of the trial judge, as we have already said, demonstrated that he felt there were points involved calling for further consideration. That consideration we have given to the best of our ability. For the reasons we have stated, the outcome of the appeal is that the appellant must be acquitted of the charge preferred against him.

*Conviction quashed.*

*Solicitors: Registrar of Criminal Appeals; T Hambrey Jones, Chelmsford.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*



**HOUSE OF LORDS**

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD DIPLOCK AND LORD SALMON)

7th June, 5th July 1972

ATKINSON v MURRELL

*Gaming—Lottery—Offence—Need to prove prize fund in hands of promoter to which participants have contributed or which is provided by non-participant—Betting, Gaming and Lotteries Act, 1963, s 41.*

To constitute a lottery which is unlawful under s 41 of the Betting, Gaming and Lotteries Act, 1963, it is not necessary that there should be a prize fund in the hands of the promoter to which the participants have contributed and out of which prizes are provided, or a prize or prizes in the hands of the promoter provided by a third party who is not a participant.

APPEAL by George Atkinson against a decision of a Queen's Bench Divisional Court reported ante p 379.

*R A R Stroyan QC and B M McIntyre for the appellant.*

*R D Harman for the respondent.*

Their Lordships took time for consideration.

5th July. The following opinions were delivered.

**LORD REID:** I would dismiss this appeal for the reasons given by my noble and learned friend, VISCOUNT DILHORNE.

**LORD MORRIS OF BORTH-Y-GEST:** I have had the advantage of reading the speech prepared by my noble and learned friend, VISCOUNT DILHORNE, and I am in agreement with it.

**VISCOUNT DILHORNE:** The appellant was convicted of three offences by the City of London justices. He was charged with using three premises for the collection of correspondence in connection with the promotion of a lottery, contrary to s 42 (1) (f) of the Betting, Gaming and Lotteries Act 1963. The only question for decision is whether a scheme called World Wide Roulette was a lottery. If it was, it was not disputed that the appellant was rightly convicted. The justices held that it was a lottery. So did the Divisional Court, and the appellant now appeals to this House with the leave of that court.

A person wishing to participate in the scheme buys an envelope for £1. Enclosed in the envelope is a list containing six names and addresses. The purchaser of the envelope writes his name and address on the bottom of the list and sends the list and £1 to the promoters. He also sends £1 to the person whose name and address is at the top of the list. On receipt of the list the promoters strike out the name at the top of the list and send to the participant three envelopes for him to sell for £1 each. Each envelope contains a list containing six names but with the name of the person second on the list in the envelope originally purchased at the top and the participant's name the last of the six on the list. If he sells all three envelopes and the purchasers of them comply with the scheme and the process continues, his name eventually will appear at the top of the list and then under the scheme new participants will each send direct to him £1. If all the envelopes sent out by the promoters

are sold and if the new participants send him their pounds, he will receive £729. It is pure chance what, if any, sum he will receive up to the maximum of £729, depending on the number of envelopes sold and whether the purchasers, when his name is at the top of the list, decide to send him £1.

Before the Divisional Court counsel for the appellant took two points. One was that the receipt of the pounds by the person whose name was at the top of the list depended not on chance but on the decision of the new participant to send it to him. This contention was rejected and, in my opinion, rightly rejected, by the Divisional Court. While it is true that whether or not £1 was sent by each new participant depended on his individual decision, the amount received by the person whose name was at the top of the list depended solely on chance, on the number of envelopes which might be sold and the number of the purchasers who decided to send him money.

The second point taken by counsel for the appellant was that in respect of which the Divisional Court granted a certificate granting leave to appeal to this House. That court certified the following question:

'Whether in order to constitute a lottery which is unlawful under s 41 of the Betting, Gaming and Lotteries Act 1963 there must be either (a) a prize fund for profits in the hands of the promoter to which the participants have contributed and out of which prizes are provided; or (b) a prize or prizes in the hands of the promoter provided by a third party who is not a participant.'

Counsel for the appellant contended that to constitute a lottery, there must be a distribution of a prize or prizes depending on pure chance, that the participants must in some way pay for their chance, and that before the prizewinners were ascertained, there must be a fund out of which the prizes are to be paid or prizes in the hands of the promoters. He recognised that, if that was right, a lottery in which tickets were sold on credit so that there would be no fund in the hands of the promoters before the result was known would not be unlawful.

A lottery was not defined in the Betting, Gaming and Lotteries Act 1963, nor has it been defined in any other Act. The only question at issue in this appeal is whether it is an essential feature of an unlawful lottery that there should be such a fund or prizes in the hands of the promoters for them to distribute when the prizewinners were ascertained.

Counsel for the appellant was unable to cite any authority in which it was held that that was an essential feature of a lottery or any authority in which that question had been considered. In support of his contention he did refer to some dicta. In *Whitbread & Co Ltd v Bell* (1), where it was held that a 'Win with Whitbread' scheme was not a lottery as the participants had made no payment or contribution, LORD PARKER CJ said:

'There is, as far as I know, no case of a successful prosecution for running a lottery which has not involved some payment or contribution by the participants, and indeed the trend of authority has all been the other way. There must be some payment or contribution, if not towards the prizes themselves, at any rate towards funds, ie profits, out of which prizes are provided.'

He also cited the following passage from the judgment of the sheriff-substitute in *Douglas v Valente* (2):

'I am satisfied that the whole trend of judicial decision and the majority of judicial observations, as well as the more recent dictionary definitions, favour

(1) 134 JP 445; [1970] 2 All ER 64; [1970] 2 QB 547.

(2) 1968 ScLT 85.

the view that in its ordinary sense a lottery involves contribution to the prize fund by the participants.'

LORD PARKER CJ then said:

'I entirely agree, subject, possibly, to the deletion of the words "to the prize fund", unless by that is meant to include profits out of which the prizes are provided.'

If the participants in this case had sent their pounds to the promoters for them to distribute to the person whose name was at the top of the list, it would not have been possible to contend that the scheme was not a lottery. The fact that each new participant sent his £1 direct to the person whose name was at the top of the list and so contributed to the prize won by him, made, it was contended, all the difference and made what would, if the money had been sent to the promoters have been a lottery, not a lottery.

In my opinion, *Whitbread v Bell* decided no more than that for there to be a lottery the participants must pay for their chances. The question whether the payment should be made solely to the promoters never arose for consideration and the case cannot be regarded as any authority for the proposition for which counsel for the appellant contended.

My Lords, in my opinion a scheme which is a lottery if the prizes are in the hands of the promoters for them to give to the winners does not cease to be a lottery if the scheme provides that each participant shall send direct to the winner a contribution to his prize. I entirely agree with the conclusion of GRIFFITHS J who delivered the judgment of the Divisional Court with which the other members of the court agreed, when he said:

'Whereas it is true that most lotteries involve a scheme which creates an identifiable prize fund, I can find no reason to conclude that this is an essential feature of a lottery, provided the scheme achieves the overall object of the distribution of money by chance.'

For these reasons the answer to the question certified is, in my opinion, in the negative, and in my view, this appeal should be dismissed.

**LORD DIPLOCK:** I have had the advantage of reading the speech prepared by my noble and learned friend, VISCOUNT DILHORNE, and I am in agreement with it.

**LORD SALMON:** I have had the advantage of reading the speech prepared by my noble and learned friend, VISCOUNT DILHORNE, and I am in agreement with it.

*Appeal dismissed.*

Solicitors: Rowe & Maw; Director of Public Prosecutions.

Reported by G F L Bridgman Esq, Barrister

LINCOLN CROWN COURT

(CAULFIELD, J)

13th, 14th January 1972

R v BARTON

*Criminal Law—Privilege—Legal professional privilege—Documents in possession or control of solicitor—Documents furthering defence of accused person.*

No legal professional privilege attaches to documents in the possession or control of a solicitor which, on production, would help to further the defence of an accused person at a criminal trial.

APPLICATION at the trial of William Henry Barton at Lincoln Crown Court on charges of fraudulent conversion, theft, and falsification of accounts alleged to have been committed in the course of his employment as an employee of a firm of solicitors by a solicitor who was a partner in that firm to set set aside a subpoena and notice to produce on the ground that the documents in question were subject to legal professional privilege.

*James Kingham for the Crown.*

*Michael Parker for the defendant.*

*David Wild for the solicitor making the application.*

**CAULFIELD J:** This is a novel application in my experience. We are on circuit and counsel, who have given the greatest possible assistance, have themselves been in some difficulty in carrying out the research necessary in order to help the court. This accused man is facing a number of counts which allege that, in the course of his employment as a legal executive with a firm of solicitors in this county, he fraudulently converted to his own use moneys which formed part of an estate which he was administering on behalf of either executors or administrators. He is also charged with theft and falsification of accounts. All these counts are said to have arisen out of his administering, in the course of his duties, certain estates. It is not necessary also to state that the Crown alleges that in one or two instances he was an executor or trustee of the estate.

These, of course, are very serious allegations that are made against him in these counts. After arraignment, but before impanelling the jury, counsel for the accused applied to me for a ruling on a point that had been taken by a solicitor who is a partner in the relevant firm. A subpoena to attend the trial to give evidence was served on the solicitor by the defence, and, included in the subpoena to attend to give evidence was what in effect is the old-fashioned notice to produce documents. The documents to produce which notice was given are, I am told (and I assume for the purposes of this ruling) documents that came into existence in the solicitors' office when the solicitor was acting as solicitor to executors or administrators in the administration or winding-up of estates. Those documents would not otherwise be relevant or admissible in this trial. They are not the subject of any charge against the accused, and to support the Crown case they would not be evidence. But I am told by counsel for the accused, and I have to assume that this is absolutely correct for the purposes of this ruling, that the documents, or certain of the documents, included in the notice to produce will help to further a point that is going to be raised by the defence. Putting it in another way, counsel says that in the interests of his client justice could not be done unless these documents were disclosed. He contends that certain of the documents may or do contain evidence which will help the accused in resisting the charges to which he has pleaded not guilty.

The solicitor has acted perfectly properly, as one would expect, throughout. He in fact is a witness for the Crown, and therefore the subpoena to give evidence which has been served on him was really unnecessary. This ruling is concerned simply with the notice to produce which is incorporated in the subpoena. Having received the advice of the Law Society, the solicitor has taken the point that these documents are privileged and therefore he does not have to produce them. When the defence application was made he was not represented and I took the view that as a matter of justice he should have the opportunity of receiving independent advice and having separate representation before me. So the matter was adjourned, and now counsel has made submissions to me on behalf of the solicitor to support his contention.

The principles of legal professional privilege are fully set out in Professor Cross's book on evidence (3rd edn, 1967, p. 240), and generally speaking it is perfectly simple to decide whether or not a particular document is privileged. As Professor Cross says in his book:

'Communications passing between a client and his legal adviser, together, in some cases, with communications passing between these persons and third parties, may not be given in evidence without the consent of the client if they were made either (i) with reference to litigation that was actually taking place or was in the contemplation of the client, or (ii) if they were made to enable the client to obtain, or the adviser to give, legal advice.'

And of course the privilege is one that is claimed by the client. Further, it is fairly plain from what counsel for the solicitor has submitted to me on his behalf that a solicitor has a duty to alert his client to this particular point, and indeed to take this point even though the client has not himself had the opportunity to take it. So the solicitor has acted perfectly properly throughout. In the normal case in civil proceedings this is the sort of application which would come to be determined prior to the trial, and the documents which were the subject of objection by the solicitor would be produced to the master or judge and one of them who would not be trying the action, would look at the documents and give a ruling. But I am in some difficulty as to how to determine this application. I have not seen any of these documents, and therefore, apart from what I have heard from counsel, I do not think that it is possible for me to make any ruling on the ground that these were documents that had any reference to litigation that was actually taking place or was in the contemplation of the client, or, secondly, that the documents were made to enable the client to obtain, or the adviser to give, legal advice.

I am not going to decide this application on the basis that either one or other of those two principles or is is not satisfied in the present case. I think the correct principle is this, and I think that it must be restricted to these particular facts in a criminal trial. The principle I am going to enunciate is not supported by any authority. I am applying what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.

I am not going to express in any detail what documents should or should not be in evidence in this case. Of course, those documents, when they are produced in this case, will have to contain evidence that is both relevant and admissible. Those two points will have to be satisfied, and no doubt the Crown will be alert to object if there is any evidence in the documents which is neither relevant nor admissible, but where there is evidence which is in the possession of the solicitor that is relevant



and admissible to a contention by the accused either pointing to his innocence or resisting his guilt, that document, in my judgment, is not privileged and the solicitor must obey the subpoena and notice to produce that has been served on him. The documents can no doubt be examined by counsel for the defence in the company of counsel for the Crown, and I see no reason why the solicitor should not have his own separate adviser present at the time. I have no doubt then that the point I have made in this ruling will be appreciated and only those documents which are relevant and admissible will be brought before the court. Therefore I do not set aside this subpoena and I do not set aside the notice to produce.

*Application refused.*

Solicitors: Director of Public Prosecutions; Hunt & Co, Peterborough; Grocock & Staniland, Boston.

Reported by T R Fitzwalter Butler, Esq, Barrister.

#### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, JJ)

16th, 17th May 1972

WILLIAMS AND OTHERS v SUMMERFIELD

*Criminal Law—Evidence—Bankers' books—Application to justices for right to inspect and take copies—When order should be made—Interference with liberty of subject—Matters to be considered by justices—Bankers' Books Evidence Act, 1879, s 7.*

By s 7 of the Bankers' Books Evidence Act, 1879: 'On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party . . .'

Since an order under this section may involve a serious interference with the liberty of the subject, in criminal proceedings justices should warn themselves of the importance of such an order and should exercise great care before making one. They should take into account, amongst other things, whether the prosecution have other evidence to support the charge, and, if they decide to make an order, should limit the period of the disclosure of the bank account to a period strictly relevant to the charge before them. If the application appears to be merely a fishing expedition in the hope of finding some material on which the charge can be made, they should refuse to make an order.

PER CURIAM: In a difficult case where justices are disturbed whether or not they should exercise their jurisdiction to make an order under s 7, they may perfectly properly decline to make an order and indicate that the application for an order would more properly be made to the High Court.

CASE STATED by Bristol justices.

The respondent, Edward Summerfield, an inspector of police, applied as against the appellants Douglas Donald Williams, June R Williams, Douglas William Cooper, Dorothy V Cooper, Charles Peter David Coxall, Evelyn W Coxall, Gordon Hillier Richards, Grace I Richards, Anthony Browning, Edith Browning, and John Henry Hodge, for an order that he be at liberty to inspect and take copies of certain entries in bankers' books relating to the accounts of the appellants and any accounts held jointly by them respectively or jointly with any other person, pursuant to s 7 of the Bankers' Books Evidence Act 1879.

The justices were of the opinion that an application had been made by a party to legal proceedings and that the bankers' books were relevant in those proceedings. Accordingly they made orders that the respondent be at liberty to inspect and take copies of the books notwithstanding that the books might tend to incriminate the appellants. The appellants appealed.

*D H W Vowden QC and N J Mylne for the appellants.*

*P Chadd QC for the respondent.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated from Bristol justices in respect of their adjudication as a magistrates' court sitting at Bristol. On 11th January 1972 complaints were made by the respondent, who is a police officer, against the male appellants and later against the female appellants, for an order that he be at liberty to inspect and take copies of certain entries in bankers' books relating to the accounts of the appellants and any accounts held jointly by them respectively or jointly with any other person pursuant to s 7 of the Bankers' Books Evidence Act 1879.

Before looking at the facts, it is perhaps useful just to remind oneself of the terms of that Act. It can fairly be described as an Act for the relief of bankers, because for the most part, as is well known, its purpose is to enable entries in a bankers' book to be proved in legal proceedings without the disruption of the bank which would result if the original books had to be taken away and kept in court. So one finds in the earlier sections provision for the acceptance of a copy as proof of an entry in a bankers' book, and various provisions for the verification of the copy.

It is not until one gets down to s 7 that one finds any kind of provision in this Act whereby an application of a hostile character can be made. Section 7 provides:

'On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.'

The interpretation section, s 10, defines legal proceedings as meaning 'any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration' and the expression 'the court' means 'the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken'. The expression 'a judge' means 'with respect to England a judge of the High Court of Justice, with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland.'

To return to the circumstances of this case, on 19th January the appellants appeared before the justices to show cause why orders should not be made under s 7, and the facts which the magistrates found and record in their case are these. First that the respondent, as I have already said, is a detective inspector in the Bristol Constabulary who was charged with the duty of investigating an alleged theft by the male appellants of money from the Port of Bristol Authority. They find that each of the male appellants had received money belonging to the Port of Bristol Authority to which he was not entitled. They find that the male appellants between them have repaid a total of £15,000, and handed over premium bonds worth approximately £4,000. I take that to mean that the male appellants have already conceded the receipt of money which they should not have obtained, and have conceded it by returning the substantial sums to which the justices referred. The case goes on to find that

'there is a large sum of money outstanding but that it is impossible for the respondent to specify the sum without sight of the aforementioned bank accounts'.

That was no doubt his justification for asking for the order. Then one finds that

'on 11th January 1972 the male appellants were summoned on charges of criminal offences under the Larceny Act 1916 and the Theft Act 1968. Thereby the prosecution became "a party to legal proceedings" and therefore within the definition of s. 7 of the Bankers Books Evidence Act 1879.'

I was troubled by that paragraph in the justices' findings when I first read it because it looked very much on its face as though the justices had found that the respondent, in order to put himself in a position in which he could seek discovery of the bank accounts, had started legal proceedings for that very purpose and no other. I have no doubt that, if the facts were that a police officer seeking to make investigations of a suspect bank account started legal proceedings for that purpose and no other, that would be thoroughly irregular, and that the Bench from whom the order under s 7 was sought should summarily reject it. But the matter has been more fully explained to us by counsel for the respondent, and I approach this case on the basis that the respondent issued summonses against the male appellants perhaps somewhat sooner in his investigation than he would otherwise have done and perhaps in a form somewhat different from that which he might wish to use when the proceedings progressed to a later stage, but that the summonses were genuine in the sense that they were summonses alleging offences which were to be pursued.

The matter is one of considerable interest, because, although this provision has been on the statute book for nearly 100 years, it seems that its application to criminal proceedings had never previously been tested. So far as civil proceedings are concerned a working rule has long since been established, and it is conveniently expressed in *Re Bankers' Books Evidence Act 1879, R v Bono* (1) although in fact that was a criminal proceeding albeit for criminal libel. The effect of the judgment in *Bono's* case and other authorities is that the courts have set their face against s 7 being used as a kind of searching enquiry or fishing expedition beyond the ordinary rules of discovery.

In civil proceedings the normal approach to the use of s 7 is that documents which would not be discoverable under the ordinary rules are not to be disclosed by a side wind, as it were, by the application of s 7. It is quite clear that the section applies to ordinary criminal proceedings, and counsel for the appellants has really put his argument as high as this. He refers us to the well-known principle that an accused is not bound to incriminate himself, and he says that an order under s 7 against an accused in criminal proceedings for the disclosure of his bank account is a means of requiring him to incriminate himself.

When pressed on this argument, counsel for the appellants, it seems to me, had to retreat to the position in which he was really contending that s 7 could have no effective application to criminal proceedings. For my part I was unable to discover, in the way in which he was putting his argument before us, any practical example in which such an application would not be met by the objection that it was a means of requiring the accused to incriminate himself. For my part I do not think that the application of the section can be restricted to that extent or in that way.

On the other hand, one must I think recognise that an order under s 7 can be a very serious interference with the liberty of the subject. It can be a gross invasion of privacy. It is an order which clearly must only be made after the most careful thought and on the clearest grounds. I would like to adopt the approach which is adopted in civil proceedings were that practical. The difficulty, of course, is that there is no

(1) (1913), 29 TLR 635.

discovery in criminal proceedings, and therefore one cannot equate the use of s 7 to documents which are discoverable. Such a test does not exist in proceedings under criminal law.

The nearest approach which occurs to me in the criminal law to the rule applied in civil proceedings is that, as everyone knows, there are wide provisions whereby search warrants can be issued by justices on the application of the prosecution in criminal cases. Generations of justices have, or I would hope have, been brought up to recognise that the issue of a search warrant is a very serious interference with the liberty of the subject and a step which would only be taken after the most mature, careful consideration of all the facts of the case.

I think that in criminal proceedings, justices should warn themselves of the importance of the step which they are taking in making an order under s 7; should always recognise the care with which the jurisdiction should be exercised; should take into account among other things whether there is other evidence in the possession of the prosecution to support the charge, or whether the application under s 7 is a fishing expedition in the hope of finding some material on which the charge can be hung.

If justices approach these applications with a due sense of responsibility and a recognition of the importance of that which they are being asked to do, if they are always alive to the requirement of not making the order extend beyond the true purposes of the charge before them, and if in consequence they limit the period of the disclosure of the bank account to a period which is strictly relevant to the charge before them, and if finally they recognise the importance of considering whether there is other evidence in the possession of the prosecution before they provide the bank account as perhaps the only evidence, if they observe those precautions and pay heed to those warnings, I feel that they will produce a situation in which the section is used properly, wisely, and in support of the interests of justice, and will not allow it to be used as an instrument of oppression which on its face it might very well be.

I would also like to add that justices may bear in mind that any judge of the High Court has a jurisdiction concurrent with theirs in the making of an order of this kind. The quotation which I have already made from the statute shows that a High Court judge enjoys this jurisdiction, and in my judgment it would be perfectly proper, when justices are faced with a difficult case in which they are genuinely disturbed whether they should use the jurisdiction or not, for them to decline to make the order and say that they feel that the application would be more appropriately made to the High Court.

Those being the principles on which I think this jurisdiction ought to be exercised, I come back to this case. It seems to me that if the justices had approached this case as I would wish them to approach it, they might very well have reached the answer which they reached. There is evidently here a great deal of material to suggest that the appellants have received money which they ought not to have received, and the plea by the respondent that he could not determine who had received what and precisely how the money had been handled without an inspection of the bank accounts is one which the justices could properly have acceded to in making the order which they made. For all those reasons I think the order was justified and I would dismiss the appeal.

**SHAW J.** I agree.

**WIEN J.** I also entirely agree.

*Appeal dismissed.*

Solicitors: *Hextall Erskine & Co*, for Cartwrights, Bristol; Director of Public Prosecutions.

Reported by T R Fitzwalter Butler, Esq, Barrister

## COURT OF APPEAL (CRIMINAL DIVISION)

(LORD WIDGERY, CJ, EDMUND DAVIES AND LAWTON, LJ, SHAW AND WIEN, JJ)

1st, 15th May 1972

R v LILLIS

*Criminal Law—Trial—Conviction of alternative offence—Indictment for burglary—Conviction of theft outside building—Criminal Law Act, 1967, s 6 (3).*

By s 6 (3) of the Criminal Law Act, 1967: 'Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.'

Where, under this subsection, the 'allegation of another offence' arises only by implication, the test is whether the lesser offence is an essential ingredient of the major one. Where, however, the 'allegation of another offence' expressly arises, different principles apply. The test then is whether, if all the averments which have not been proved are struck out of the indictment, there are left particulars of another offence which the defendant can there and then defend. If so, the judge should ask the jury to consider whether that other offence has been proved. If the defendant is likely to be put at a disadvantage by an allegation that he has committed another offence, an adjournment should be granted, or, if the adjournment would have to be a long one, the prosecution should be required to start again on the reduced charge.

The appellant was charged with burglary, contrary to s 9 (1) of the Theft Act 1968. The particulars of offence alleged that 'having entered as a trespasser part of a building, namely, the conservatory' at X he 'stole therein a rotary grass mower'. The trial judge held that the prosecution had failed to establish a *prima facie* case of burglary, but he ruled that s 6 (3) of the Act applied and invited the jury to consider whether the appellant had been guilty of theft of the mower even though such theft had not been committed in the conservatory. The jury convicted the appellant of theft. On appeal,

**Held:** it was immaterial that the theft, having been committed outside the conservatory, could not have formed an ingredient of the charge of burglary and that the ruling of the judge and the conviction were right.

**APPEAL** by Michael Joseph Patrick Lillis against his conviction at Gloucester Crown Court of the theft of a rotary grass mower when he was sentenced to nine months' imprisonment.

*B E J Shiner* for the appellant.

*E A M S Rush* for the Crown.

*Cur adv vult*

15th May. **LAWTON LJ** read this judgment of the court: This appeal against conviction raises two questions: first, What is the right construction of s 6 (3) of the Criminal Law Act 1967, and, secondly, How should that construction be applied to the facts of this case? Section 6 (3) provides:

'Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.'



The appellant was convicted at the Gloucester Crown Court on 14th January 1972 on an indictment which charged him with burglary. The particulars of offence were in these terms:

'Michael Joseph Patrick Lillis, on a day unknown between the 1st and 31st May, 1971, in the county of Gloucester, having entered as a trespasser part of a building, namely, the conservatory at 2, Spring Cottages, Down Hatherley, stole therein a rotary grass mower.'

The prosecution's case as opened was that the appellant had entered as a trespasser the conservatory of a house belonging to a Mr Maraffi and had stolen therein a rotary grass mower. One of the prosecution's witnesses was Mr Maraffi's daughter. She said in evidence that she had given permission to the appellant to take the mower from the conservatory in order to get it repaired. The mower was never seen again by Mr Maraffi and there was ample evidence that the appellant had dishonestly appropriated it so as to make him guilty of theft, but it was not established when he had stolen the mower save that it must have been after 1st May 1971 and before the beginning of August 1971.

Before the close of the prosecution's case the trial judge discussed briefly with counsel the effect of Miss Maraffi's evidence on the prosecution's case and when that case was closed counsel on behalf of the appellant submitted that his client had no case to answer. The judge accepted that the prosecution had failed to establish a *prima facie* case of burglary, but ruled that s 6 (3) of the Criminal Law Act 1967 applied so as to enable the court to consider a case against the appellant of stealing the mower. The case proceeded on that basis, and, after a summing-up of which no complaint is made, the jury returned a verdict of not guilty of burglary, but guilty of theft. On the certificate of the trial judge granted under s 1 (1) of the Criminal Appeal Act 1968 the appellant appealed against that verdict. The trial judge in his certificate referred to what had happened at the trial and asked whether he had been 'correct in inviting the jury to consider whether the [appellant] was guilty of theft, even though the theft was not committed in the building.'

Before this court counsel for the appellant did not suggest that the reduction of the charge had embarrassed or prejudiced his client in any way. His submission was that on the evidence in this case s 6 (3) could not be applied at all so as to reduce the charge of burglary to one of theft. He contended that on the right construction of s 6 (3) the reduced charge had to be an ingredient of the offence originally charged. A theft outside a building could never, he said, be an ingredient of burglary because the stealing which is an ingredient of that offence must be committed within the building. If this submission is right the law would produce some odd results. If, for example, the appellant had gone to the conservatory intending to steal the mower from inside, where he knew it was normally kept, but found on getting there that Mr Maraffi had absentmindedly left it leaning against the door on the outside and had not told the prosecution that he had done so, on an indictment charging the appellant with burglary he could not be convicted of any offence. In putting his case in this way he was seeking to apply what SACHS LJ had said in *R v Springfield* (1), namely:

'The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words is the lesser offence an essential ingredient of the major one?'

Counsel for the Crown submitted that this case came clearly within the words of s 6 (3).

(1) (1969), 53 Cr App Rep 608.

The subsection under consideration was a necessary provision in an Act which was passed (and I quote from the preamble)

'to amend the law of England and Wales by abolishing the division of crimes into felonies and misdemeanours and to amend and simplify the law in respect of matters arising from or related to that division or the abolition of it'.

Before the passing of the Criminal Law Act 1967 the law applicable to the kind of problem which presented itself to the trial judge in this case was partly to be found in the common law and partly in a number of statutes. At common law on an indictment charging felony the accused could be convicted of a less aggravated felony of which the ingredients were included in the felony charged and similarly as regards misdemeanours, but except under statute a conviction for a misdemeanour was not allowed on a charge of felony. The object of s 6 (3) of the Criminal Law Act 1967 was to provide a general rule continuing and combining the rules of common law and the provisions of most of the statutes which enabled alternative verdicts to be returned in specific cases or types of cases.

At common law on an indictment charging burglary the accused could be acquitted of that offence but found guilty of larceny, but before the passing of the Theft Act 1968 difficulties could occur because of the differences between larceny and correlated offences such as fraudulent conversion. One of the objects of that Act was to get rid of these differences by defining theft in wider terms than larceny had been defined in the Larceny Act 1916. The reason why on an indictment for burglary, which was a felony, an accused person could be convicted of larceny, which was also a felony, was the fact that burglary was an aggravated form of larceny; and under the Theft Act 1968 the modern offence of burglary is also an aggravated form of theft. Many generations of practitioners have been taught that a prosecution for burglary should start with proof of the larceny because without such proof there could be no case of burglary. The Theft Act 1968 has not changed this and the current edition of Archbold's Criminal Pleading, Evidence and Practice (37th edn, 1969), p 573, para 1509, repeats the traditional advice as to the order in which the ingredients of burglary should be proved.

In this case the prosecution called ample evidence to prove the theft of the article mentioned in the indictment, but failed to prove that it was committed whilst the appellant was a trespasser in the building mentioned in the indictment—in other words, they failed to prove the aggravating circumstances. It was to cope with just this situation that the common law developed the rule about alternative verdicts.

The problem in this case is whether the Criminal Law Act 1967, in seeking to put the common law rule and the provisions of certain statutes into the statutory form, has used words which prevent courts from taking a course which might have been open to them before the passing of that Act. In the judgment of this court s 6 (3) has had no such effect. The allegation in the indictment included expressly an allegation of another offence falling within the jurisdiction of the court of trial. This can be shown by striking out of the indictment all the averments which had not been proved—the red pencil test as it was referred to in the course of the argument. The allegation which was left would have read as follows: 'Michael Joseph Patrick Lillis on a day unknown . . . in the county of Gloucester . . . stole . . . a rotary grass mower'. A count in these terms would have complied with the rules set out in Sch 1 to the Indictments Act 1915: see rr 4 (4) and 6 (1) [replaced by the Indictment Rules, 1971]. The prosecution had failed to prove that the theft had been committed within the dates alleged in the indictment on which the appellant had been arraigned, but from the earliest days of the common law dates had not been material averments unless time was the essence of the offence. It follows that on a literal construction of the subsection, this case comes within it.

Is there any reason why the Act should not be construed literally? One reason suggested was that such a construction would run counter to what this court had said in *R v Springfield* per SACHS LJ. It is pertinent to remember that in that case the court was concerned with a verdict of common assault which had been given after a trial on an indictment charging robbery. The particulars of offence would have made no reference to assault. The problem under s 6 (3) was whether a charge of robbery at common law included by implication a charge of common assault. Before setting out what he considered to be the test, SACHS LJ said:

'Where an indictment . . . charges a major offence without setting out any particulars of the matters relied upon, what is the correct test for ascertaining whether it contains allegations which expressly or impliedly include an allegation of a lesser offence?'

From the nature of that case no question of an express inclusion could have arisen.

The test which was enunciated in *R v Springfield* is, in the judgment of this court, the correct one when deciding what was included in the indictment by implication, but when, as in this case, the court has to decide what was included expressly in the indictment, the proper course is to look at the words of the indictment and to apply the red pencil test. To do otherwise would be to ignore the word 'expressly'. If what is left after striking out all the averments which have not been proved leaves particulars of another offence within the jurisdiction of the court of trial which the accused can then and there defend, the judge can and should ask the jury to consider whether that other offence has been proved. The judge should always, however, remember that accused persons come to court to contest the charge which is in the indictment. They may be put at a disadvantage by finding during the trial that they have to meet an allegation that they have committed another offence. Judges must protect accused persons in such circumstances. They can do so by granting adjournments or even by discharging the jury if an adjournment would have to be a long one and by requiring the prosecution to start again on the reduced charge. In the judgment of this court the trial judge acted correctly in leaving theft to the jury. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; Whiteman & Son, Gloucester.

Reported by T R Fitzwalter Butler, Esq, Barrister.

COURT OF CRIMINAL APPEAL (CRIMINAL DIVISION)

(CAIRNS AND STEPHENSON, LJ and GRIFFITHS, J)

15th, 16th June 1972

R v REID

*Criminal Law—Kidnapping—Ingredients of offence—Not continuing offence—Need to prove concealment of victim—Kidnapping of wife by husband.*

The offence of kidnapping is complete when the victim is seized and carried away; it is not a continuing offence involving concealment of the person seized.

The offence may be committed by a husband against his wife even though they are cohabiting at the time.

APPEAL by Samuel Percival Reid against his conviction at Lewes Assizes charging on four counts of an indictment burglary with intent to inflict grievous bodily harm contrary to s 9 (1) (a) of the Theft Act 1968, burglary by entering a building and stealing a key contrary to s 9 (1) (b) of the 1968 Act, aggravated burglary contrary to s 10 (1) of the Act, and kidnapping his wife. Three sentences of two years on the first three charges and a sentence of three years on the last charge were ordered to run concurrently.

W R Rees-Davies for the appellant.

C P B Purchas for the Crown.

*Cur adv vult*

16th June. CAIRNS LJ read the following judgment of the court: The appellant was convicted on 16th September 1971 at Lewes Assizes before Mr Commissioner Adie-Shepherd on four counts of an indictment, the fourth count being for kidnapping his wife. He was sentenced to concurrent sentences of which the longest was three years, and a 12 months' suspended sentence was put into operation consecutively.

He applied for leave to appeal against conviction on all counts and against his sentences. The single judge gave him leave to appeal against the conviction for kidnapping and against the sentences, but refused leave to appeal against conviction on the other counts. He renewed his application on those counts.

One ground of appeal on count 4 was that a man could not be held guilty of kidnapping his wife. When the matter came before this court last Tuesday, 13th June, it became evident that it was impracticable then to deal with any of the issues except this particular ground of appeal. Accordingly argument was heard on that issue which is one of law on which leave to appeal was not needed and for the rest leave was given to amend the notice of appeal, and the appeal and applications were stood over to be heard at a later date.

The conclusion reached on the point of law was that it is an offence at common law for a man to take and carry away his wife against her will. Two subsidiary points were argued: first that the offence of kidnapping involves some secreting of the victim; and, secondly, that if a husband can ever be held guilty of kidnapping his wife it can only be so if they were living separately at the time. This court decided against both of those contentions. We now give reasons for our conclusions.

It is convenient to take first the question whether some secreting or concealment of the victim is necessary to constitute the offence of kidnapping. Counsel for the appellant referred to Archbold's Criminal Pleading, Evidence and Practice (37th edn), p. 889 which under the heading 'Kidnapping' has the sentence:

'The stealing and carrying away, a secreting of any person of any age or either sex against the will of such person . . . is an offence at common law . . .'

It is, however, quite clear that the word 'a' in that sentence is a misprint for 'or'. That this is so is evident because the authority cited is Russell on Crime (12th edn), vol 1, p. 692, where the wording is exactly the same except that the word 'or' and not 'a' is used. Russell cites East Pleas of the Crown, vol. 1, pp 429, 430, where the statement is:

'The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law ...'

We can find no reason on authority or in principle why the crime should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized.

As to the question whether a husband commits the offence when he takes and carries away his wife against her will there is no English authority directly in point. We were referred to some ancient cases, such as *Re Cochrane* (1), where it was held that a husband in order to prevent his wife from eloping could legally confine her within his own dwelling.

But all such conceptions of a husband's rights were swept away by the Court of Appeal in *R v Jackson* (2), where it was held that even in order to enforce a decree of restitution of conjugal rights a husband could not keep his wife in confinement.

Next, reliance was placed in *R v Miller* (3), where LYNSEY J ruled that a husband could not be charged with rape of his wife because of the implied consent given by her at the time of the marriage for sexual intercourse. Assuming that that is a decision which would be upheld by this court today, as to which we express no opinion, we find it impossible to stretch that doctrine to the extent of saying that on marriage a wife impliedly consents to being taken away by her husband using force or threats of force from the place where she is living. It is to be noted that LYNSEY J said:

'The result is that, as the law implies consent to what took place so far as intercourse is concerned (but only so far as intercourse is concerned), the defendant cannot be guilty of the crime of rape, and I shall direct the jury that there is no evidence on which they can convict him of rape.'

He went on to hold that the husband was not entitled for the purpose of exercising his right to intercourse to use such force as was necessary to enable him to do so, and he held that in using such force he could be guilty of assault.

We were referred to certain American authorities. In the American Restatement the only relevant proposition is the passage where it is stated bluntly: 'A husband may be found guilty of the offence of kidnapping his wife.' 51 CJS, Kidnapping, 3a. The authority cited is a case decided in the Supreme Court of Louisiana, *The State v Kay* (4), where an information charged a husband with kidnapping his wife, reciting that at the time they were lawfully separated. He was convicted and the judgment was affirmed. ST PAUL J, delivering what appears to have been the judgment of the court, held that the recital as to separation was mere surplusage though O'NEILL CJ reserved his opinion as to this. In *The People v Carvalho* (5), a District Court of Appeal of California heard an appeal from a conviction of kidnapping a wife. The conviction was quashed because the court held that the evidence did not justify a finding that

(1) (1840), 8 Dowl 630; 4 Jur 534.

(2) 55 JP 246; [1891] 1 QB 671; [1891-94] All ER Rep 61.

(3) 118 JP 340; [1954] 2 All ER 529; [1954] 2 QB 282.

(4) (1933), 145 So 544.

(5) (1952), 246 P 2d 950.



force had been used, but it was not contended that if force had been used the conviction would have been bad. In *The People v Ford* (1), the Supreme Court of California held that the wife's lack of consent to accompany her husband so as to sustain a charge of kidnapping was for the jury. All these cases are persuasive authority that a husband can be guilty of kidnapping his wife, and *The State v Kay* lends some support to the view that the crime can be committed when the parties are not separated.

In *The People (Attorney-General) v Edge* (2) there was a very learned discussion by the Supreme Court of Ireland on the history and features of the crime of kidnapping, but we do not find there anything bearing on the issues before this court.

In the opinion of this court *R v Jackson* (3) itself goes strongly to support the proposition of the Crown in the present case. *R v Miller* (4), reading the judgment as a whole, favours the same view rather than the contrary. With the additional support provided by the American cases we reach without any doubt the conclusion that the crime of kidnapping can be committed by a husband against a wife.

Nor do we see any reason why a wife who is not separated from her husband, even a wife who is still to be regarded as cohabiting with her husband, should lack this protection of the criminal law. The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete and if that force results in carrying her away from the place where she wishes to remain then this court is quite satisfied that the offence of kidnapping is committed.

It was for these reasons that the court decided against the appellant on the points of law raised in relation to count 4 of the indictment. This is, of course, without prejudice to all the other issues in the case.

*Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals; McNamara, Ryan & Co, Weybridge.

Reported by T R Fitwalter Butler, Esq, Barrister.

(1) (1964), 388 P 2d 892.

(2) [1943] IR 115.

(3) 55 JP 246; [1891] 1 QB 671; [1891-94] All ER Rep 61.

(4) 118 JP 340; [1954] 2 All ER 529; [1954] 2 QB 282.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, JJ)

3rd, 4th, 18th May 1972

BROOKS v ELLIS

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Laboratory test—Requirement to provide specimen—'Person driving or attempting to drive'—Requirement made after driving ceased—Need only for requirement to be closely related to episode of driving—Road Safety Act, 1967, s 3 (3), (4).*

By s. 3 (3) of the Road Safety Act, 1967: 'A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence and—(a) if it is shown that at the relevant time he was driving or attempting to drive a motor vehicle on a road or other public place, he shall be liable to be proceeded against and punished as if the offence charged were an offence under s 1 (1) of this Act . . . ' By s 3 (4) it is provided that under the previous subsection "' the relevant time" means—(a) in relation to a person required under s 2 (1) of this Act to provide a specimen of breath for a breath test, the time when he was so required'.

The aforementioned provisions do not mean that the requirement for a breath test under s 2 (1) must have been made absolutely simultaneously or contemporaneously with the driving or attempted driving; they mean only that the moment of requirement must be sufficiently closely related to the episode of driving to be regarded in a general sense as being that the time of that episode; the words 'at the time' signify the occasion rather than the moment of time when the requirement was made.

CASE STATED by Hove, Sussex, justices.

The appellant while driving a car at speeds up to 60 miles an hour, was followed through the streets of Hove by a police constable in a car. He finally turned into the drive of his house, and the police constable went over to him as he was getting out of his car and asked him to give breath for a breath test. The appellant refused. Later at a police station he refused to supply a specimen of blood or urine. On a charge of failing to provide a laboratory specimen, contrary to s. 3 (3) of the Road Safety Act 1967, it was argued that the appellant was not driving or attempting to drive a motor vehicle at the relevant time, but the justices were of opinion that there had been a continuing pursuit by the constable and that that pursuit was still in progress when the appellant drove on to his private driveway. Moreover, the appellant was getting from the driver's side of the motor car as the constable approached, still in hot pursuit. The justices, accordingly, found that the appellant was 'driving a motor vehicle on a road' within s 2 (1) of the Road Safety Act 1967, that his course of driving had not terminated on his return home, and that the constable had reasonable cause to require the appellant to provide a specimen of breath. They convicted the appellant of failing without reasonable excuse to provide a specimen of breath for a breath test in pursuance of a requirement under s 2 (1) of the Act, contrary to s 2 (3) of the Act, and being a person who had driven a motor vehicle on a road, having been arrested under s 2 of the Road Safety Act 1967, and having been required at a police station by a constable to provide a specimen for a laboratory test, failing without reasonable excuse to provide such specimen, contrary to s 3 (3) of the Road Safety Act 1967. They imposed fines of £10 and £25 for each offence and disqualified and appellant from holding or obtaining a driving licence for a period of 12 months.

The appellant appealed.

I Krolick for the appellant.

D H Farquharson QC and C T Drew for the respondent.

18th May. **SHAW J** read this judgment of the court: This appeal by Case Stated by the justices for the borough of Hove in respect of their adjudication as a magistrates' court affords yet another illustration of the morbid susceptibility of the breathalyser provisions of the Road Safety Act 1967 to disputation and argument. Once more the questions raised are whether in requiring specimens of breath or blood the conditions prescribed by the Act were duly and properly fulfilled.

The appellant appeared before the justices to answer two informations charging him, first, with contravening s 2 (3) of the Act in that he failed without reasonable excuse to provide a specimen of breath for a breath test in pursuance of a requirement so to do under s 2 (1), and, secondly, with contravening s 3 (3) in that he failed without reasonable excuse to provide a specimen of blood or urine for a laboratory test after being required so to do pursuant to s 3 (1). He was convicted on both charges.

A great number of points were taken before the justices considered the question whether the conditions governing the requirement of specimens and the means of taking tests under the Road Safety Act 1967 had been complied with, or were proved to have been satisfied, or were capable of being satisfied. In so far as those contentions related to the charge under s. 2 (3) of the Act they were without substance and might seem to some to have been vexatious. Counsel for the appellant had the good sense to abandon them in this court. Accordingly, the only question that falls to be considered in this conviction is that raised in relation to the conviction under ss 1 (1) and 3 (3).

The appellant's contention in this regard was that he was not driving or attempting to drive a motor vehicle at the relevant time within the provisions of s 3 (3) and (4) by reason of the fact that he had ceased to be a driver and was neither driving nor attempting to drive when the respondent made the requirement for a specimen of his breath. If that argument was well founded the requirement made under s 3 (1) was unlawful, and the appellant did not have to comply with it and did not need to excuse his refusal to do so.

The justices' opinion is stated in the Case as follows:

'It is our opinion that there had been a continuing pursuit by the respondent and that this pursuit was still in progress when the appellant drove on to his private driveway . . . Moreover the appellant was getting from the driver's side of the motor car as the respondent approached, still, if we may so express ourselves, in hot pursuit. Having regard to the foregoing we were most firmly of the opinion that the appellant was a person "driving a motor vehicle on a road" within the meaning of the provisions of the Road Safety Act 1967 and that his course of driving had not terminated on his speedy return home in the circumstances of this case.'

The question posed by them is whether on the facts as found the appellant was driving or attempting to drive a motor vehicle at the relevant time for the purposes of s 3.

The question has come to have an all-too-familiar ring, but counsel for the appellant contends that it has never been specifically dealt with in relation to the provisions of s 3 of the Road Safety Act 1967, which govern the taking of specimens for laboratory tests as distinct from breath tests under s 2.

Section 3 (1) provides:

'A person who has been arrested under [s 2] or s 6 (4) of the [Road Traffic Act 1960] may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine),

if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under subs. (7) of [s. 2] . . .

Section 3 (3) provides:

'A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence and—(a) if it is shown that at the relevant time he was driving or attempting to drive a motor vehicle on a road or other public place, he shall be liable to be proceeded against and punished as if the offence charged were an offence under section 1 (1) of this Act; and (b) in any other case, if it is shown that at that time he was in charge of a motor vehicle on a road or other public place, he shall be liable to be proceeded against and punished as if the offence charged were an offence under section 1 (2) of this Act.'

By s 3 (4) it is provided that in s 3 (3).

"the relevant time" means—(a) in relation to a person required under section 2 (1) of this Act to provide a specimen of breath for a breath test, the time when he was so required . . .

It is necessary to look back at s 2 (1). It reads in this way:

'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion. Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

It is to be observed that the only direct reference to chronology is in the proviso which lays down that the requirement must be made as soon as reasonably practicable after the commission of the traffic offence giving rise to the constable's suspicion. The phrases 'at the relevant time' and 'the time when' in relation to the driving do not appear in s 2, and therefore decisions in such cases as *R v Kelly* (1), where the charge was laid under that section, cannot provide the whole answer to questions arising from the construction and operation of s 3.

Counsel for the appellant conceded that in the present case the requirement of a specimen of breath was properly made notwithstanding that the appellant had reached the end of his journey and was in his own premises. A contrary argument could hardly have been sustained in the light of the judgment in *R v Jones* (2), where a similar situation had arisen, the motorist in the case also having reached the supposed sanctuary of private premises before he was overtaken by a police officer. In the course of delivering the judgment of the court SACHS LJ said:

'Accordingly, both as a matter of reasonable approach and on well-established authority, this court has concluded that a "requirement" under s 2 (1) of the Act may be made off the road so long as it is made in the course of a chain of action following sufficiently closely on an observed driving on the road. It is thus not, in the view of this court, the law that a motorist merely by turning a few feet off a highway can stultify police action and escape being required to

(1) 134 JP 482; [1970] 2 All ER 198.

(2) 134 JP 215; [1970] 1 All ER 209.

give a breath test, when that action would otherwise be proper under the subsection.'

But, said counsel for the appellant, that was a case where the motorist *did* comply with the requirement under s 3 and the charge was therefore laid not under s 3 (3) of that section but under s 1 (1) of the Act directly which like s 2 does not incorporate the phrase 'at the time when'. If one introduces into s 3 (3) (a) the meaning of 'the relevant time' applied by sub-s (4) to the present context the subsection would read thus: 'A person who . . . fails to provide a specimen . . . shall be guilty of an offence if it is shown that at the time when he was required to provide a specimen of breath he was driving or attempting to drive . . . on a road or other public place.'

The argument for the appellant was that the time when he was required to provide a specimen of breath was when he was getting out of his car. At that time he was neither driving nor attempting to drive. Hence his failure later to provide a specimen under s 3 (1) could not be an offence under s 3 (3) of that section.

This argument runs parallel to that advanced in the case of *R v Jones*, which has already been cited. Indeed, if it were valid, it would include the proposition that when the requirement was made the appellant's car was not on a road or public place so that he could not then be guilty even of the less serious offence arising from being in charge of a car. A motorist in those circumstances would escape altogether the net cast by the 1967 Act by refusing to provide any specimen. Thus a premium would be put on non-compliance.

The driving of a motor car is an event of duration and not the act of an instant. Section 3 (3) by restricting its operation to situations in which a motorist is driving on a road at the time when he is required to provide a specimen is saying only that the moment of the requirement must be sufficiently closely related to the episode of driving to be regarded in a general sense as being at the time of that episode. It need not be absolutely contemporaneous or simultaneous; indeed, as has often been said, this is, in the literal sense, impossible. It does not appear to this court that the situation envisaged under ss 2 and 3 as being within the scope of their provisions must vanish altogether at the very moment that a journey ends. In practical everyday human affairs whether something happens at a given time or at a given place does not fall to be decided by the use of a stop watch or tape measure.

In the recent case of *Sakhuja v Allen* (1) the House of Lords considered at large the scope and operation of the breathalyser provisions. In the course of his speech VISCOUNT DILHORNE observed that

'to give s 3 (3) (a) a reasonable interpretation in its context, the words "at the time" he was required to take a breath test must be given a broad interpretation as signifying the occasion rather than the moment of time when the request was made.'

This court respectfully agrees with that view and adopts it. Applying it to the circumstances of the present case it is apparent that the justices were justified in coming to the conclusion to which they did and accordingly this appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Bernard Oberman & Co; Sharpe, Pritchard & Co*, for *T Lavelle, Lewes*.

Reported by *T R Fitzwalter Butler Esq*, Barrister.

(1) p 414 ante.



## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW and WIEN, JJ)

9th May, 1972

## MABY AND OTHERS v WARWICK BOROUGH COUNCIL

*Shop—Sunday trading—Offence—'Place where any retail trade or business is carried on'—Premises other than shop—Market stalls—Whether sufficient degree of permanency—Question of fact and degree—Stalls erected on Saturday and taken down after trading on Sunday—No defined space for stall marked out on market site—Possibility of components of stalls varying from week to week—Shops Act 1950 (14 Geo 6 c 28), ss 47, 58.*

The first appellant, who operated a Sunday market, provided and erected individual stalls in the market and let them to individual traders on a daily basis. He did not allocate individual stalls to the traders who decided among themselves who should take any particular stall. There was no defined space marked on the ground within which any stall should be erected. The stalls were made of components of steel tubing, wooden boards, and corrugated PVC roofing. The components used for a stall in 'one week were not necessarily the same as those used for a stall in the same position in the succeeding week. The stalls were erected on Saturday and demolished at the end of the trading day on Sunday. The first appellant and five stallholders were charged with engaging in retail trading by offering for sale certain goods not mentioned in sch 5 to the Shops Act, 1950, so that in consequence each of them had committed an offence under the Act. The prosecution alleged that s 47 of the Act applied to each of the appellants by virtue of s 58 in that each stall was 'a place where any retail trade or business is carried on'. The justices convicted the appellants. On appeal,

**HELD:** to constitute 'a place where any retail trade or business is carried on' it must be established that the geographical position where the retail sales were made had some degree of permanency; it was a question of fact and degree whether a particular establishment had a sufficient degree of permanency to bring it within s 58, and the justices were entitled to say that a stall which was erected and on which business was done throughout a single day in each week had a sufficient degree of permanency to bring it within the section; the appeal must, therefore, be dismissed.

## CASE STATED by Warwick justices.

Information was preferred on behalf of the respondents, Warwick Borough Council, by Humphrey Byron Dolphin, town clerk of the council, against each of the appellants, Maby, Cox, Krisham, Blakeman, Johal and Ferguson, alleging that each of them, on Sunday, 22nd August 1971, at premises known as the Cattle Market, Coten End, Warwick, did engage in retail trading by offering for sale certain goods not mentioned in sch 5 to the Shops Act 1950 and that in consequence each appellant did commit an offence under ss 47 and 58 of the Shops Act, 1950. The first appellant, Maby, was charged with aiding and abetting the other appellants to infringe the Act.

The justices found the appellants guilty of the offences charged. They appealed.

*D R M Henry for the appellants.*

*D E Roberts for the respondents.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the petty sessional division of Warwick in respect of their adjudication at a magistrates' court sitting at Warwick on 12th November 1971. On that date they convicted each of the present appellants (except the first named) of an offence charged in these terms:

'that each of the appellants . . . at premises known as the Cattle Market, Coten End, Warwick, did engage in retail trading by offering for sale certain goods not mentioned in sch 5 to the Shops Act 1950 and that in consequence

each appellant did commit an offence under sections 47 and 58 of the said Shops Act.'

As regards the first appellant he was charged with aiding and abetting the others to commit that offence.

The facts found are important. The justices find that the first appellant, Mr Maby, has operated a market on Sundays at the Warwick Cattle Market since 25th March 1971 under licence from a limited company. They found that on 22nd August, which was the day charged in the informations, the first appellant operated a market at these premises, and that he provided and erected the individual stalls in the market. These stalls, having been so provided and erected, were hired out or let on licence to individual traders by the first appellant on a daily basis, a daily basis because, as appears in a moment, this was a Sunday market, and did not take place on the other days in the week. The justices find that the first appellant does not allocate individual stalls to any trader; the traders who have stalls on licence decide amongst themselves who shall take each one. There is no defined space marked on the ground within which any stall shall be erected; they are made of components of steel tubing, wooden boards and corrugated PVC roofing which enable them to be constructed each week for use on Sundays. They are free standing and the components used to construct one stall on one weekend are not necessarily the same components used for a stall in that position in the succeeding week. The erection takes place on Saturday for Sunday trading, and the stalls are demolished at the end of the trading day on Sunday. Finally, the justices find that each of the appellants were present at the market on 22nd August, and that they engaged in retail trading by offering for sale the goods alleged. The latter part of that finding must, of course, be confined to the appellants other than the first named.

This is a matter which we are told is of some considerable importance up and down the country. The reason, again we are told, why trading in markets on Sundays has not previously come before the courts is because old statutory provisions expressly prohibited it. Now that the statute law has been revised, those provisions have gone, and now, so it is submitted, the only restriction on Sunday trading in a market is the restriction imposed by the Shops Act 1950. Accordingly we are considering for the first time the effect of the Shops Act 1950 on Sunday sales in a market of the kind I have described.

One finds in s 74 of the 1950 Act a definition of 'shop': it includes 'any premises where any retail trade or business is carried on'. It is not contended in this case that the stalls in question were shops, and the reason as I understand it why that aspect is not set before us is that it is conceded they are not premises for the purpose of the definition. However, that is not an end of the matter, because constantly through the Shops Act 1950 one finds Parliament making provisions which apply to any 'place', where any retail trade or business is carried on, the same kind of restrictions and regulations as are applied to shops.

One gets a very good example of that in the sections which are referred to in the information in this case, because under s 47 it is provided:

'Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday . . .'

That is the substantive provision relative to shops with regard to Sunday trading generally. In s 58 we find that:

'The foregoing provisions of this Part of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop, and as if in relation to any such place the person by whom the retail trade or business is carried on were the occupier of a shop . . .'

The point can be put quite shortly: Were any of these stalls, erected and used in the manner which I have described, a 'place where any retail trade or business was carried on'. If a stall satisfies that requirement, then it follows that it becomes subject to the Sunday trading requirements of s 47 just as though it was a shop.

There is some authority on this, because the legislation so far as shops and places used for retail trade or business has been in existence for some time. The first case to which we were referred is *Eldorado Ice Cream Co Ltd v Clark* (1). In that case the appellants were convicted by justices of offences relating to Sunday employment at an alleged shop of which they were the occupiers. In fact what they did was to occupy a warehouse in which ice cream was stored, and on Sunday there emerged from this warehouse a large number of men with tricycles who rode round the locality and sold the ice cream from their box tricycles. It was held by this court that the warehouse was not a shop which was open for the service of customers on Sunday, nor was it a place where retail trade or business was carried on. Further the box tricycle was not a 'place', and therefore the appellants had been wrongly convicted.

The interest in that case really is concerned with the box tricycle, because obviously the warehouse was not a shop and was not a place in which a retail trade or business was carried on. But the court was given the benefit of an ingenious argument designed to show that the box tricycle was a place. That contention was not accepted by the court. LORD HEWART CJ, giving the leading judgment, referred to the fact that a warehouse was not a shop, and he said that the particular spot at which at a given time the box tricycle was to be found was not a shop either, nor was the movable box tricycle itself a place, and that was so because it lacked the fixed locality and position which was clearly contemplated by the legislation.

Following that came *Stone v Boreham* (2). Here the subject of the enquiry was a mobile shop, with which one is familiar nowadays. It was a motor vehicle set up as a shop which toured round, and from which sales were made from time to time. It was contended that this vehicle plying its trade on a Sunday was so doing in breach of the provisions of the 1950 Act, not because it was a shop within the meaning of the Act, but because it was a place, or, alternatively, the spot on the road where it stood on making the sale was a place, within the meaning of s 58. That contention was again rejected. One finds in LORD GODDARD's judgment the following passage:

'It seems to me that the piece of ground on which the vehicle stood] is not a place where the respondent had set up a place of business or had established himself as, for example, people establish themselves nowadays at the side of a road on Sundays by putting out a table and selling flowers or fruit. It was simply the place where he stopped, and it seems to me that it would be fanciful to distinguish this case from *Eldorado Ice Cream Co., Ltd. v. Clark* (1) on the ground that that case was dealing with a charge which alleged that a man sold from a tricycle and in this case it is said he sold from a place, namely, where the tricycle or van stopped.'

DEVLIN J, giving his reasons for taking the same view, namely, that the mobile shop was not a place, said:

'The Shops Act, 1950, is extended by s. 58 to any place where the retail trade or business is carried on, but not to any place where the sale happens to be effected. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. Clearly it may well have been a dozen

(1) 102 JP 147; [1938] 1 All ER 330; [1938] 1 KB 715.

(2) 122 JP 418; [1958] 2 All ER 715; [1959] 1 QB 1.

or a score of similar places which could equally well be described as the place where a sale happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? So to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense.'

LORD GODDARD CJ had observed in that case that it might be a very good thing if a mobile shop were brought within the scope of the Shops Act 1950, but for those reasons it was held that it was not.

Of course, whenever a retail sale is made, it is made at a place; it cannot take place in the stratosphere, it must occur in some geographical position, and both those judgments make it clear in my view that that geographical position must have some degree of permanency. It was not enough that it was a place in which a particular sale took place.

One goes from there to *Kahn v Newberry* (1). This was a costermonger's barrow from which apples were being sold in Great Windmill Street. This was not a Sunday trading case, it was a case of trading after hours because the selling was taking place between 10.20 and 10.50 p.m. The defendant was standing beside a stationary costermonger's barrow in the street; he sold to two different customers in the period of five minutes during which he was under observation. It was contended for the prosecution that a stationary costermonger's barrow was not a moving vehicle and was a place within the meaning of ss 2 and 12 of the Shops Act 1950, and that the pitch on which retail trade or business was carried on from a stationary costermonger's barrow was a place within the meaning of those sections. Quarter sessions were of the opinion that the defendant was engaged in carrying on a retail trade or business after 8.00 p.m. in a place not being a shop in a locality where it was unlawful to keep open a shop. It was held by this court that the costermonger's barrow was not a place, nor was the piece of ground on which it stood, because here again there was not the element of permanency necessary to satisfy the meaning of 'place' in this Act. The court pointed out that it is not possible to make a sensible distinction between a costermonger's barrow and the mobile shop in the earlier case. In the judgment of DONOVAN J, one finds this passage:

'Two things perhaps might finally be said. This case is not the case where a stall is regularly erected on the same piece of land so that an aspect of some permanency is given to the site as one where goods are regularly sold by retail. It may be that such a place would be within the language of s. 12 and s. 58 of the Shops Act, 1950. That case can be left to be decided if and when it arises.'

LORD PARKER CJ also made it perfectly clear that he was not minded to decide in that case the point which comes before us today, namely, whether a stall with some element of permanency may not be a place for the purposes of s 58, and thus distinguishable from the authorities to which I have already referred.

The final case to which we have had our attention directed is *Greenwood v Whelan* (2). This was concerned with s 12 of the Pharmacy and Medicines Act 1941, and no question arose in the case whether the site in which the transaction took place was a place for the purposes of s 58. On the facts of that case it had to be a shop or nothing and to that extent it is somewhat remote from the problem which we have to decide.

Counsel for the appellants in his duty to the court referred us to it because he thought that certain passages in it tended to be unhelpful to him, and that we should have our attention drawn to them. I think that the point which concerned him most was

(1) 123 JP 307; [1959] 2 All ER 202; [1959] 2 QB 1.

(2) [1967] 1 All ER 294; [1967] 1 QB 396.

that LORD PARKER, when going through the history of the Shops Act legislation, pointed out that, if one went back to 1892, the relevant legislation included in the definition 'shop' such things as market stalls and warehouses, those words being dropped out in the subsequent legislation. LORD PARKER explained that they had been dropped out because the need was catered for by the introduction of the conception that the Shops Act 1912 should apply to a 'place' where retail trade or business was carried on. Counsel brings this to our attention lest the proper view of LORD PARKER's judgment may be that anything which used to be a stall is now a place.

For my part I do not think that that is a proper conclusion from LORD PARKER's judgment in any event. I do not think it was there being said that anything which had been a stall under the old legislation would be a place. I think that what LORD PARKER was saying was that anything which had been a stall under the old legislation and which ought to come within the Shops Act 1912 would now be brought within it under the reference to 'place' in, for example, s 58.

For my part, I am quite satisfied that there is an intermediate range of circumstances between, on the one hand, the itinerant seller with a tricycle or barrow, and the person who settles down permanently seven days a week in a single recognised location. The itinerant seller is not carrying on business in a 'place', as the authorities show. The man who has a seven-day-a-week establishment continually in the same place is, in my judgment, clearly carrying on his retail trade or business from a 'place' within the section. In between one gets a situation such as the present, and I think in the end it is probably a matter of fact and degree whether a particular establishment, if that is not too grand a word, does have a sufficient degree of permanence to justify its inclusion in the words a 'place' where a retail trade or business is carried on'. Looking at it like that, I am quite satisfied that a stall which is erected and on which business is done throughout a single day in each week is of such a permanent character that the tribunal of fact, in this case the justices, are perfectly entitled to say that it comes within the section.

Not only do I think the justices were entitled to say that, I think, if I may express a personal opinion, that they were right to say that, and that it would be a great pity if the restrictions of the Shops Act 1950 did not attach to a stall of this character merely because it was not open seven days a week, or lacked any greater degree of permanency than that to which I have already referred.

Counsel for the appellants in his helpful argument took us through a good many provisions of the Act with a view to showing us certain sections which would be extremely difficult to apply if we came to the conclusion to which I have already indicated that I have come. In particular he referred us to the provisions of the Act relative to Sunday trading by members of the Jewish religion, a matter which is dealt with in s 53 of the Act. Without attempting to go into detail that section contemplates that a shopkeeper of the Jewish religion may have his shop open on Sunday and closed on Saturday. It is pointed out that it would be very difficult to apply that kind of regulation to a stall which is only open on one day in the week. Similar arguments were addressed to us in regard to the employment of young persons in a shop where there is the necessity of balancing Sunday work with an additional holiday later in the week. It was pointed out that that again is a provision which is very difficult to apply to the circumstances of the case with which we are concerned. But for my part I do not find those difficulties so compelling as to make me reject the view which I would take of the ordinary plain meaning of the words in s 58. I think that they do cover this situation, and the mere fact that a shop or a place is conducted in such a way as to make some of the restrictions of the Act difficult to apply to it, does not seem to me to point to the conclusion that the establishment is therefore not a shop, or not a place, as the case may require.



I have come to the conclusion that the justices were right in convicting the appellants and I would dismiss the appeal.

**SHAW J:** I agree.

**WEIN J:** I agree.

*Appeal dismissed.*

Solicitors: Barlow Lyde & Gilbert, for Field & Sons, Leamington Spa; H B Dolphin, Town Clerk, Warwick.

Reported by T R Fitzwalter Butler, Esq, Barrister

### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD DIPLOCK AND LORD KILBRANDON)

19th, 20th June, 19th July 1972

BRUTUS v COZENS

*Public Order—Insulting behaviour conducive to breach of peace—‘Insulting’—Conduct displeasing and annoying to other people—Public tennis match—Disruption of match by appellant jumping over barrier and running on court—Public Order Act, 1936, s 5 as replaced by Race Relations Act, 1965, s 7.*

By s 5 of the Public Order Act, 1936, as replaced by s 8 of the Race Relations Act, 1965: ‘Any person who in any public place or at any public meeting—(a) uses threatening, abusive or insulting words or behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.’

During the annual tournament of the All England Law Tennis Club a match on one of the courts was in progress when the appellant stepped over the barrier of the court blowing a whistle and throwing leaflets about, and approached the players at one end attempting to hand one a leaflet. Nine or ten other people followed him on to the court, holding up banners with slogans about the policy of apartheid in South Africa and throwing more leaflets. Play was stopped, and the appellant, when asked to leave, sat down on the court. The spectators showed strong resentment at his conduct, shouting and gesticulating, and when the appellant was removed by the police some of them tried to strike him. The appellant was charged with using insulting behaviour within s 5, but justices dismissed the charge.

**HELD:** the conduct of the appellant, while possibly being most displeasing and annoying to both the spectators and the players, could not be said to be insulting within the section; the meaning of an ordinary word in the English language was a question of fact, and it could not be said that, in giving ‘insulting’ the meaning which they had the justices had misdirected themselves and had erred in law; accordingly, their decision was right.

**APPEAL** by Dennis Brutus against a decision of a Queen’s Bench Divisional Court, reported ante p 390, setting aside a decision of Wimbledon justices that the appellant had not been guilty of an offence under s 5 of the Public Order Act, 1936, and remitting the case to them for further hearing.

Morris Finer QC and Brian Capstick for the appellant.  
E M Hill for the respondent.

Their Lordships took time for consideration.

19th July. The following opinions were delivered.

**LORD REID:** The charge against the appellant is that on 28th June 1971, during the annual tournament at the All England Lawn Tennis Club, Wimbledon, he used insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act 1936, as amended.

While a match was in progress on no 2 court he went on to the court, blew a whistle and threw leaflets around. On the whistle being blown nine or ten others invaded the court with banners and placards. I shall assume that they did this at the instigation of the appellant although that is not made very clear in the Case stated by the justices. Then the appellant sat down and had to be forcibly removed by the police. The incident lasted for two or three minutes. This is said to have been insulting behaviour.

It appears that the object of this demonstration was to protest against the apartheid policy of the government of South Africa. But it is not said that that government was insulted. The insult is said to have been offered to or directed at the spectators. The spectators at no 2 court were upset; they made loud shouts, gesticulated and shook their fists and while the appellant was being removed some showed hostility and attempted to strike him. The justices came to the conclusion that the appellant's behaviour was not insulting within the terms of the offence alleged. They did not consider the other points raised in argument, but dismissed the information without calling on the appellant.

On a Case Stated a Divisional Court set aside the judgment of the justices and remitted the case to them to continue the hearing. They certified as a point of law of general public importance:

'Whether conduct which evidences a disrespect for the rights of others so that it is likely to cause their resentment or give rise to protests from them is insulting behaviour within the meaning of s 5 of the Public Order Act 1936.'

Section 5 is in these terms:

'Any person who in any public place or at any public meeting—(a) uses threatening, abusive or insulting words or behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'

Subsequent amendments do not affect the question which we have to consider.

It is not clear to me what precisely is the point of law which we have to decide. The question in the Case Stated for the opinion of the court is 'whether, on the above statement of facts, we came to a correct determination and decision in point of law'. This seems to assume that the meaning of the word 'insulting' in s 5 is a matter of law. And the Divisional Court appear to have proceeded on that footing.

In my judgment that is not right. The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word 'insulting' being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.

Were it otherwise we should reach an impossible position. When considering the meaning of a word one often goes to a dictionary. There one finds other words set out. And if one wants to pursue the matter and find the meaning of those other words the dictionary will give the meaning of those other words in still further words which often include the word for whose meaning one is searching. No doubt the court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different. Or the court could frame a definition. But then again the tribunal would be left with words to consider. No doubt a statute may contain a definition—which incidentally often creates more problems than it solves—but the purpose of a definition is to limit or modify the ordinary meaning of a word and the court is not entitled to do that.

So the question of law in this case must be whether it was unreasonable to hold that the appellant's behaviour was not insulting. To that question there could in my view be only one answer—No. But as the Divisional Court have expressed their view as to the meaning of 'insulting' I must, I think, consider it. It was said [by MELFORD STEVENSON J, FORBES, J and LORD WIDGERY, CJ, agreeing]:

"The language of s 5, omitting words which do not matter for our present purpose, is this: "Any person who in any public place . . . (a) uses . . . insulting . . . behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence". It therefore becomes necessary to consider the meaning of the word "insulting" in its context in that section. In my view it is not necessary, and is probably undesirable, to try to frame an exhaustive definition which will cover every possible set of facts that may arise for consideration under this section. It is, as I think, quite sufficient for the purpose of this case to say that behaviour which affronts other people and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest such as was aroused in this case—and I rely particularly on the reaction of the crowd as set out in the Case—is insulting for the purpose of this section."

I cannot agree with that. Parliament had to solve the difficult question how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous, and it may be distasteful or unmannerly, speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded.

We were referred to a number of dictionary meanings of 'insult' such as treating with insolence or contempt or indignity or derision or dishonour or offensive disrespect. Many things otherwise unobjectionable may be said or done in an insulting way. There can be no definition. But an ordinary sensible man knows an insult when he sees or hears it.

Taking the passage which I have quoted, 'affront' is much too vague a word to be helpful; there can often be disrespect without insult; and I do not think that contempt for a person's rights as distinct from contempt for the person himself would generally be held to be insulting. Moreover there are many grounds other than insult for feeling resentment or protesting. I do not agree that there can be conduct which is not insulting in the ordinary sense of the word but which is 'insulting for the purpose of this section'. If the view of the Divisional Court was that in this section the word 'insulting' has some special or unusually wide meaning, then I do not agree. Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else.

If I had to decide, which I do not, whether the appellant's conduct insulted the spectators in this case, I would agree with the justices. The spectators may have been very angry and justly so. The appellant's conduct was deplorable. Probably it ought to be punishable. But I cannot see how it insulted the spectators. I would allow the appeal with costs.

**LORD MORRIS OF BORTH-Y-GEST:** The charge which was brought against the appellant was that he

'did use insulting behaviour whereby a breach of the peace was likely to be occasioned at the All England Lawn Tennis Club, Church Road, Wimbledon, S.W.19 on 28th June, 1971.'

Having found the facts the justices came to the conclusion that the appellant's behaviour was not 'insulting behaviour' within the terms of the offence charged under s 5 of the Public Order Act 1936, as amended; it was therefore unnecessary for them to consider any further matters. Under that section, provided other matters are proved, a person will commit an offence if he uses threatening behaviour or if he uses abusive behaviour or if he uses insulting behaviour. In the present case the justices had to consider whether the appellant had used insulting behaviour. The words 'insulting behaviour' are words that permit of ready comprehension. Having found the facts it was for the justices applying rational judgment and common sense to reach a decision. Manifestly they thought that, however else the appellant's behaviour might be characterised, it was not to be described as insulting. Having had the case of *Bryan v Robinson* (1) cited to them, in which LORD PARKER CJ had pointed out that persons may be annoyed by behaviour which is not insulting behaviour, the justices may have thought that the appellant's behaviour was annoying or very annoying but yet was not on that account to be held to have been insulting. The justices may have considered that in most cases insulting behaviour is behaviour which insults some person or persons; they may have thought that after the incident neither a spectator nor a player, however displeased or annoyed he might have been, could sensibly have complained that he had been 'insulted'.

In my view, the justices' decision was really a decision of fact just as would be the decision of a jury if called on to decide whether someone had used insulting behaviour. The decision either of justices or of a jury could be attacked if there had been misdirection. In the present case I can see no ground at all for suggesting that the justices had misdirected themselves.

The decision of the justices could, in my view, only be reversed if it is held that the facts as found show as a matter of law that the appellant's behaviour was insulting. What the Divisional Court has done is to lay down a definition of the words 'insulting behaviour' and then to say that the appellant's behaviour came within the definition. But the Act contains no such definition and indeed no words of

(1) 124 JP 310; [1960] 2 All ER 173.

definition are needed. The words of the section are clear and they convey of themselves a meaning which the ordinary citizen can well understand. The suggested definition would enlarge what Parliament has enacted, and it would do this in relation to a criminal offence. It would lay down that behaviour which affronts other people and evidences a disrespect or contempt for their rights and which reasonable people would foresee would be likely to cause resentment or protest is insulting behaviour for the purposes of s 5. It may well be that behaviour which is insulting will often be behaviour which shows a disrespect or contempt for people's rights but it does not follow that whenever there is disrespect or contempt for people's rights there must always be insulting behaviour. Furthermore, there may be many manifestations of behaviour which will cause resentment or protest without being insulting.

In the submissions made on behalf of the respondent it was acknowledged that the definition laid down by the Divisional Court was too wide and that it would embrace conduct going beyond what Parliament had intended. It was not supported. An alternative definition was propounded. It was suggested that in the concept of insulting behaviour there are the two elements: (a) that it is deliberate behaviour which is intended or is likely to give offence and (b) that it is behaviour which is contemptuous of or about those who are to be offended. I find it unnecessary and indeed undesirable to compose a definition of a word which is in general use and which presents no difficulty of application or understanding. If the facts as found by the justices (which I do not recount because they are recorded in the Case Stated) were put to a juryman who was asked to say whether, in his view, they constituted insulting behaviour I would think it probable that his answer would be the same as that given by the justices. But whether this be so or not I find it impossible to say that on the facts as they found them the justices were obliged as a matter of law to find that the behaviour was insulting.

For the reasons which I have given I would allow the appeal and set aside the order made by the Divisional Court.

**VISCOUNT DILHORNE:** After the magistrates at Wimbledon had dismissed the information laid against the appellant without calling on him to answer the prosecution's case, they were asked to state a Case. They did so and in para 7 thereof said:

'Having considered the evidence and the authorities cited to us, we came to the conclusion that the respondent's [the present appellant's] behaviour was not insulting within the terms of the offence alleged against him',

and in para 8 said:

'The question for the opinion of the High Court is whether, on the above statement of facts, we came to a correct determination and decision in point of law.'

The Case Stated did not state precisely what was the question of law on which the opinion of the High Court was sought. It may be because the justices found some difficulty in formulating it. The Divisional Court, however, treated the case as raising the question of the meaning to be given to the word 'insulting' in the expression 'insulting behaviour' in s 5 of the Public Order Act 1936.

The Divisional Court allowed the appeal, but, while refusing leave to appeal to this House, certified that a point of law of general public importance was involved, namely:



'Whether conduct which evidences a disrespect for the rights of others so that it is likely to cause their resentment or give rise to protests from them is insulting behaviour within the meaning of s 5 of the Public Order Act 1936.'

The appellant now appeals with the leave of this House.

In the Divisional Court in the course of his judgment, with which the other members of the court agreed, MELFORD STEVENSON J said:

'behaviour which affronts other people, and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest such as was aroused in this case, and I rely particular on the reaction of the crowd as set out in the Case, is insulting for the purpose of this section.'

I do not think that this is right. The Public Order Act 1936, by s 5, made it an offence for a person to use threatening, abusive or insulting behaviour whereby a breach of the peace is likely to be occasioned. It does not make any kind of behaviour which is likely to lead to a breach of the peace an offence. Behaviour which evidences a disrespect or contempt for the rights of others does not of itself establish that that behaviour was threatening, abusive or insulting. Such behaviour may be very annoying to those who see it and cause resentment and protests but it does not suffice to show that the behaviour was annoying and did annoy for a person can be guilty of annoying behaviour without that behaviour being insulting. And what must be established to justify conviction of the offence is not that the behaviour was annoying but that it was threatening, abusive or insulting.

The reaction of those who saw the behaviour may be relevant to the question whether a breach of the peace was likely to be occasioned, but it is not, in my opinion, relevant to the question, was the behaviour threatening, abusive or insulting?

The Act does not define the meaning to be given to the word 'insulting' and the cases cited in this House, the Divisional Court, and before the justices do not say or suggest that it should be given any special meaning. Unless the context otherwise requires, words in a statute have to be given their ordinary natural meaning and there is in this Act, in my opinion, nothing to indicate or suggest that the word 'insulting' should be given any other than its ordinary natural meaning.

The justices had two questions to decide: first, was the appellant's behaviour insulting, and, secondly, if so, was it likely to occasion a breach of the peace. Both were questions of fact for them to decide. In considering the first, it was relevant for them to consider whether the behaviour was such as to indicate an intention to insult anyone, and if so whom; and if the justices in this case did so they may well have concluded that the appellant's behaviour did not evince any intention to insult either players or spectators, and so could not properly be regarded as insulting.

In my opinion, the answer to the question certified by the Divisional Court is in the negative for proof of the matters therein referred to does not suffice to show or tend to show that the behaviour was insulting and the decision of the Divisional Court was wrong. I would therefore allow the appeal with costs.

**LORD DIPLOCK:** I agree with your Lordships that this appeal should be allowed.

**LORD KILBRANDON:** I agree that this appeal should be allowed. At the close of the prosecution evidence, the justices found no case to answer, and gave their decision in the following terms:

'Having considered the evidence and the authorities cited to us, we came to the conclusion that the [appellant's] behaviour was not insulting within the terms of the offence alleged against him. "Insulting behaviour" being an essential element of an offence within s 5 of the Public Order Act, 1936, we did not consider the other points raised before us and accordingly dismissed the information without calling upon the [appellant].'

The authorities were *Bryan v Robinson* (1), *Jordan v Burgoyne* (2) and *Cooper v Shield* (3). In the first, a case of alleged insulting behaviour, LORD PARKER CJ had laid it down that 'somebody may be annoyed by behaviour which is not insulting behaviour'. We must assume that the justices weighed the evidence against this ruling, and appreciated accordingly that, while the spectators may have been annoyed, that did not necessarily mean that they had been insulted. The second relates to insulting words which might have been expected to, and did, cause a riot to break out at a public meeting; this could not have assisted the justices or affected their decision. The third is concerned with whether the locus of the incident was a public place, and the present point did not arise. No authority was cited to the justices, or indeed before this House, which declares that any positive test is available by which insulting behaviour can be recognised as such; nevertheless, we were in effect invited to apply some such test. We were asked to hold that, accepting as facts the incidents described in the Stated Case, it followed as a matter of law that the conduct of the accused was insulting, and, therefore, in the circumstances criminal. This seems to me to be impossible. It may well be that if the justices had found the appellant's behaviour to have been insulting, their decision would not have been challengeable, but that only means that their decision, whichever way it went, must have been a decision on a question of fact; no question of law can be spelled out of their evaluation of behaviour which, in the absence of a specific finding that it was of an insulting character, is capable of more than one interpretation. The drawing of inferences from behaviour is a fact-finding process. It would be unwise, in my opinion, to attempt to lay down any positive rules for the recognition of insulting behaviour as such, since the circumstances in which the application of the rules would be called for are almost infinitely variable; the most that can be done is to lay down limits, as was done in *Bryan v Robinson*, in order to ensure that the statute is not interpreted more widely than its terms will bear.

I did not myself find the quotation of dictionary definitions helpful, as it might perhaps have been had the question been whether, the justices having convicted, there is any accepted meaning of the word 'insulting' which they might be said legitimately to have adopted in coming to their conclusion. But 'insulting' is an ordinary uncomplicated English word. Boswell defends Dr Johnson, to whose work we were referred, against a charge of obscurity in his definitions, by quoting from the preface to the dictionary:

'To explain, requires the use of terms less abstruse than that which is to be explained, and such terms cannot always be found . . . The easiest word, whatever it may be, can never be translated into one more easy.'

One felt the force of this on being offered as exegetical substitutions for the word 'insult' such words as 'insolence' or 'affront'. All three words are as much, or as little, in need of interpretation.

(1) 124 JP 310; [1960] 2 All ER 173.

(2) 127 JP 368; [1963] 2 All ER 225; [1963] 2 QB 744.

(3) 135 JP 434; [1971] 2 All ER 917; [1971] 2 QB 334.

It was conceded before us that the question which has been submitted to us as involving a point of law of public importance could not be answered in the affirmative. To do so would be to declare that, among other manifestations, 'conduct which evidences a disrespect for the rights of others which is likely to cause their resentment' must as a matter of law be held to be insulting, and punishable under the Public Order Act 1936. A common example might be an assertion, by throwing down a gate, of a public right of way. This would be showing disrespect of a right of property, and would certainly be resented, but the behaviour might in certain circumstances be in fact lawful. I would accordingly allow this appeal.

*Appeal allowed.*

Solicitors: B M Birnberg & Co; Solicitor, Metropolitan Police.

Reported by G F L Bridgman Esq, Barrister.

### HOUSE OF LORDS

(LORD PEARSON, LORD DIPLOCK, LORD SIMON OF GLAISDALE, LORD KILBRANDON AND LORD SALMON)

15th, 16th May, 19th July 1972

McMILLAN v CROUCH

*Shipping—Pilot—Pilotage district—Offer by licensed pilot—Pilotage by unlicensed pilot—Ship moving from one mooring to another—Pilotage district byelaws—Pilotage Act, 1913, s 30 (3)—London Pilotage District Byelaws, Part IX, byelaw 2.*

At a time when a ship was about to be moved a distance of three quarters of a mile in the London pilotage district of the River Thames from moorings to another moorings two licensed pilots approached the master of the ship and offered pilotage. The offer was rejected and the ship was moved under the direction of the respondent, an unlicensed pilot. On a charge under s 30 (3) of the Pilotage Act, 1913, which provides that, if in any pilotage district a pilot not licensed for the district pilots a ship after a licensed pilot has offered to do so, he shall be liable to a fine,

HELD (LORD SIMON OF GLAISDALE dissenting): by reason of byelaw 2 of the London Pilotage District Byelaws, Part IX, the respondent was entitled to move the vessel when he did and s 30 (3) did not apply.

APPEAL by Daniel Ivor McMillan against a decision of a Divisional Court of the Queens' Bench Division, reported p 179 ante., allowing the appeal of the respondent, William James Crouch, against his conviction by Dartford justices on an information preferred by the appellant charging that he on 24th October 1970, did pilot the ship Wadhurst during and after her departure from Littlebrook power station, Kent, after a licensed pilot for the district had offered to pilot her, contrary to s 30 (3) of the Pilotage Act 1913.

Gerald Darling QC and N W Lyell for the appellant.  
R F Stone QC and Geoffrey Brice for the respondent.

Their Lordships took time for consideration.

19th July. The following opinions were delivered.

**LORD PEARSON:** The respondent was charged by the appellant with an offence against s 30 (3) of the Pilotage Act 1913, in that he piloted a ship in the London pilotage district after the appellant, a licensed pilot for the district, had offered to pilot the ship. The respondent is a waterman and not a licensed pilot. Section 30 (1) of the Act provides that 'A pilot licensed for a district may supersede any pilot not so licensed who is employed to pilot a ship in the district'. Section 30 (3) provides:

'If in any pilotage district a pilot not licensed for the district pilots or attempts to pilot a ship after a pilot licensed for that district has offered to pilot the ship, he shall be liable in respect of each offence to a fine not exceeding fifty pounds.'

The respondent in fact conducted the ship from one mooring to another within the London pilotage district, and did so after the appellant had sought to supersede him under s 30. The respondent contends that he was entitled to do this because by virtue of s 32 and a byelaw made thereunder the operation of s 30 was excluded in this case. The question at issue in this appeal is whether the respondent's contention is correct. The answer must depend ultimately on the true construction of the Act and the byelaw, but the previous statutory history and passages in previous judgments have some relevance and can be taken into account as leading up to the present provisions.

In the Oxford English Dictionary a pilot is defined as

'One who steers or directs the course of a ship; a steersman, helmsman; specifically a person duly qualified to steer ships into or out of a harbour, or wherever the navigation requires local knowledge.'

Normally one thinks of a pilot as a person who, having special knowledge of the shoals, currents, winds and other local conditions at a port, is employed to conduct a ship inwards from the open sea to her destination in the port or outwards from some place in the port to the open sea. The ship is navigating and being piloted. But after the completion of the inward voyage and before the commencement of the outward voyage there may be movements of the ship within the port, for instance from one mooring to another or into or out of a dock. Do such movements constitute navigation, and is the person conducting them to be described as a 'pilot' and ought a licensed pilot to be employed? On the one hand, the employment of a licensed pilot may be desirable in the interests of safety for the ship concerned and other ships and the port installations, but, on the other hand, it may seem oppressive to require the shipowner to incur the expense of employing a licensed pilot for minor operations of this kind and the skill of experienced watermen may be considered sufficient. One can see the possibility of a conflict of interests and demarcation disputes arising between the licensed pilots of Trinity House and the experienced watermen who are not licensed for pilotage. Such matters were dealt with in the previous legislation.

In the Pilotage Act 1808, s 31 provided:

'That it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot, in the charge of any ship or vessel within the limits of his licence',

and went on to provide penalties for a master of a ship continuing to employ an unlicensed person and for an unlicensed person continuing to act in the conduct of the ship after a licensed pilot had offered to take charge. Section 21, however, provided:

'Nothing in this Act contained shall be construed to prevent any ship or vessel which shall be brought into any port or ports in England by any pilot duly

licensed, from being afterwards removed in such port or ports by the master or mate thereof, or other person having the command, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel ...'

In the Pilotage Act 1812, s 34 conferred on licensed pilots their right of supersession, but s 22 provided:

'Nothing in this Act contained shall be construed to prevent any ship or vessel which shall be brought into any port or ports in England by any pilot duly licensed, from being afterwards removed in such port or ports by the master or mate, or other person belonging to such ship or vessel and having the command thereof, or, if in ballast, by any other person or persons appointed by any owner, or the master, or any agent of the owner, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel.'

In the Pilotage Act 1825 broadly similar provisions were contained in ss 70 and 63.

It is to be observed that in the Acts of 1808, 1812 and 1825 the provisions which permitted movements of ships within a port, for the purposes of entering into or going out of any dock or for changing a ship's moorings, to be conducted without the aid of a licensed pilot were so worded (e.g. 'nothing in this Act contained shall be construed to prevent ...') as to override the provisions conferring on licensed pilots the right to supersede unlicensed persons in the conduct of a ship.

In the Merchant Shipping Act 1854 the right of supersession was conferred by s 360, and s 362 provided:

'An unqualified pilot may, within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot under the following circumstances, that is to say:

'When no qualified pilot has offered to take charge of such ship, or made a signal for that purpose; or

'When a ship is in distress or under circumstances making it necessary for the master to avail himself of the best assistance which can be found at the time; or

'For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where such act can be done by an unqualified pilot without infringing the regulations of the port, or any orders which the harbour master is legally empowered to give.'

Neither s 360 nor s 362 contained any words showing which of them was to override the other. But presumably each of the three limbs in s 362 was meant to have effective operation. Under the first limb an unqualified pilot was entitled to take charge of a ship if no qualified pilot had offered to take charge of her. Under the third limb nothing would be added if the unqualified pilot would be entitled to take charge only so long as no qualified pilot had offered to take charge. I think it is to be inferred that an unqualified pilot taking charge under the third limb was not liable to be superseded by a qualified pilot under s 360.

In the Merchant Shipping Act 1894, s 596 in effect re-enacted s 362 of the 1854 Act and s 597 in effect re-enacted s 360 of the 1854 Act. I do not think the change in the order of the sections alters the meaning in any way.

Cases that were cited illustrate the distinction between the ship's inward voyage to her destination in the port, on which pilotage may be compulsory until the inward voyage is completed, and subsequent movements within the port for changing



moorings or entering or leaving a dock: *R v Lambe* (1); *R v Neale* (2); *McIntosh v Slade* (3); *The Rigborgs Minde* (4); *The Andoni* (5).

In approaching the construction of the Pilotage Act 1913 one can carry in from reading previous enactments and judgments impressions that in relation to pilotage requirements there is an important distinction between a ship's inward and outward voyages and her intermediate movements within the port and that hitherto the statutory authorities or liberties for unqualified or unlicensed persons to conduct such movements within the port seem to have overridden or prevailed against the qualified or licensed pilot's right of supersession. The 1913 Act is an Act to consolidate and amend the law relating to pilotage, and therefore it cannot be presumed to have left the previous law intact but can reasonably be expected to have re-enacted or preserved the effect of previous statutory provisions, except in so far as there were reasons for altering them.

The 1913 Act is a comprehensive Act dealing with numerous aspects of pilotage law and administration. Only a few of its provisions are directly relevant to the question in this appeal. Section 11 (1) and (2) provides as follows:

'(1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship.

'(2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.'

The odd feature of these provisions is that, although there is in sub-s (1) the general mandatory requirement of pilotage in the cases to which the subsection refers, there is no corresponding sanction for failure to comply with the requirement: the sanction provided by sub-s (2) applies only after a licensed pilot has offered to take charge of the ship. In *Muller v Trinity House* (6) ROWLATT J said:

'I think the true construction is not that no vessel shall navigate unless she has a licensed pilot on board, but that she is under a continuing obligation to fly the pilot flag and must take a pilot on board if he offers.'

With the substitution of 'pilot signal' for 'pilot flag' I think that is correct. Section 43 (1) and (2) provides:

'(1) The master of a ship (other than an excepted ship) shall when navigating in circumstances in which pilotage is compulsory under this Act, display a pilot signal and keep the signal displayed until a licensed pilot comes on board.

(1) (1792), 5 Term Rep 76.

(2) (1799), 8 Term Rep 241.

(3) (1827), 6 B & C 657.

(4) (1883), 8 PD 132.

(5) [1918] P 14.

(6) [1925] 1 KB 166, [1924] All ER Rep 706.

'(2) The master of a ship, whether navigating in circumstances in which pilotage is compulsory or not, which is being piloted in a pilotage district by a pilot not licensed for the district, shall display a pilot signal and keep the signal displayed until a licensed pilot comes on board.'

That s 43 (2) is an important ancillary provision to facilitate the exercise by a licensed pilot of his right of supersession under s 30, of which sub-ss (1) and (3) (which are the material sections for present purposes) have already been set out.

Now I come to the crucial section, which is s 32. It provides as follows:

'(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as may be provided by byelaw in the case of ships being so moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock: Provided that a byelaw shall in every case be made for the purpose aforesaid in any pilotage district where any class of persons other than licensed pilots were in practice employed at the date of the passing of this Act for the purpose of changing the moorings of ships or of taking ships into or out of dock.

'(2) A ship whilst being navigated within any closed dock, lock, or other closed work in a pilotage district shall notwithstanding anything in this Act be deemed to be navigating in a district in which pilotage is not compulsory.'

This section is evidently intended to lay down lines of demarcation between the work of licensed pilots and the work of other persons, who would normally be experienced watermen. The proviso clearly shows an intention to protect the watermen in places where they had an established trade at the date of the passing of the Act.

The main provision, however, is in favour of the licensed pilots. It creates a general rule that a ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district. When a ship is deemed to be navigating in a pilotage district, the provisions of s 11 (1) and (2) for compulsory pilotage, and the provisions of s 43 (1) and (2) for display of the pilot signal, become applicable in appropriate cases. If there is no byelaw to the contrary then in appropriate cases pilotage will be compulsory and the pilot signal must be displayed even though the ship is only moving within the port for the purpose of changing her moorings or entering or leaving a dock.

On the other hand, the exception in s 32 (1) is in favour of the watermen. A pilotage authority may under ss 17 (1) (q) and 32 (1) make a byelaw for their district. The subsection does not say in terms what a byelaw is to do. But it is evidently intended to create an exception from the general rule, and I think that within its limited sphere it must contradict the general rule. A ship, which would otherwise be deemed by virtue of the general rule to be navigating in a pilotage district, will by virtue of the exception be deemed not to be navigating in a pilotage district. Then the provisions of s 11 (1) for compulsory pilotage will not apply to that ship, and by consequence the provisions of s 43 (1) for display of the pilot signal will not apply to her. In my opinion, the provisions of s 43 (2) will not apply to her, because if a ship is not navigating in a pilotage district it must follow that she is not being piloted in a pilotage district. Equally, in my opinion, s 30 (1) does not apply to such a ship, because if she is not navigating in a pilotage district it must follow that no one is employed to pilot her in a pilotage district.

I think that is the conclusion from correct linguistic analysis of the statutory provisions. It is powerfully supported by the consideration that s 32 (1) was evidently

intended to give protection within a limited sphere to watermen having established trades in particular ports, and the section should be so interpreted as to give an effective protection. The respondent's interpretation of the section gives effective protection. The appellant's interpretation would not do so; as soon as a waterman not being a licensed pilot began his conduct of the ship in the harbour he could be superseded by a licensed pilot; thus the waterman would have a right which was immediately defeasible.

I have still to consider the byelaw that was made. It is printed in Part IX of the London Pilotage District Bye-Laws. Under the general heading of 'Bye-laws relating to exemptions from compulsory pilotage' two byelaws are set out as follows:

'1. Ships of the following classes, when not carrying passengers, are exempted from compulsory pilotage in the district, viz:—(i) Ships of less than 3,500 tons gross tonnage trading coastwise; (ii) Home trade ships of less than 3,500 tons gross tonnage trading otherwise than coastwise; (iii) Ships of less than 1,500 tons gross tonnage whose ordinary course of navigation does not extend beyond the seaward limits of any harbour authority within the district whilst navigating within those limits.

'2. A ship while being moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock in the part of the district between London Bridge and Gravesend shall not be deemed to be navigating in the district, and shall accordingly be exempt from compulsory pilotage provided that between Barking Creek and Gravesend the above exemption shall not apply to ships which are being moved for a distance exceeding two nautical miles.'

The relevant byelaw is the second one. It was argued that the sole effect of this byelaw was to exempt ships from compulsory pilotage and that it did not affect the licensed pilot's right of supersession. In support of this argument reliance was placed on the heading 'Bye-laws relating to exemptions from compulsory pilotage' and on the words in the second byelaw 'and shall accordingly be exempt from compulsory pilotage'. It may be that the authors of the byelaw were thinking wholly or mainly of the effect of this byelaw on compulsory pilotage, but the byelaw contained the words 'shall not be deemed to be navigating in the district' and must have the proper effect of a byelaw made under s 32 (1). Also it was suggested that there might be a difference between 'shall not be deemed to be navigating' and 'shall be deemed not to be navigating', but I think that in the context this distinction is too fine to be acceptable.

In my opinion, the decision and reasoning of the Queen's Bench Divisional Court in *Babbs v Press* (1) and the present case and *Montague v Babbs* (2) on the question at issue in this appeal were correct and should be affirmed.

I would dismiss the appeal with costs.

**LORD DIPLOCK:** I have had the advantage of reading the speech of my noble and learned friend, LORD PEARSON, with which I agree. I would therefore dismiss the appeal.

**LORD SIMON OF GLAISDALE:** What is the difference between 'not deemed to be navigating' and 'deemed not to be navigating'? And when the draftsman wrote the former, did he really mean the latter? Is 'deemed' used to import

(1) 135 JP 604; [1971] 3 All ER 654.

(2) p 179 ante.

a fiction or to demark a boundary which might otherwise be uncertain? What is the consequence of the one reading or the other? Is a man who has every appearance of being a pilot piloting a ship nevertheless not a pilot piloting a ship for the purposes of s 30 (3) of the Pilotage Act 1913 because the statute provides elsewhere that a byelaw shall be made establishing in certain circumstances an exception from a provision whereby a ship is deemed to be a ship navigating in a pilotage district? My Lords, these are fascinating intellectual exercises; but, in my respectful submission, they have little more to do with the interpretation of a statute designed to promote the safety of ships and their crews, passengers, and cargoes than this morning's crossword puzzle or a debate about how many angels can dance on the point of a pin. The purpose of the Pilotage Act 1913 cannot be in doubt. In the section under which the respondent was prosecuted the language is clear and unambiguous. In order to expound its meaning it is quite unnecessary to seat oneself on a tripod or to bind on phylacteries. If any shade is to preside over your Lordships' deliberations, it should be Samuel Plimsoll's rather than that of Duns Scotus.

In the interpretation of an Act of Parliament, the first thing to do is to ascertain its purpose. Words are at best less than perfect tools of communication; and in English they often bear a number of different meanings. However skilfully the draftsman may have chosen his language, however subtly he may have varied, juxtaposed and contrasted his terminology so as to isolate the precise shade of meaning he intends each word to bear, an autistic, a narrowly linguistic, approach to interpretation is liable to misconstrue. This is no more than the forensic aspect of a general human fallibility in communication. But one thing is certain: the draftsman will have used these slippery, amorphous tools of communication in order to further the object of the statute. Once this object is grasped, a number of possible meanings can be at once eliminated, and in the end one generally demonstrated to express the parliamentary intention—though a linguistic analysis may well be useful at this final stage if there is doubt as to the particular parliamentary objective, and is generally in all events of service as a cross-check. But, if misconstruction is to be avoided, the functional approach must have priority over the linguistic.

*The 'mischief'—the social background*

The life of those who go down to the sea in ships has always been perilous and still is so. To the general hazards of commercial employment, where precautions almost always add to the expense of the goods or services to be supplied, there are the additional dangers of the vast forces which nature can unloose on puny men in fragile craft attempting a living in an element which is not humankind's natural habitat. Experience has shown that it is not enough to trust to the benevolence or sagacity or even the self-interest of shipowners. Experience has shown that it is not safe to assume, as was argued for the respondent, that a master would not take any action that might hazard his ship. If these things provided sufficient safeguard, tribunals of Admiralty would happily lose much of their work, and large portions of the Merchant Shipping Act 1894 could be eliminated from the statute book.

The need for particular statutory provision regulating pilotage arises because, by a cruel irony, as ships approach land the proximity of a haven from natural elements may actually increase the hazards. Sea lanes converge, and to the perils of wind and water there is now added a new—perhaps even greater—danger, constituted by human fallibility. Shipping may be mishandled; and, even correctly handled, other shipping is a complication to manoeuvre: the busier the waterway, the greater the dangers from this source. Nor does nature herself relent. If the vast forces of the open sea are now less extensive, they are liable to be more concentrated. Winds become funnelled, and there are unexpected crosscurrents. Tideways race, and curious eddies may trap the wariest stranger. The very proximity of the looked-for land means that

there is less sea-room for manoeuvre; and the sea floor, perhaps sharpened by rock or wreck, rises up towards the ship's bottom. Nor is it safe for even the most skilful navigator to rely on charts. There are likely to be shifting shoals and sandbanks. Channels may be awaiting a dredger. There may be peculiar local customs or byelaws affecting navigation. Many fine ships, many gallant men, have been lost when their destination was actually in sight. Full fathom five is no more than 30 feet. It was not in the currentless deep that bones were picked in whispers.

It is by reason of these special hazards which attend the movement of ships in and out of port, and because of the special need for local knowledge, that pilotage is required and its use regulated and enforced by Parliament. Of course, there will often be persons without qualification who are ready to offer their services. These are likely to be less costly than the services of qualified persons, since the offerors are spared the expense of acquiring and maintaining and insuring qualifications for performing the duties in question; so there will always be a temptation to shipowners and their servants and agents to avail themselves of the services of unqualified persons. Some persons without professional qualification may be competent, some not: but professional qualification is at least some assurance of competence. In many situations it is enough, and more consonant with liberty, to rely on the good sense of the offeree to choose the degree of competence which suits his purse—for example, a man requiring a haircut. But in some fields the law finds it expedient to enforce qualification and regulation before services are performed. Many villages have crones wise in the concoction of simples: nevertheless Parliament has placed restrictions on the professionally unqualified engaging in the practice of medicine or pharmacy. It is a by-word that barrackrooms and forecloses have their lawyers, and there are others who fancy their skills at drafting or advocacy; nevertheless professional practice is limited to those examined and approved by and subject to the discipline of the Inns of Court or the Law Society. Similarly, Parliament has provided for the licensing of qualified pilots and made provision for their use.

*The 'mischief'—the statutory context*

The massive Merchant Shipping Act 1894, Part X of which was concerned with pilotage and was replaced by the Pilotage Act 1913, had as a principal purpose the establishment of rules to promote safety and welfare, with criminal sanctions against their non-observance. Of its manifold provisions, apart from the pilotage provisions, I need only mention one, because there is an analogous provision in relation to pilotage. Part II of the 1894 Act, dealing with masters and seamen, at its very outset stipulates for certificates of competency to be held by ships' officers, such certificates only to be granted after examinations.

The attitude of Parliament is more specifically demonstrated by the preamble to the first statutory precursor of the 1913 Act—the Pilotage Act 1716:

'Whereas there hath been time out of mind, and now is, a very useful and well regulated society or fellowship, of pilots of the Trinity-House of Dover, Deal and the Isle of Thanet, who have always had the sole piloting and load-manage of all ships and vessels from the said places up the rivers of Thames and Medway: and whereas by the usage and good rules and orders of the said society every person must appear at a court of load-manage, and be publickly examined by some of the elder and more experienced members of the said society and fellowship, touching his skill and abilities in pilotage, before he is to be admitted a member of the said society or fellowship, or ought to undertake the conducting and piloting of any ship or vessel from the before-mentioned places up the said rivers, whereby ignorant and dangerous persons have been prevented from undertaking such pilotage; and there hath been from time to time a sufficient



number of safe and able pilots for the said rivers maintained and kept up: And whereas notwithstanding the many and great advantages of the said society or fellowship to the publick, several unqualified persons have of late taken upon them the piloting and conducting of ships and vessels by and from the places before-mentioned up the said rivers of Thames and Medway, who have not been admitted into the said society or fellowship, or undergone any examination of their abilities for such service, whereby the said useful society or fellowship hath been much discouraged, several ships and vessels, with their cargo and mariners, have been lost or in utmost danger and hazard: For remedy thereof be it therefore enacted . . .

It is not necessary for your Lordships to be satisfied that the unqualified pilots were correctly described as 'ignorant and dangerous persons' or that 'several ships and vessels, with their cargo and mariners' had truly 'been lost or in the utmost danger and hazard' by reason of such unqualified pilotage. In order to construe the Act or its re-enactments it is enough—indeed, necessary—to recognise that this was the opinion expressed by Parliament.

#### *The Pilotage Act 1913*

The provisions of the Pilotage Act 1913 are entirely consonant with the natural, social and economic background which I have ventured to rehearse and with the Parliamentary attitude disclosed in the preamble to the 1716 Act and in the provisions of the Merchant Shipping Act 1894.

Part I of the 1913 Act gives the Board of Trade power to improve pilotage organisation at the various ports of the United Kingdom. Part II deals with general pilotage law. Section 7 (1) enables the Board of Trade to make pilotage orders dealing with a number of matters; I need set out only two of them:

'(c) define the limits of pilotage districts, distinguishing as respects any pilotage district in part of which pilotage is compulsory and in part of which pilotage is not compulsory, the part of the district in which pilotage is compulsory'

I shall call the latter 'a compulsory pilotage district', the other 'a non-compulsory pilotage district'. It is not disputed that the act charged as an offence against the respondent was committed in a compulsory pilotage district.

'(i) authorise, where it appears expedient, any pilotage authority to make byelaws providing for the grant of certificates (in this Act referred to as deep sea certificates) certifying that persons are qualified to act as pilots of ships for any part of the sea or channels outside the district of any pilotage authority, so, however, that a pilot holding such a certificate shall not be entitled to supersede any other person as pilot of a ship'

'Any other person' must at least include, if not be assumed to refer only to, a person lawfully acting as a pilot of a ship but not licensed under the Pilotage Act. Yet the draftsman here went to the trouble of stipulating expressly that the pilot holding the deep sea certificate had no right in such circumstances to supersede the other pilot; whereas, significantly, there is no such limitation in s 32, which makes provision as to movements of ships within harbours.

Sections 10 to 15 inclusive deal with compulsory pilotage—stipulating where it is obligatory and what are its legal incidents. Section 11 (1) reads as follows:

'Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an

excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship.'

I shall for convenience refer to anyone who comes within either paragraphs (a) and (b) as 'a qualified pilot', and anyone who falls outside either paragraph as an 'unqualified pilot'; but it should be noted that the 1913 Act sometimes (confusingly though, on strict analysis, correctly) uses 'pilot licensed for the district' to cover both (a) and (b), and that the 1894 Act and its precursors use 'qualified pilot' where the 1913 Act uses 'licensed pilot' and deal somewhat differently with masters and mates holding pilotage certificates (though the final result is similar—see s 599 of the 1894 Act). The ship in question in the instant appeal was not 'an excepted ship' either by statutory definition or under the byelaw-making powers contained in s 11 (3) and (4).

It will be noticed that, under s 11, in certain circumstances pilotage by a qualified pilot may be compulsory within a non-compulsory pilotage district and not compulsory within a compulsory pilotage district. But navigation without a qualified pilot is not automatically made a criminal offence even when pilotage is compulsory. The reason for this is obvious—a qualified pilot may not be available (see *Muller v Trinity House* (1)). So Parliament has stipulated that the offence is only committed after a licensed pilot has offered to take charge of the ship, s 11 (2) providing:

'If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.'

I venture to emphasise that this subsection is not limited to compulsory pilotage districts, but extends to something which (as I have shown) is different, namely, 'circumstances in which pilotage is compulsory under this section'.

The machinery to ensure that a licensed pilot can offer to take charge of the ship is contained in s 43, which obliges the master of the ship to signal that he requires a pilot. The section reads as follows:

'(1) The master of a ship (other than an excepted ship) shall when navigating in circumstances in which pilotage is compulsory under this Act, display a pilot signal, and keep the signal displayed until a licensed pilot comes on board.

'(2) The master of a ship, whether navigating in circumstances in which pilotage is compulsory or not, which is being piloted in a pilotage district by a pilot not licensed for the district, shall display a pilot signal and keep the signal displayed until a licensed pilot comes on board.

'(3) If the master of any ship fails to comply with this section, he shall be liable in respect of each offence to a fine not exceeding twenty pounds.'

This section is of great importance for the construction of the Act. It provides separately for cases where the ship is navigating in circumstances in which pilotage is compulsory under the Act (sub-s (1)) and those where, whether or not pilotage is compulsory, the ship is being piloted in a pilotage district (not, be it noticed, merely a compulsory pilotage district) by an unqualified pilot (sub-s (2)). Why should a ship being piloted by an unqualified pilot and navigating in circumstances in which

(1) [1925] 1 KB 166, [1924] All ER Rep 706.

pilotage is not compulsory have nevertheless to display a pilot signal and keep it displayed until a licensed pilot comes on board? The only possible answer is that it is so that the licensed pilot may thus supersede the unlicensed. If a qualified pilot is on board, the master must, again under sanction of penalty, cause a pilot flag to be exhibited (s 41)—obviously so as to save any other licensed pilot from offering his services unnecessarily.

Section 16 confers on pilotage authorities power to license pilots for their districts. Section 17 confers on pilotage authorities extensive power to make byelaws, subject to confirmation by the Board of Trade. By s 17 (1) (q) byelaws may 'provide for any matter for which provision is to be made or may be made under this Act by byelaw'. But there is no power to make a byelaw derogating from the right of a licensed pilot to supersede an unqualified pilot under s 30 or from the consequences of that right.

By s 23 a pilotage authority may grant a pilotage certificate (the type of certificate referred to in s 11 (1) (b)) to the master or mate of a ship 'if, after examination, they are satisfied that, having regard to his skill, experience, and local knowledge, he is capable of piloting the ship of which he is master or mate within their district'. This is yet another indication of the importance Parliament attached to a pilot having demonstrated his qualification to the competent authority.

Before I come to the two crucial sections on which this appeal turns, ss 30 and 32, there is a further group of provisions to which I must refer as an aid to construction of the Act. I can sum them up by saying that they are designed to ensure the competence and good conduct of licensed pilots. By s 17 (1) a pilotage authority's byelaw-making powers extend to

'(a) determine the qualification in respect of age, physical fitness, time of service, local knowledge, skill, character, and otherwise to be required from persons applying to be licensed by them as pilots, provide for the examination of such persons, and fix the term for which a licence is to be in force, and the conditions under which a licence may be renewed . . .

'(c) provide generally for the good government of pilots licensed by the authority, and of apprentices, and in particular for ensuring their good conduct and constant attendance to and effectual performance of their duties, whether at sea or on shore . . .

'(e) provide for the punishment of any breach of any byelaws made by them for the good government of pilots or apprentices by the infliction of fines . . .'

Section 26 enables a pilotage authority to suspend or revoke a pilot's licence in case of an offence under the Act or breach of byelaw or other misconduct affecting capability as a pilot or failure in or neglect of duty as a pilot or incompetence to act as such. Section 46 provides (*inter alia*) that it is a punishable offence for any pilot, when piloting a ship, to endanger the ship or the life or limb of any person on board by wilful breach or neglect of duty or by reason of drunkenness. (If the respondent was, as his counsel contended, not a pilot piloting a ship for the purposes of the Act it would have been no offence by him under this section to have endangered ship, life or limb by wilful breach or neglect of duty or by reason of drunkenness.) Section 48 (1) enacts a number of offences which may be committed by a licensed pilot 'either within or without the district for which he is licensed', including acting as pilot when in a state of intoxication. (Of course, the respondent, not being a licensed pilot, could not be guilty of any offence under this section.)

#### Sections 30 and 32

In the light of the foregoing I turn to the two sections on whose construction and interaction this appeal finally depends. I must set them out in full:

'30.—(1) A pilot licensed for a district may supersede any pilot not so licensed who is employed to pilot a ship in the district.

'(2) Where a licensed pilot supersedes an unlicensed pilot the master of the ship shall pay to the latter a proportionate sum for his services, and shall be entitled to deduct the sum so paid from the sum payable in respect of the services of the licensed pilot. Any question as to the proportion payable to the licensed pilot and to the person whom the licensed pilot has superseded shall be referred to the pilotage authority by whom the licensed pilot has been licensed, and their decision on the question shall be final.

'(3) If in any pilotage district a pilot not licensed for the district pilots or attempts to pilot a ship after a pilot licensed for that district has offered to pilot the ship, he shall be liable in respect of each offence to a fine not exceeding fifty pounds.

'(4) If the master of a ship knowingly employs or continues to employ a pilot not licensed for the district to pilot the ship within any pilotage district after a pilot licensed for that district has offered to pilot the ship, or, in the case of an outward bound ship, without having taken reasonable steps (proof whereof shall lie on the master) to obtain a licensed pilot, he shall be liable in respect of each offence to a fine not exceeding fifty pounds.

'(5) If any person other than the master or a seaman being bona fide one of the crew of the ship is on the bridge of a ship, or in any other position (whether on board the ship or elsewhere) from which the ship is navigated, that person shall, for the purposes of this section, be deemed to be piloting the ship unless the contrary is proved.

'32.—(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as may be provided by byelaw in the case of ships being so moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock: Provided that a byelaw shall in every case be made for the purpose aforesaid in any pilotage district where any class of persons other than licensed pilots were in practice employed at the date of the passing of this Act for the purpose of changing the moorings of ships or of taking ships into or out of dock.

'(2) A ship whilst being navigated within any closed dock, lock, or other closed work in a pilotage district shall notwithstanding anything in this Act be deemed to be navigating in a district in which pilotage is not compulsory.'

The purpose of s 32 (1) is obvious, and entirely consonant with the manifest general purpose of the Act, which was to ensure, in the interest of the safety of shipping in crowded waters, that, in general, it is moved only under the control of qualified pilots. 'Harbour' is interpreted in s 742 of the Merchant Shipping Act 1894. Movement within a harbour which forms part of a pilotage district is inherently likely to be attended with some risk both to the ship being moved and to other shipping. It seems likely that the main purpose of s 32 (1) was to forestall any argument that a ship being moved by tug and not under her own propulsion is not a ship navigating in a pilotage district, and this purpose throws some light on the probable scope of the proviso. However, I accept the argument for the respondent that the object of the proviso was to ensure that a byelaw should be made to preserve an existing employment usage of unlicensed pilots for the purpose of changing moorings or movement in or out of dock. The crux of the appeal is, therefore, whether, on the proper construction of the Act, an unlicensed pilot so employed is liable to supersession under s 30. An alternative way of posing the question is to ask which of ss 30 and 32 is the overriding section.

*Sections 30 and 32: which overrides?*

I have myself no doubt that it is s 30 which is overriding; and that, even though an unlicensed pilot may under byelaw be lawfully employed to change moorings etc, he is nevertheless liable to supersession by a licensed pilot.

First, such a construction is the one most consonant with the purpose of the Act. The choice is not between licensed pilots and experienced watermen. There is not a word in the Act about watermen, experienced or otherwise. The choice is between qualified pilots and any others whatever, including 'ignorant and dangerous persons'. Piloting a vessel for two miles in the waters of a busy harbour like the Port of London is not to be dismissed with a shrug as if it were of no more moment than pushing a bicycle across a country lane. It is not necessary to envisage an intoxicated pilot for it to be apparent which construction best fits the purpose of the Act, whether to be collected from its social or its statutory setting.

Secondly, the appellant's construction seems to me to be the only one consistent with Parliamentary sense. Why should this Act solemnly proclaim the right of supersession in s 30 if it meant no more than that a licensed pilot could supersede an unlicensed pilot provided the former should be piloting the ship and the latter should not be? It goes without saying that someone who has a right to do a thing may supersede someone who has no right to do it: it does not need a Parliamentary enactment to establish that. A right of supersession only needs statutory stipulation if the person to be superseded is otherwise lawfully conducting the operation. This is borne out by s 30 (2), whereby on supersession the unlicensed pilot is to be proportionately paid for his services; it is not to be thought that Parliament would provide that he should be paid for services which he ought not to be performing at all at the moment of supersession.

Thirdly, as I have already ventured to indicate, s 43 only makes sense if the licensed pilot is entitled to supersede the unlicensed pilot even when the ship is navigating in circumstances in which pilotage is not compulsory (such as those *ex hypothesi* envisaged by the proviso to s 32 (1)).

Fourthly, separate penalties are provided by ss 11 and 30 respectively. In other words, unqualified pilotage after a licensed pilot has offered to take charge of the ship in circumstances in which pilotage is compulsory is one offence, and failure to permit supersession is another, different one. This could only be if there is a right of supersession even though the ship is lawfully navigating in a pilotage district under an unqualified pilot, i.e. that the circumstances are not such that pilotage is compulsory.

Fifthly, if the draftsman had intended that unqualified pilots enjoying rights by virtue of a byelaw made under s 32 (1) should not be liable to supersession by a licensed pilot under s 30, he had two everyday tools of draftsmanship available to him to make this plain. The first was to have started s 30 (1) with the words 'Subject to the provisions of this Act . . . ' or, better still, 'Subject to any byelaw made under subsection (1) of section 32 of this Act . . . ' The second was to have used in s 32 (1) the words 'Notwithstanding anything in this Act . . . ' The draftsman used neither of these common statutory phrases. He did not use them, not because he was ignorant of them, but because he did not wish to use them: their use would have contradicted his purpose. The point is reinforced by the fact that the draftsman did use the words 'notwithstanding anything in this Act' in sub-s (2) of s 32. (See also ss 16 'Subject to the provisions of this Act', 24 and 54 'notwithstanding anything in this Act'; also ss 8 (2), 10, 14, 15 (1) for similar expressions.) (cf also the Pilotage Acts 1808, s 21, 1812, s 34, 1825, s 63, 'Nothing in this Act contained shall be construed to prevent . . . ' The omission of these words in comparable later provisions must have been, at the very least, to forestall argument that what is now a byelaw under the proviso to s 32 (1) overrode what is now s 30.)



Sixthly, although the Act gives express power to exempt certain classes of ships from compulsory pilotage (s 11 (3) (f) and (4)) and to exempt a ship changing moorings or being taken into or out of any dock from being deemed to be a ship navigating in a pilotage district (s 32 (1)), there is no power to make any byelaw derogating from the right of a licensed pilot to supersede an unlicensed one. The byelaw relied on by the respondent does not, indeed, purport to give exemption from supersession: it is expressly to give exemption from compulsory pilotage.

Seventhly, I have already drawn attention to the fact that the draftsman provided expressly that possession of a deep sea certificate gives no right of supersession; this suggests that without express provision the right of supersession given by s 30 might be considered to extend even to impinge on lawful pilotage by unlicensed pilots outside the pilotage district—a fortiori to lawful pilotage by unlicensed pilots within a pilotage district.

Eighthly, the history of this legislation gives some further slight indication that the appellant's construction is correct. In the Merchant Shipping Act 1854, it was s 360 which empowered a qualified pilot to supersede an unqualified pilot (corresponding to s 30 (1) and (2) of the 1913 Act). Section 361 provided for a penalty if an unqualified pilot piloted the ship after a qualified pilot had offered to take charge of her (corresponding to s 30 (3) of the 1913 Act). Section 362 provided for occasions on which an unqualified pilot might take charge of a ship as pilot within any pilotage district without subjecting himself or his employers to any penalty. They included occasions when no qualified pilot had offered to take charge of the ship (or made a signal for that purpose) and circumstances roughly corresponding to those envisaged by the byelaw-making power in the proviso to s 30 (1) of the 1913 Act. But in the 1894 Act the order of these provisions was changed: the occasions on which an unqualified pilot might act without penalty were dealt with in s 596; the power of a qualified pilot to supersede one unqualified was dealt with in s 597; the provision for penalties as to employment of an unqualified pilot after offer from a qualified pilot was dealt with in s 598. Although this change of order did not alter the substance of the pre-existing law, it is nonetheless significant. For the order of the sections in the 1894 Act is the logical order if the qualified pilot has the right of supersession notwithstanding that the unqualified pilot is acting lawfully (e.g. for the purpose of changing moorings); whereas if the argument for the respondent is right (i.e. that there is no right of supersession so long as the unqualified pilot is acting lawfully, e.g. for the purpose of changing moorings), the 1894 order of sections was misleading and there should have been no change from the 1854 order.

Ninthly, scholarly comment supports the construction contended for by the appellant. Most of the textbooks are equivocal and inconclusive on the crux of this appeal—namely, whether s 30 is to be read subject to the proviso to s 32 (1), or vice versa—merely setting out the provisions of the statute. But all those textbooks—including two of particular authority in view of the eminence of their editors—which do deal with the point support the appellant unequivocally. The 14th edition of Abbott on Shipping was edited in 1901 by the famous admiralty lawyers, J B Aspinall QC (he had died before the appearance of the edition) and B C Aspinall KC. Commenting on the Merchant Shipping Act 1894, the learned editors wrote at p 31:

'From a perusal of the general enactment it appears that the following are the occasions on which an unqualified pilot may act without subjecting himself or his employers to a penalty'

and then set out the three situations stated in s 596 (including change of moorings), adding, 'A qualified pilot may, however, supersede an unqualified pilot' (citing s 597). Counsel for the respondent was constrained to submit that this was an incorrect

proposition, which he did undauntedly. But then there is MacLachan on Merchant Shipping. The editions previous to the 6th (like the early editions of Abbott) did not deal with which of ss 30 and 32 of the 1913 Act (or their respective statutory predecessors) is overriding. But the co-editor of the 6th edition of 1923 was an admiralty lawyer even more eminent than the Aspinalls, Mr A T Bucknill (later BUCKNILL LJ). It was stated at p 208: 'A licensed pilot is always entitled to supersede an unqualified pilot', citing s 30. This statement was repeated in the 7th edition, edited by two other great admiralty lawyers, Mr G St Clair Pilcher (later PILCHER J) and Mr O L Bateson (later QC). Finally, there is Duckworth's Principles of Marine Law (4th edn, p 171):

'At one time it was permissible for unlicensed pilots to act as pilots under special circumstances, especially when no licensed pilot was available. And even under the Pilotage Act, 1913, persons who are not licensed may, when the byelaws permit it, be employed in moving a ship within a harbour for the purpose of changing her moorings, or of taking her into or out of dock. But when a licensed pilot offers himself, any unlicensed person who has been employed is immediately superseded.'

In my view, every resource for statutory interpretation operates in favour of the appellant's construction—the objective of the legislation as described from both the social and legislative context, illumination from all other relevant provisions of the Act, the commentaries of authoritative writers and the plain meaning of the actual language in question. It is to this last that I now turn.

#### *Conclusion on s 30 (3)*

Ever since the end of the 15th century judges have been complaining about obscurity and ambiguity in the drafting of Acts of Parliament; and, presumably, the only reason why they did not do so before that was because they were then themselves the draftsmen. It therefore seems to me a little hard that the draftsman of s 30 (3) should not be given the credit of meaning exactly what he said in plain terms—particularly when the ostensible meaning of the words is reinforced by the considerations which I have been venturing to urge on your Lordships. I come finally, then, to the crucial words of the subsection under which the respondent was prosecuted.

'If in any pilotage district [the alleged offence took place within the London pilotage district] a pilot not licensed for the district [such was the respondent] pilots or attempts to pilot a ship [the respondent piloted a ship in every ordinary sense of those words] after a pilot licensed for that district has offered to pilot the ship [the appellant, a pilot licensed for that district, had offered to pilot the ship], he shall be liable in respect of each offence to a fine not exceeding fifty pounds'

—these words, at least, do not admit of dispute. In my view, therefore, the respondent was rightly convicted, and the appeal should be allowed.

I have naturally been dismayed to find that my noble and learned friends take a different view on what seems to me to be so clear and unambiguous. This has caused me to re-examine closely the arguments for the respondent which have found favour with them, and to cross-check the construction which I myself venture to favour with as close and rigorous a linguistic analysis as I could manage. Nevertheless, I have found it impossible, with all deference, to change my view. But the appeal turns on a pure point of statutory interpretation, however important to the lives of the people for whose benefit the Pilotage Act was passed. To set out these further deliberations of mine would, therefore, I cannot but feel, be an unjustifiable trial of your Lordships' patience. Indeed, I have only ventured to set out at such length the positive

arguments which have weighed with me in case they might be of some assistance should Parliament ever wish to reconsider the matter.

I would, however, like to refer to one final matter. The introduction to Digby and Cole's Pilotage Law shows that the Pilotage Act 1913 was framed with reference to the recommendations of a Departmental committee. It may be that their report would have thrown light on the disputed intention of Parliament expressed in the Pilotage Act. Consonantly with your Lordships' practice we have not looked at that report. There are weighty considerations in favour of such a practice. But the issue is generally posed as if the choice lay between the adduction of all relevant extra-statutory material (including reports of debates in Parliament) in every case, on the one hand, and the adduction of no such material in any case, on the other. The choice, however, need not necessarily be so stark: there might be some material only, and then in only certain specific circumstances, in respect of which present rigidities might be relaxed; and the sanction of costs might be available were courts burdened with material that was less than decisive. Perhaps the matter could be reconsidered on some such lines.

**LORD KILBRANDON:** I have had the advantage of reading the speech prepared by my noble and learned friend, LORD PEARSON. I agree with it, and I would therefore dismiss this appeal.

**LORD SALMON:** I have had the advantage of reading the speech prepared by my noble and learned friend, LORD PEARSON. I agree with it, and I would therefore dismiss this appeal.

*Appeal dismissed.*

*Solicitors: Holman, Fenwick & Willan; Ingledew, Brown, Bennison & Garrett.*

*Reported by G F L Bridgman Esq., Barrister.*

### HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD DIPLOCK AND LORD SALMON)

12th, 13th, 14th June, 19th July 1972

#### DIRECTOR OF PUBLIC PROSECUTIONS v MERRIMAN

*Criminal Law—Joint charge—Plea of guilty by one defendant—Other defendant convicted of committing offence independently—Direction to jury—Need to consider question of common purpose.*

It is open to a jury, when trying a joint charge to which one defendant has pleaded guilty, the offence being alleged to have been committed by each on the same and not on separate occasions and when they were together, to convict the remaining defendant of committing independently the offence which is the subject-matter of the joint charge. 'Joint charge' only means that more than one person is being charged, it being permissible within certain rules for two persons to be named in one count, but each person is being charged with having himself committed the offence. There is no need to direct the jury that the accused must have a common purpose or design, or that one is to be regarded as a principal and the other or others as aiding and abetting.

APPEAL by the Director of Public Prosecutions against a decision of the Court of Appeal, reported 135 JP 469, allowing the appeal of the respondent, John Michael Merriman, against his conviction at Manchester Crown Court of, jointly with one Frank Merriman, wounding one William Parry with intent to do him grievous bodily harm.

G Heilpern QC and K J Taylor for the Crown.

T H Pigot QC and A W Bell for the respondent.

Their Lordships took time for consideration.

19th July. The following opinions were delivered.

**LORD REID:** For the reasons given by my noble and learned friend, LORD DIPLOCK, I would allow this appeal and dispose of the case as he suggests.

**LORD MORRIS OF BORTH-Y-GEST:** Frank Merriman and his brother, John Michael Merriman, the respondent, were charged on indictment in September 1970 at the Crown Court at Manchester. The indictment contained two counts. In the first count the statement of offence was: 'Wounding with intent contrary to s 18 of the Offences against the Person Act, 1861.' The particulars of offence were as follows:

'Frank Merriman and John Michael Merriman on the 11th day of July 1970 in the county borough of Rochdale wounded William Parry with intent to do him grievous bodily harm.'

The second count was a charge against John Michael Merriman. The offence charged was: 'Assault occasioning actual bodily harm.' The particulars of offence were as follows:

'John Michael Merriman on the 12th day of July 1970 in the county borough of Rochdale assaulted David Donoghue thereby occasioning him actual bodily harm.'

When the accused were arraigned Frank Merriman pleaded guilty to the first count. The respondent pleaded not guilty but was prepared to plead guilty to

unlawful wounding. He pleaded not guilty to the second count. The prosecution declined to accept his pleas. Frank Merriman stood down. A jury was then sworn and the trial of the respondent took place on the charges preferred against him.

After the case for the prosecution had been opened the learned commissioner said that he proposed to direct the jury to make up their minds whether the respondent actually stabbed Mr Parry with a knife and that they could dismiss from their minds any question whether he had acted in concert with his brother Frank. The learned commissioner had read the deposition of Mr Parry's evidence. He said:

'It might assist if I say this, having read the evidence of Mr Parry—what view the jury take of his evidence is a matter for them not me—but his evidence is that he says he was actually stabbed by this defendant. I am going to direct the jury to make up their minds about that and dismiss from their minds any question of acting in concert.'

He further said:

'By way of explanation: "I was going to stop the fighting between my brother and Parry"—and I think it would be unsafe for the jury to consider the question of acting in concert if they were unable to accept Mr Parry's evidence in toto because if they accept his evidence completely then what he says is: "I was stabbed by this defendant. I was also stabbed by his brother", and that is what I am going to direct the jury to make up their minds about.'

So—for the reasons he indicated—he thought that it would be better to eliminate any consideration of the question whether the brothers had acted in concert. No reference was made by anyone to the case of *R v Scaramanga* (1) and to later cases which followed it.

The course adopted by the learned commissioner would, I think, seem to everyone to have been both reasonable and sensible. Certainly it was eminently fair to the accused man. Indeed, it was in his favour as eliminating a possibility of his being convicted without its being held that he himself had stabbed Mr Parry with a knife. The clear words of the indictment named him as having wounded William Parry with intent to do him grievous bodily harm. Could it be irrational to direct the jury that they could find him guilty if they were satisfied that he did wound William Parry with intent to do him grievous bodily harm?

The point of law that is raised in the appeal may thus be stated. The count in the indictment coupled the two accused together in a charge of wounding with intent. Is it the law that in those circumstances if one accused pleads guilty to the offence the other accused can only be convicted if he is found to have acted jointly and cannot be convicted if, though it is found that he did wound with intent, his deed was committed independently?

I can briefly narrate the events which bring the point of law for your Lordships' decision. Pursuant to the course that the learned commissioner had said that he would follow he directed the jury that they need not trouble to consider whether there had been a joint or common purpose between the two brothers. In a careful summing-up he gave clear guidance to the jury on the points in issue. The first count related to events that followed a visit by the two brothers and their father to a public house of which Mr Parry was the licensee. Mr Parry thought that they had got into a condition that did not warrant their being served with more to drink and that they ought not any longer to be allowed to remain on his licensed premises. He told them and two companions of theirs to leave. Mr Parry was ejecting the party

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.



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<b>CRIMINAL LAW</b> - Obtaining property by deception - Intention permanently to deprive owner - Dishonesty - Post office employee - Post office giro account - Knowledge of no right to overdraw - Cheque drawn when account known to be exhausted - No prospect of account being put in funds before presentation of cheque - Genuine intention to repay when funds became available - Theft Act, 1968, s 15. <i>Halstead v Patel</i> .. .. .	QBD	465
<b>CRIMINAL LAW</b> - Privilege - Legal professional privilege - Documents in possession or control of solicitor - Documents furthering defence of accused person. <i>R v Barton</i> .. .. .	Lincoln CC	614
<b>CRIMINAL LAW</b> - Publicity of proceedings - Committal proceedings - Application by some defendants for order permitting publication of reports of proceedings - Application of order to all defendants including defendants joined later - Criminal Justice Act, 1967, s. 3 (2). <i>R v Blackpool Justices. Ex parte Beaverbrook Newspapers Ltd</i> .. .. .	QBD	225
<b>CRIMINAL LAW</b> - Publicity of proceedings - Committal proceedings - Application for order permitting publication of reports of proceedings - Application made before taking of depositions begun - Criminal Justice Act, 1967, s 3 (2) <i>R v Blackpool Justices. Ex parte Beaverbrook Newspapers Ltd.</i> .. .. .	QBD	225
<b>CRIMINAL LAW</b> - Sending obscene or indecent article through post - Issue of obscenity or indecency - Matter entirely for jury - Admissibility of evidence as to effect of article - Post Office Act, 1953, s 11 (1) (b). <i>R v Stamford</i> .. .. .	CA	522
<b>CRIMINAL LAW</b> - Sentence - Isolated act charged - Plea of guilty to that charge - Statement by prosecutrix - Allegation of other similar acts - Evidence of defendant and of prosecutrix heard by judge - Acceptance by judge of evidence of other similar acts - Sentence passed on that basis. <i>R v Hutchison</i> .. .. .	CA	304
<b>CRIMINAL LAW</b> - Sentence - Youthful offender - Suspended sentence - Conviction during period of suspension - Sentence of 12 months' imprisonment and suspended sentence activated to run consecutively - Overall term amounting to eighteen months - Criminal Justice Act, 1961, s 3 (1) (3). <i>R v Halse</i> .. .. .	CA	77
<b>CRIMINAL LAW</b> - Theft - Property received from or on account of another - Obligation to retain and deal with property in a particular way - Need to prove dishonesty and undertaking of obligation by defendant - Travel agent - Money received from customers for air trips - Money paid into general account of firm - No flights materialising - No money refunded - Theft Act 1968, s 5 (3). <i>R v Hall</i> .. .. .	CA	593
<b>CRIMINAL LAW</b> - Trial - Conviction of alternative offence - Indictment for burglary - Conviction of theft outside building - Criminal Law Act, 1967, s 6 (3). <i>R v Lillis</i> .. .. .	CA	620
<b>CRIMINAL LAW</b> - Trial - Shorthand note - Absence of official shorthand writer - Duty of judge, counsel and officers of court - Steps to ensure that unchallengeable record is made and judge's direction to jury is adequately recorded - Criminal Appeal Rules, 1968, r 18 (3). <i>R v Payne. R v Spillane</i> .. .. .	CA	74
<b>CRIMINAL LAW</b> - Trial - Trial in absence of defendant - Voluntarily waiver of right to be present in court - Defendant absconding during trial before giving evidence. <i>R v Jones</i> .. .. .	CA	543

<b>CUSTOMS AND EXCISE</b> - Importation of prohibited goods - Conspiracy to require possession knowingly and with intent to evade prohibition - Time and place of acquisition - Time and place distant from importation - Not relevant as a defence - No distinction between uncustomed goods and goods prohibited from importation - Customs and Excise Act, 1952, s 304 (a).		
<i>R v Ardalan</i> .. .. .	CA	453
<b>CUSTOMS AND EXCISE</b> - Importation of prohibited goods - Indecent or obscene photographs - 35 mm cinematograph films - Indecency not apparent on mere visual inspection - Customs Consolidation Act, 1876, s 42.		
<i>Derrick v Commissioners of Customs and Excise</i> .. .. .	QBD	294
<b>DANGEROUS DRUGS</b> - Possession - Lawful obtaining of drugs under doctor's prescription - Mistaken belief of defendant that drugs had been destroyed - Subsequent discovery by defendant of drugs originally supplied - Legality of possession - Drugs (Prevention of Misuse) Act, 1964, s 1 (1).		
<i>R v. Buswell</i> .. .. .	CA	141
<b>ELECTIONS</b> - Local government - Failure by returning officer to hold recount when requested - Irregularity not affecting result - Ballot papers - Validity - Paper marked with cross otherwise than in proper place - Paper with name of the candidate left standing and names of other candidates struck out - Representation of the People Act, 1949, s 37 (1) - Local Elections Rules, r 42, r 43 (3).		
<i>Levers v Morris</i> .. .. .	QBD	62
<b>EVIDENCE</b> - Document - Refusal to produce - Public interest - Gaming - Licence - Application to Gaming Board for certificate of consent - Character, reputation and financial standing of applicant - Right of Board to obtain fullest information - Refusal to produce document received in answer to request for information - Gaming Act, 1968, Sch. 2, paras 5, 6.		
<i>Rogers v Secretary of State for Home Department Gaming Board for Great Britain v Rogers</i> .. .. .	HL	574
<b>FOOD AND DRUGS</b> - Samples for analysis - Unwrapped meat pies - Purchase of six pies by sampling officer - Division into three lots each consisting of two pies - Submission of one lot to public analyst - Aggregate of meat in those two pies smaller percentage of their total content than that required under regulations - Liability of seller - Food and Drugs Act, 1955, s 93 (1), Sch VII, Part I, paras 1, 2.		
<i>Skeate v Moore</i> .. .. .	QBD	82
<b>FORCIBLE ENTRY.</b> See <b>CRIMINAL LAW</b> .		
<b>GAME</b> - Killing during close season - Exemption from liability - Deer - Killing on enclosed woodland - Action necessary for preventing serious damage to crops 'on that land' - Killing to prevent damage on adjoining land - Deer Act, 1963, s 10 (3).		
<i>Trall v Buckingham</i> .. .. .	QBD	475
<b>GAME</b> - Killing without licence - Exceptions and exemptions - Deer - Killing on enclosed lands - 'Enclosed lands' - Farmland as distinct from moorland - Deer hit on land with permission running to and dying on neighbouring land - Game Licences Act, 1860, s 4, s 5.		
<i>Jemmison v Priddle</i> .. .. .	QBD	230
<b>GAMING</b> - Betting office - Licence - Application - Notice advertising application - Inclusion of matter additional to that required by statute - Effect on validity of notice - Betting, Gaming and Lotteries Act, 1963, Sch 1, para 6.		
<i>R v Inner London Area (West Central Division) Betting Licensing Committee. Ex parte Percy</i> .. .. .	QBD	273
<b>GAMING</b> - Club - Licensing - Application - Notice - Insertion of matters additional to those mentioned in Gaming Act, 1968, sched 2, para 6 (2).		
<i>R v Leicester Gaming Licensing Committee. Ex parte Shine</i> .. .. .	CA	71
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Appeal to quarter sessions - Finality of decision - Gaming Act, 1968, sched 7, para 4.		
<i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Refusal or cancellation - Grounds - Discretion of licensing authority - Gaming Act, 1968, sched 7, paras 8, 18.		
<i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Club - Registration - Right of proprietary club to be registered - Gaming Act, 1968, Part III, sched 7.		
<i>Tehrani v Rostrom</i> .. .. .	CA	40
<b>GAMING</b> - Lottery - Distribution of money by chance - Chain letter scheme - No identifiable prize fund - Betting, Gaming and Lotteries Act, 1963, s 42 (1) (f)		
<i>Atkinson v. Murrell</i> .. .. .	QBD	379
<b>GAMING</b> - Lottery - Offence - Need to prove prize fund in hands of promoter to which participants have contributed or which is provided by non-participant - Betting, Gaming and Lotteries Act, 1963, s 41.		
<i>Atkinson v Murrell</i> .. .. .	HL	611

when he felt a blow (which proved to be a stab wound) in his back; he turned round and identified the respondent (who had a knife in his hand) as the one who was responsible. Thereafter Mr Parry was stabbed a number of times (some seven in all) by the two brothers. Various matters were raised by the defence all of which were fairly put to the jury. The second count, with which only the respondent was concerned, charged him with assaulting and occasioning actual bodily harm to a police constable who after the incidents outside the public house went to the accused's home.

The jury needed a retirement of only 11 minutes before returning verdicts of guilty on both counts. Frank Merriman was then sentenced to five years' imprisonment. The respondent, who was five years older than his brother (and had a worse record) was sentenced to six years' imprisonment on the first count and to nine months' imprisonment (consecutive) on the second count. In his case there was a six months suspended sentence. It was brought into operation and directed to be consecutive to the other two sentences. That was on 10th September 1970.

The respondent appealed to the Court of Appeal against his conviction on count 1. The first and most prominent ground of appeal (which I feel sure would have mystified the respondent) was that there was misdirection in that the count being a joint count against him and his brother, and, his brother having pleaded guilty, the learned commissioner ought not to have told the jury to ignore the question of acting in concert and of joint design. There was no doubt that the learned commissioner had directed the jury that they need not concern themselves with the question whether or not the accused who was before them had acted in concert with his brother. Applying the decisions in *R v Saramanga* (1) and in *R v Parker* (2) the Court of Appeal, 'although with the utmost reluctance', felt obliged to allow the appeal and to quash the conviction on count 1.

The court held that inasmuch as the charge in the indictment was a joint charge and as Frank had pleaded guilty to it there could only be a conviction of the respondent if it was held by the jury that the two brothers were acting in concert. Having referred to the terms of the summing-up the court held as follows:

'But when one recalls that this was a case where Frank had pleaded guilty to the joint charge, it was not, in the judgment of this court, right to say that to convict [the respondent] on that joint charge, it was sufficient to establish that he started the trouble without adverting to the fundamental allegation that the two accused were acting in concert. We are driven to the conclusion that this jury, who presumably acted on the direction that they were given, may well have asked themselves only one question: Are we satisfied on Mr Parry's evidence that [the respondent] stabbed him in the back? Because of the nature of the charge and of Frank's plea, and in the light of the authorities, we are forced to the conclusion that that was a misdirection. Furthermore, it is a misdirection of such a kind that it would, in our view, be improper to apply the proviso to cure the mischief which resulted therefrom.'

That was on 17th May 1971. A point of law of general public importance was certified as being involved and leave to appeal was given. That left unaffected the sentences other than that on count 1. We were informed by counsel that the respondent (who had been in custody since 29th July 1970) was in fact released from prison on 1st June 1971. The Court of Appeal made no order under the provisions of s 37 of the Criminal Appeal Act 1968. It does not appear whether they considered making an order or whether they thought that there was no occasion to make one.

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(2) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.



The present case illustrates that it is desirable for all concerned to have the provisions of the section in mind.

The point of law which was certified by the Court of Appeal was thus expressed:

'Whether it is open to a jury, when trying a joint charge to which one defendant has pleaded guilty, to convict the remaining defendant of committing independently the offence which is the subject-matter of the joint charge.'

My Lords, I would unhesitatingly answer that question in the affirmative and if authority points to a different conclusion I would say that such authority should no longer be followed. But in answering the question it is important to consider what is meant by a 'joint charge'. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having himself committed an offence. All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established. It might be established in different ways. A's guilt might be proved by showing that he wounded C. A's guilt might be proved by showing that though he did not himself touch C he caused and directed B to do so; or it might be shown that A and B joined together with a common purpose of wounding C so that in effecting that common purpose each was but the accepted agent of the other. So, unless there is some special statutory provision, there is no magic in speaking of a joint charge. If the language of the law is to be used then a joint charge is also a several charge. Indeed, if in one count there is a charge that A and B wounded C it is always possible for either A or B to submit that the circumstances are such that each should be separately tried. The court would decide what course would in all the circumstances be fair and reasonable and in the interests of justice.

My Lords, as was pointed out in *R v Assim* (1), questions of joinder, whether of offences or of offenders, are very considerably matters of practice on which the court, unless restrained by statute, has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules. The current rules in regard to indictments are really a reflection of what has been thought to be fair—fair in the interests of the community in the preservation of law and order; fair in the interests of those who are charged and are tried.

It is only fair that a person should know what is the charge brought against him. In his *Commentaries* Blackstone wrote (bk. 4, p. 318):

'Then the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin) that he may fully understand his charge.'

Prior to the time of George II all indictments were in Latin. By statute it was then provided that they should be in the English tongue.

'it was thought to be of much greater use and importance, that they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby.'

(See 2 Hale's Pleas of the Crown, p. 169 (a).) There could be no doubt at all that in the present case John Michael Merriman fully knew what was the charge against him. Nor can there be any doubt that the indictment conformed with the provisions of s 3 of the Indictments Act 1915. Each accused was informed what was the specific offence or what were the specific offences with which he was charged.

It is furthermore a general rule that not more than one offence is to be charged in a count in an indictment. By r 4 (1) of Sch 1 to the Indictments Act 1915 it is provided as follows:

'A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.'

The question arises: What is an offence? If A attacks B and, in doing so, stabs B five times with a knife has A committed one offence or five? If A in the dwelling-house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down, but I consider that clear and helpful guidance was given by LORD WIDGERY CJ in a case where it was being considered whether an information was bad for duplicity (see *Jemmison v Priddle* (1)). I agree respectfully with LORD WIDGERY that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend on the circumstances. In the present case it was not at any time suggested, and in my view could not reasonably have been suggested, that count 1 was open to objection because evidence was to be tendered that the respondent stabbed Mr Parry more than once.

In connection with the rule to which I have referred the following question arises. If A and B are charged together with wounding with intent does that mean that the offence charged is a different offence from what it would be if they were separately charged with wounding with intent. In my view, for the reasons which I have already given it is not. Although charged together in one count each one is being separately charged and each is only being charged with the one offence. The guilt of A or of B might be proved by showing that the particular accused himself took direct action or it might be proved by showing that he committed his offence by using the hand of another. But if guilt is proved it is guilt of the offence charged and of no different offence and of no more than of the one offence charged in the count.

In this connection we were helpfully referred to the judgments of STREET CJ and OWEN and HERRON JJ in *R v Fenwick* (2) in the Court of Criminal Appeal in New South Wales. The two accused were in one count jointly charged with rape and the indictment did not contain separate counts alleging independent crimes of rape by each accused. The two accused were driving a girl home after a dance. Each one had intercourse with her. She said that it had been against her will. They said that she had consented. On appeal it was contended that it was not open to the jury, if they found an absence of common purpose, to consider the individual cases of the two accused as if separate indictments had been preferred against them for the act of rape which it was alleged that the particular accused had committed. The contention failed. STREET CJ said:

'Indictments are to be read jointly and severally and this indictment, as is the

(1) Ante p 230; [1972] 1 All ER 539.

(2) (1953), 54 New South Wales 147.

common practice in indictments in cases of murder, although it is framed against two accused, is to be regarded as a joint and several indictment of those accused.' He referred to Hale's Pleas of the Crown (vol 1, p 46), where there was a reference to an indictment against a husband and wife and where it was pointed out that

'every indictment is as well several, as joint; and as upon such an indictment the wife may be acquitted, and the husband found guilty, so e converso the wife may be convicted, and the husband acquitted; for the indictment is in law joint, or several, as the fact happens...'

It was also said that 'every indictment of that nature is joint or several, as the matter falls out upon the evidence'. As to the joining of persons and offences in one indictment, see also Hale's Pleas of the Crown, vol. 2, p. 173.

If A and B and C are jointly charged with the murder of X and if A alone is found guilty I cannot think that it could be said that he is beign convicted of a different offence from that with which he was charged. If A and B are jointly charged in one count with wounding C and if A and B are tried together there are various conclusions as to the facts which a jury might reach. The jury might decide that both A and B were guilty because they had joined together (or acted 'in concert') to do what was done; the jury might decide that A alone was guilty; the jury might decide that B alone was guilty; the jury might decide that A and B were both guilty though what they did was not done in concerted action. It would be a singular state of the law if the jury had to be told that the last three possibilities were not open to them because the charge laid was a limited or circumscribed one, or alternatively if the jury had to be told that if they thought that each accused had separately wounded C they could convict either A or B but not both of them.

In *R v Scaramanga* (1) there were two joint counts against two persons: the first was a charge of causing malicious damage; the second was of occasioning actual bodily harm. Both accused were convicted. One of the two appealed. His conviction on the second count was quashed. In regard to the first count, it being held that the two accused had not acted in concert, the question arose whether on the joint count of causing malicious damage each could be convicted of independent acts, there being uncontroverted evidence that each had caused part of the damage. The conclusion of the court was that except where provided by statute 'when two persons are jointly charged with one offence, judgment cannot stand against both of them on a finding that an offence has been committed by each independently'.

It is this conclusion, loyally followed in subsequent cases such as *R v Parker* (2) and *R v Rowlands* (3), which now calls for examination. In the latter two cases the law (as a result of the decision in the *Scaramanga* case) was stated to be that if two persons are jointly charged with one offence and if one is convicted the only charge of which the other can be convicted is that of also taking part in the joint offence, but, on the other hand, that one of the two could be convicted of committing the offence independently though both of them could not be so convicted. It is said that the basis of this is that if only one offence is charged it is not open to the court or jury to find two offences proved. My Lords, I feel that it would be a matter of great regret if the law and practice in the criminal courts had to remain bound by such technical, elusive and involved rules.

The decision in *R v Scaramanga* was reached because it was considered that older authorities required the decision. But, in my view, the decision is not based on sound reasoning and should now be overruled. If A and B are jointly charged and

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(2) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

(3) [1972] 1 All ER 306; [1972] 1 QB 424.

if the prosecution set out to prove that they acted in concert but in fact prove that they acted separately each one is shown to have committed the offence with which he was charged. It is not as though either would be shown to have committed more than one offence or to have committed a different offence from that with which he was charged. It would merely be that proof that he committed the offence of which he was charged would have been presented on an alternative basis. In some cases the gravity of an offence does not vary according to whether it is committed separately or in conjunction with others acting pursuant to a common purpose. If A and B and C are jointly charged with murdering X no one of them who is found guilty is guilty of a different offence or of a greater offence according to whether someone else is also found guilty. In such a joint charge as that A and B and C wounded X with intent it may well be that the gravity of the offence of any one who is convicted will be greater according to whether an attack was an individual or separate one or was an attack in which two or three people set upon one person. But the offence itself is not different in those differing circumstances. The court for the purposes of assessing punishment would have no difficulty in ascertaining, if necessary by a question to the jury, what was the true view of the facts.

The two cases which mainly influenced the court in *Scaramanga's* case were *R v Hempstead and Hudson* (1) and *R v Hurse and Dunn* (2). In the first of these there was a joint charge of stealing and the jury found that the two accused had not acted together. The complication arose because one was found guilty of a capital offence and the other of simple larceny. In the very short report it was stated that judgment could not be given against both. But neither in that case nor in the second of the above mentioned cases do I find a sufficient or satisfactory statement of reasoning. In the second case the two accused were jointly charged with uttering counterfeit coin. There were three counts. The prosecution case was that the two accused had jointly prepared the counterfeit coin and that though they had uttered the coin at different shops when apart from each other they had intended to share the proceeds. The result, so the prosecution contended, was that they were jointly guilty of each act of uttering but that in any event one could be found guilty on one count and the other on one of the other counts; if necessary the prosecution elected to proceed against Dunn on the first count and against Hurse on the second. The judge allowed the trial to proceed on that basis. In fact the jury found them both guilty of the whole. The case shows, however, that the court accepted that on a count alleging that the two acted jointly it would be open to the jury to convict one even though he acted separately. If that is so, I can see no valid or logical reason why both should not be convicted of the offence charged even though each acted separately in committing it.

There were two further cases referred to in *Scaramanga's* case as authority for what was laid down. In the first of these, *R v Messingham* (3), the two accused were jointly indicted on a charge of receiving. The evidence pointed to the conclusion that John received goods which he knew to be stolen and that Mary later received the goods from John. They were both convicted, but at the trial it was contended for Mary that she could not be legally convicted with John, first because the offence of John was complete before she took any part in the transaction, and, secondly, because she did not receive the goods from an unknown thief, as alleged in the indictment, but from her son. The judges at a meeting took the view that on a joint charge it was necessary to prove a joint receipt and that, as Mary was absent when the son received, it was a separate receipt by him. It may well be that the case shows that while John could be separately convicted though he was charged jointly, Mary could not be convicted

(1) (1818), Russ & Ry 344.

(2) (1841), 2 Mood & R 360.

(3) (1830), 1 Mood CC 357.

because what was really alleged against her was a separate and different receiving which had not been made the subject of a charge against her. In the later case (in 1851) of *R v Dovey and Gray* (1) there was one count which was a joint charge of receiving. Both were convicted though at the trial counsel for Gray contended that the evidence showed separate acts of receiving. The jury were asked whether they found a joint or separate receiving: they answered that Dovey received at one place and Gray at another and that 'the prisoners were not together at the time'. The judges held that the first receiver Dovey was properly convicted and the report records:

'and as *R v Messingham* shews that several persons cannot be convicted of distinct felonies which are charged in an indictment as a joint felony, the evidence ought to have been confined to the case of the first receiver, and a verdict of acquittal taken in favour of Gray.'

From these short reports and without seeing the precise terms of the indictment it is not possible to draw firm conclusions but it may well be that separate receivings would be separate offences and that to have convicted Gray would have meant convicting her of an offence with which she had not been charged. It seems very probable, as LORD PARKER CJ pointed out, that s 14 of the Criminal Procedure Act 1851 owed its origin to the decision in *R v Dovey and Gray*.

I do not propose to refer to other cases (decided mainly in the first half of the last century) which were cited to us. I have not found in them any adequate basis of reasoning to support the technical and highly inconvenient rule which was laid down in *Scaramanga's* case. For the reasons which I have given I consider that if A and B are jointly charged with wounding C it is open to the prosecution to secure a conviction of both A and B on the ground that they acted jointly or (no matter how either A or B has pleaded) to secure a conviction of either A or B or of both of them on the ground of an independent commission of the offence.

I express no opinion whether the Court of Appeal ought in this case to have applied the proviso. If the law had been as contended for on behalf of the respondent in the Court of Appeal, then inasmuch as Frank had pleaded guilty to the joint charge there could only have been a conviction of the respondent if the jury were satisfied that he had acted in concert with his brother. Whatever I may surmise as to this I have not seen the evidence. The learned commissioner appears to have had some doubt whether the brothers had acted in concert. By his summing-up he deprived the respondent of the chance of an acquittal on the basis (had *Scaramanga* and the other cases been good law) that there had not been any concerted action.

For the reasons which I have given I consider that the course followed by the learned commissioner at the trial was correct. I would therefore allow the appeal and restore the conviction.

**VISCOUNT DILHORNE:** The respondent, John Michael Merriman, was on 10th September 1970 convicted of two offences at the Crown Court at Manchester. He and his brother Frank were jointly charged on an indictment which contained two counts. The first count read as follows:

'First Count

**'STATEMENT OF OFFENCE**

'Wounding with intent contrary to s 18 of the Offences against the Person Act, 1861.

**'PARTICULARS OF OFFENCE**

'Frank Merriman and John Michael Merriman on the 11th day of July 1970 in the county borough of Rochdale wounded William Parry with intent to do him grievous bodily harm.'

(1) (1851), 15 JP 69.



The second count charged the respondent with assault occasioning actual bodily harm on David Donoghue on 12th July 1970.

Frank Merriman pleaded guilty to count one and the respondent not guilty to both counts. On conviction the respondent was sentenced to six years' imprisonment on the first count and to nine months' imprisonment on the second. A suspended sentence of six months' imprisonment was also brought into operation and it was ordered that the sentences should run consecutively.

On 17th May 1971 the Court of Appeal quashed the respondent's conviction on the first count and, on the application of the prosecution, granted a certificate for leave to appeal to this House. By virtue of s 2 (3) of the Criminal Appeal Act 1968 the order of the Court of Appeal quashing the conviction operated as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal.

At the time his appeal was allowed the respondent was in custody. As a result of it, he had only to serve the sentence imposed on him on conviction on the second count and the sentence which had been suspended. Having served those sentences he was, on 1st June 1971, released from custody. Section 37 of the Criminal Appeal Act 1968, so far as material, is in the following terms:

'(1) The following provisions apply where, immediately after a decision of the Court of Appeal from which an appeal lies to the House of Lords, the prosecutor is granted or gives notice that he intends to apply for leave to appeal.

'(2) If, but for the decision of the Court of Appeal, the defendant would be liable to be detained, the Court of Appeal may make an order providing for his detention, or directing that he shall not be released except on bail . . . so long as an appeal to the House of Lords is pending . . .

'(5) Where the Court of Appeal have power to make an order under this section, and . . . no such order is made . . . the defendant shall not be liable to be again detained as a result of the decision of the House of Lords on the appeal.'

It does not appear from the record that the question whether an order should be made under this section either for the respondent's continued detention or for his release on bail was considered by the Court of Appeal or that any application for such an order was made to the court. The prosecution was not then being conducted by the Director of Public Prosecutions.

The consequence is that if it now be held that the respondent was rightly convicted of wounding with intent, the conviction will be restored but he will escape all punishment for that offence which the evidence and the sentence of six years' imprisonment shows to have been of a most serious character. It is to be hoped that the provisions of this section will be brought to the attention of the court in all cases where the prosecution seek leave to appeal to this House from the quashing of a conviction and sentence of imprisonment.

At the beginning of the trial the commissioner, his Honour Judge Steel, made it clear that he proposed to direct the jury to make up their minds about whether the respondent stabbed Mr Parry and to dismiss from their minds any question of the two brothers acting in concert. In his summing-up he directed the jury that the issue which they had to try was whether on the evidence they were convinced that the respondent had wounded Mr Parry with intent to do him grievous bodily injury. Mr Parry had testified that, as he was getting the respondent and his brother out of his public house, he felt a blow in the small of his back. He did not at the moment realise that he had been stabbed and that a deep wound had been inflicted on him in the region of his kidneys. He turned round and grabbed the respondent by the sleeve. He said that the respondent had a knife in his hand. In all he appears to have

been stabbed seven times. The commissioner told the jury that he was not going to allow the case to go to them on the basis of joint responsibility, one brother helping the other, because they had either to accept Mr Parry's account or find the respondent not guilty.

The judgment of the Court of Appeal was delivered by EDMUND DAVIES LJ. Following the decision of the Court of Criminal Appeal in *R v Scaramanga* (1) and of the Court of Appeal in *R v Parker* (2) he said:

'when one recalls that this was a case where Frank had pleaded guilty to the joint charge, it was not, in the judgment of this court, right to say that to convict [the respondent] on that joint charge it was sufficient to establish that he started the trouble without adverting to the fundamental allegation that the two accused were acting in concert.'

He held that the failure to direct the jury as to their acting in concert was a misdirection such as to lead to the conviction being quashed and of such a kind that it would be improper to apply the proviso.

No criticism can be made of the form of the indictment. It complies with the rules contained in Sch 1 to the Indictments Act 1915, which have the force of statute. Rule 4 (1) of those rules is as follows:

'A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.'

This rule did not make new law. In the first edition of Archbold's Pleading and Evidence in Criminal Cases it is stated at p. 25:

'The defendant must not be charged with having committed two or more offences in any one count of the indictment; for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like. The only exception to this rule is to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended.'

Since the redefinition of burglary in the Theft Act 1968 there is no longer that exception. A count will not only be bad if it charges two different offences but also if it charges the commission of one offence on more than one occasion, for it then charges the commission of two or more offences. In *R v Thompson* (3) the accused was charged on two counts with incest, each count alleging the commission of the offence on 'divers days'. SIR RUFUS ISAACS CJ, as he then was, delivering the judgment of the Court of Criminal Appeal said:

'the practice is uniform and well established, that several offences should not be charged in the same count, and the indictment in this case was irregular for that reason.'

The appeal was nevertheless dismissed, it being held that by reason of that irregularity there had been no substantial miscarriage of justice: see also *R v Devett and Fox* (4).

Here the count in question charged only one offence and it was clear that that

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(2) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

(3) 78 JP 212; [1914] 2 KB 99.

(4) (1838), 8 C & P 639.

charge related to only one occasion. Section 18 of the Offences against the Person Act 1861 defines the offence of wounding with intent. It does not create a distinct and separate offence of wounding with intent in concert with others. Is it, then, the law that if two or more persons are charged in one count with one offence, even though it be proved that on one occasion they each did the acts made criminal by s 18, they cannot both be convicted unless it be proved that they acted in concert?

In Hawkins's Pleas of the Crown (8th edn, vol 2, p 331) it is stated:

'It seems certain at this day, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence of another but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal . . . the indictment . . . may either charge the defendants jointly and severally . . . or may charge them jointly only, without charging them severally, because it sufficiently appears, from the construction of law, that if they joined in such act, they could but be each of them guilty; and from hence it follows, that on such indictment . . . some of the defendants may be acquitted, and others convicted; for the law looks on the charge as several against each, though the words of it purport only a joint charge against all.'

In Hale's Pleas of the Crown (vol 1, p 46) it is stated that 'every indictment is as well several, as joint' and that where a husband and wife are jointly indicted with larceny, one may be acquitted and the other convicted 'for the indictment is in law joint, or several, as the fact happens'.

In *R v Giddins* (1) two persons were charged with robbery of two persons. That was the only charge against them. It was suggested that the robbery of each victim was a distinct felony. TINDAL CJ rejected this submission saying:

'It is all one act and one entire transaction: the two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been, the felonies would have been distinct; but that is not so in the present case.'

In *R v Archer* (2) five persons were jointly charged with wounding with intent. A violent attack by 30 or 40 persons had been made at Epsom races on the prosecutor. The report of the case contains no indication that it was considered necessary to prove more than that the accused joined in the attack. In *R v M'Phane* (3) several persons were jointly charged with assault and wounding with intent. One of the accused was discharged. He had come to the scene after the others had committed the offence charged, and delivered a separate assault.

These three cases show that at that time it was proper to charge and convict persons on a joint charge alleging one offence even though that offence was committed more than once provided that the accused were together and their acts were on the same occasion. In *R v Giddins* (1) each robbery might have been separately charged; so in this case might each of the seven woundings of Mr Parry have been made the subject of a separate charge. These cases lend no support to the view that, to support such a joint charge, it is necessary to prove that the accused were acting in concert, or in pursuance of a common design or that one was the principal and that the others aided and abetted.

The first case in which it was decided that, where two were jointly charged, both could not be convicted, although each was proved to have done the acts which con-

(1) (1842), Car & M 634.

(2) (1843), 1 Cr & K 174.

(3) (1841), Car & Man 212.

stituted the offence charged on one occasion, unless it was proved that they had acted in concert or in pursuance of a common design, appears to be *R v Scaramanga*. There delivering the judgment of the Court of Criminal Appeal, LORD PARKER CJ said:

'Before the jury could convict the defendant and Mrs. Sapieha [the other defendant] on these counts, they would have to be satisfied that these two people were jointly minded, one with the other, to wreck this restaurant and inflict harm upon the persons who were employed there . . . So far as the joint count of malicious damage is concerned, any damage done inside the restaurant before they were removed was done in the course of an argument and not in the course of a common design . . . In our judgment, except where provided by statute, when two persons are jointly charged with one offence judgment cannot stand against both of them on a finding that an offence has been committed by each independently.'

So for both to be convicted in addition to the commission on the same occasion of the acts made criminal, it was held that there had to be proof of a common design. That would appear to mean that the acts were done in pursuance of a conspiracy with which the defendants might have been charged. If this is right, then it might well be argued that such a joint charge is bad as in fact charging two offences, a conspiracy to commit the crime and the commission of the crime.

The attention of the court was not drawn to the passages in *Hale* and *Hawkins* or to the three cases to which I have referred, and the prosecution did not seek to contend that the two defendants had been rightly convicted, saying that the principle to be applied was that, except as provided by statute, a judgment could not stand against both on a finding that two offences had been committed independently. The court accepted this proposition and reliance was placed on a number of cases to which I must now refer.

In *R v Hempstead and Hudson* (1) two porters, searched on leaving their employers' premises, were found to be in possession of penknives the property of their employer. One had 25 knives, the other two. They were jointly charged with stealing 27 knives. The recorder reserved a question for the judges who were of the opinion that judgment could not be given against both prisoners. The case is very briefly reported and does not state the judges' reasons. In the body of the report it is said that there was nothing to show that the articles were not taken at different times. That suggests to me that the reason for the judges' decision may well have been that the thefts by each may have taken place on different occasions in which case the accused would have been convicted on one count of offences committed at different times. I find nothing in the report to indicate that the ground of the judges' opinion was that each of the accused had stolen independently on the same occasion.

In *R v Hurse and Dunn* (2) two persons had been charged with uttering counterfeit coins. They had not been together when each uttered the coins in question. *ERSKINE J* called on the prosecution to elect as to which prisoner and which uttering he intended to proceed, and, the prosecution having elected, if necessary, to proceed against one prisoner on two counts and the other on a third count, *ERSKINE J* allowed the trial to proceed. In his summing-up he told the jury that if they thought that the accused were acting in concert in the utterings charged they should convict on the whole indictment, and the jury did so convict. The utterings having taken place on separate occasions, it was clearly necessary to establish that they were made in pursuance of a common design but I cannot regard this case as deciding that if the utterings had taken place when they were together on the same occasion, a similar direction would have had to be given.

(1) (1818), *Russ & Ry* 344.

(2) (1841), 2 *Mood & R* 360.

Two other cases were cited by the court, *R v Messingham* (1) and *R v Dovey and Gray* (2). Both were cases of successive and not simultaneous receivings and in both cases it was decided that for the convictions to stand a joint act of receiving must be proved. I do not take this as meaning that it must be proved that they jointly received in pursuance of a common design but that they were together when the receiving occurred and jointly received the stolen property on the same occasion.

In my opinion *R v Scaramanga* (3) was wrongly decided and should be overruled. It was followed in *R v Parker* (4) and in *R v Holley* (5) and they were, in my opinion, wrongly decided.

In *Holley* the three appellants had been jointly charged in one count with the rape of a girl. She had been raped on one occasion by two of them in succession and then the third had attempted to commit the offence. The jury were directed to consider the case of each appellant separately and there was no direction as to aiding and abetting or their having acted in concert in pursuance of a common design. Lord PARKER CJ said that the position was similar to that which arose in *Scaramanga* and that the joint charge must mean that one of the three accused was a principal in the first degree and one or other or both of the others were present and aiding and abetting. This decision in this respect went further than that in *Scaramanga*.

A similar case, *R v Fenwick* (6) had come before the Court of Criminal Appeal, consisting of STREET CJ and OWEN and HERON JJ, in New South Wales. Unfortunately the attention of the court in *Holley* was not drawn to it. There two persons were charged in one count with rape, it being alleged that they had each raped the same girl when driving her home from a dance. The trial judge told the jury that the Crown's case was presented in two ways, first, that 'they acted in concert, they acted in pursuance of a common design' and, secondly, that each was individually guilty of rape 'independently of whether or not they were acting with a common purpose'. One ground of appeal by each of the accused was that it was not open to the jury, if they found the absence of a common design, to consider the individual cases of the accused as separate charges had not been preferred against each of them. STREET CJ said that the point taken was technical and 'I think it can be dealt with by an equally technical answer. Indictments are to be read jointly and severally . . .' and after referring to Hale's Pleas of the Crown, vol 1, p 46, and *R v Benfield and Saunders* (7), he said:

'It is clear, therefore, I think, that an indictment of this nature may be taken—indeed, in my experience that has been the common practice in cases such as this—as being a joint and several indictment of the accused, where the matters arise out of the one transaction . . .'

OWEN and HERRON JJ agreed that the appeal should be dismissed. OWEN J saying at the end of his judgment that if the trial judge:

'had made no reference at all to common purpose or the lack of it, but had instead told the jury that the only matter with which they need concern themselves was the issue of consent or no consent—because the parties were in agreement that that was the only matter in contest—no valid objection could have been made to the summing-up.'

In my view, no valid objection can be made to the summing-up of his Honour

(1) (1830), 1 Mood CC 357.

(2) (1851), 15 JP 69.

(3) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(4) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

(5) (1969), 53 Cr App Rep 519.

(6) (1953) 54 New South Wales 147.

(7) (1760), 2 Burr 980.



JUDGE STREET in that case and the dicta which indicate the contrary in *Scaramanga*, *Parker* and *Holley* should be disregarded. In my opinion, a joint charge of an offence against two or more persons, the offence being alleged to have been committed by each on the same and not separate occasions, and when they were together, does not require a direction that the accused must have a common purpose or design, or that one is to be regarded as a principal and the other or others as aiding and abetting.

The Criminal Appeal Act 1968, by s 2, provides that the Court of Appeal may—

‘notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice actually occurred.’

The Criminal Appeal Act 1907 contained a similar provision, the only difference being the inclusion of the word ‘substantial’ before ‘miscarriage’. In this case the court thought that it would be improper to apply the proviso to s 2. They did not say why. It is perhaps fortunate that they did not apply it for, if they had, there might have been no appeal to this House and so no opportunity of considering *R v Scaramanga* and the cases which followed it. The court in *Scaramanga*, *Parker* and *Holley* had refused to apply the proviso and it may be that the court in this case thought that it should refuse for the same reasons as the court in those cases refused to do so.

In *Scaramanga* LORD PARKER CJ said that the object of the proviso in the Criminal Appeal Act 1907

‘was to prevent the quashing of a conviction upon a mere technicality provided, as is undoubtedly the case here, that no embarrassment or prejudice to the defendant was caused thereby’,

and went on to say:

‘We, however, know of no case in which the court has applied the proviso for the purpose of, in effect, substituting another verdict. The only power in this court to substitute a verdict is that contained in section 5(2) of the Act of 1907, which power is limited to a case in which the jury could “on the indictment” have found the defendant guilty of some other offence.’

From this passage it would seem that the court was under the impression that malicious damage committed in concert was a distinct offence from that committed by an individual acting on his own. The Malicious Damage Act 1861, s 51, created only one offence and if the jury had been directed as the court thought it should have been and had convicted the accused their verdict would have been no different from what it was.

In this case, as in *Scaramanga* the objection taken by the respondent was a mere technicality. At the commencement of his trial the jury were told that the only question to be decided was whether he had wounded with intent and the trial proceeded on that basis. In the circumstances I see no ground for coming to a conclusion other than that no miscarriage of justice had actually occurred. The verdict of the jury would have been the same had the jury found the respondent guilty after being so directed, and if so directed the jury, in my view, would, in view of the evidence they clearly accepted, have returned that verdict.

It may be that at the present time there is more reluctance to apply the proviso than there used to be. If that be so, then bearing in mind that Parliament has so recently as 1968 renewed the court’s power to do so, it is, I think, to be regretted if the power is not used where no miscarriage of justice has actually occurred, where the point taken is entirely technical and where the circumstances are similar to those to which SIR RUFUS ISAACS CJ referred in *R v Thompson* (1).

For the reasons I have stated, in my opinion this appeal should be allowed and the respondent's conviction restored.

**LORD DIPLOCK:** The respondent, John Merriman and his brother, Frank, were charged in the same count of an indictment with wounding William Parry with intent to do him grievous bodily harm. The occasion was a drunken brawl in which William Parry, the landlord of a public house, was stabbed no less than seven times by one or other of the two brothers. Frank pleaded 'Guilty', the respondent stood his trial. Mr Parry's evidence was unequivocal that the respondent himself had stabbed him first from behind and that the later wounds were inflicted on him by one or other brother. The respondent denied that he himself had used a knife at all. Here, then, was a simple clear-cut conflict of evidence. If Mr Parry's evidence about the first blow were believed, the respondent was guilty of the very offence with which he was charged—he had wounded Mr Parry with intent to do him grievous bodily harm. The judge, Mr Commissioner Steel, took the view that if the jury were not satisfied that the respondent had struck the first blow himself it would mean that Mr Parry's recollection was unreliable and that it would be unsafe for them to convict the respondent on the alternative basis that he was helping his brother to attack the publican and, for this reason, was criminally responsible for wounds which his brother had inflicted as well as those which he had inflicted himself. He accordingly told the jury that they need not go into the question whether the respondent and his brother were acting together, but should make up their minds whether they were sure that Mr Parry's account of the first blow was correct. If so, they should convict; if not, they should acquit.

On this direction, the jury, after retiring for only 11 minutes, found the respondent 'Guilty', not only on this count but on a separate count of assaulting a police constable, which is not the subject of appeal. As their brief retirement shows, this was a model way in which to direct the jury on the evidence before them. It was eminently fair, even perhaps unduly favourable, to the accused. It crystallised and simplified the issue of fact on which the jury should concentrate their minds. That is what a summing-up ought to do.

Nevertheless, the Court of Appeal felt constrained with great reluctance, to allow an appeal on the ground that as Frank had already pleaded guilty to the same count the judge ought to have told the jury that they must be satisfied also that when the respondent struck the blow he was acting in concert with his brother. Although the evidence at the trial that the respondent was assisting his brother throughout the brawl was overwhelming, the Court of Appeal declined to apply the provision to s 2 (3) of the Criminal Appeal Act 1968, and quashed the conviction.

In holding that the judge had erred in law in directing the jury that they need not go into the question whether the respondent and his brother, who was charged in the same count, were acting together in pursuit of a common purpose, the Court of Appeal was following two previous decisions, one of the Court of Criminal Appeal in *R v Scaramanga* (1) and one of the Criminal Division of the Court of Appeal in *R v Parker* (2). These decisions it rightly treated as binding, for although the Criminal Division of the Court of Appeal is not so strictly bound by its own previous decisions as is the Civil Division, its liberty to depart from a precedent which it is convinced was erroneous is restricted to cases where the departure is in favour of the accused. This would not be the case in the instant appeal.

Nevertheless, on the face of it this was a case in which it would have been appropriate to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968, even on the law as

(1) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(2) 133 JP 343; [1969] 2 All ER 15; [1969] 2 QB 248.

stated in *Scaramanga* and in *Parker*. The Court of Appeal did not explain its reasons for not applying the proviso. It may well have been influenced by the consideration that if it had done so and dismissed the appeal it is unlikely that this case would have afforded the opportunity for your Lordships' House to review the decisions in *Scaramanga* and *Parker* which have given rise to considerable difficulty in the last few years. This may well have been the reason for not applying the proviso. But since the respondent was clearly guilty of the offence with which he was charged whether or not this House on the appeal should uphold the necessity on such a charge of directing the jury that they must be satisfied that he was acting in concert with his brother, the Court of Appeal ought, in my view, to have made an order under s 37 (2) of the Act directing that the respondent should be detained pending the decision of the appeal to this House. This provision of the Act was not drawn to the attention of the Court of Appeal and no such order was made. In the result, if your Lordships allow the appeal, s 37 (5) will relieve him from serving any sentence of imprisonment for the grave crime of violence that he committed.

But the important point in this appeal is as to the legal effect of charging two or more defendants with an offence in a single count of an indictment. In *Scaramanga* the Court of Criminal Appeal said:

'In our judgment, except where provided by statute, when two persons are jointly charged with one offence judgment cannot stand against both of them on a finding that an offence has been committed by each independently.'

In *Parker*, where the offence charged was stealing, the Court of Appeal said:

'It is clear that if two persons are accused of stealing jointly, one or other or both may be convicted of that joint stealing. Alternatively, either *but not both*, could be convicted of stealing independently. In each of these cases the essential feature is that one offence is charged and one offence is proved.'

My Lords, I have sought in vain to discover some rational basis for so odd a result. If stealing jointly is one offence and stealing independently a different offence, to acquit one of two persons charged with stealing jointly is necessarily inconsistent with convicting the other of stealing jointly. And if it is permissible on a charge of joint stealing to convict one of stealing independently, why is it not permissible also to convict the other? If both steal independently which of the two should be convicted and which is entitled to acquittal?

The source of the confusion lies, I believe, in the equivocal use of such expressions as 'joint offence' and 'joint charge of one offence'. It is hornbook law that, as Hawkins put it in *Pleas of the Crown*, 8th edn, vol 2, p 331: 'the offence of one man cannot be the offence of another, but everyone must answer severally for his own crime'. But when two men are aiding one another in doing physical acts with criminal intent, though the mens rea of the separate offence of each is personal to the individual charged, the physical act of either of them is in law an actus reus of the separate offence of each. A 'joint offence' of two defendants means no more than that there is this connection between the separate offences of each, so that as against each defendant not only his own physical acts but also those of the other defendant may be relied on by the prosecution as an actus reus of the offence with which he is charged.

This connection between the separate offences of two defendants has from very early times been treated as the justification for charging two defendants in the same indictment and, after the introduction of separate counts in an indictment, for charging them in the same count. To quote Hale (*Pleas of the Crown* (1778), vol 2, p 173):

'If there be several offenders, that commit the same offence, though in law they are several offences in relation to the several offenders, yet they may be joined in one indictment, as if several commit a robbery, or burglary, or murder.'

The rule against duplicity, viz that only one offence should be charged in any count of an indictment, which is now incorporated in r 4 (1) of Sch 1 to the Indictments Act 1915, has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them in a single count of an indictment. Where such a count was laid against more than one defendant, the jury could find each of them guilty of one offence only; but a failure by the prosecution to prove the allegation, formerly expressly stated in the indictment but now only implicit in their joinder in the same count, that the unlawful acts of each were done jointly in aid of one another, did not render the indictment *ex post facto* bad or invalidate the jury's verdict against those found guilty. To quote Hawkins again, *Pleas of the Crown* (8th edn, vol 2, p 331):

'on such indictment . . . some of the defendants may be acquitted, and others convicted; for the law looks on the charge as several against each, though the words of it purport only a joint charge against all.'

I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and that in doing the act or in helping the other defendant to do it he himself had the necessary criminal intent. This was held to be the law by STREET CJ and OWEN and HERRON JJ in the Supreme Court of New South Wales in *R v Fenwick*—a case of rape (1). I fully agree with their reasoning.

In *Scaramanga* (2) the Court of Criminal Appeal came to the contrary conclusion on the strength of four old authorities which, in my judgment, were decided on technicalities which have no relevance to modern procedure in criminal prosecutions. The first was *R v Hempstead and Hudson* (3). This appears to have turned on the technicality that at a time when grand larceny was a capital offence two defendants were charged in the same count with grand larceny. One was found guilty of that offence but the other was found guilty of petty larceny only, which was a different and non-capital offence. The difficulty appears to have been that sentence of death and sentence of a lesser punishment could not be pronounced on different defendants on the same count. The question was referred to the judges for their informal opinion, as was the practice before the constitution of the Court of Crown Cases Reserved in 1848. They came out with the solution that the defendant found guilty of petty larceny should be pardoned or a *nolle prosequi* entered in respect of him before any sentence was pronounced, so as to enable a capital sentence to be pronounced on the defendant found guilty of grand larceny. This decision does not appear to have anything to do with the necessity of proving that two defendants charged in the same count were acting in concert. The first defendant would have escaped the gallows if it had.

(1) (1953), 54 New South Wales 147.

(2) 127 JP 476; [1963] 2 All ER 852; [1963] 2 QB 807.

(3) (1818), 1 Russ & Ry 344.

The second case was one tried by *ERSKINE J* at assizes, *R v Hurse and Dunn* (1). The two defendants were charged together on an indictment containing three counts of uttering counterfeit coins on three separate occasions. So far from supporting the proposition that defendants charged in the same count could not be convicted unless they were acting in concert, *ERSKINE J*'s summing-up contained a clear direction to the jury that they could convict either defendant of uttering coins independently of the other despite the fact that such conviction would be on a count in which they were charged together.

The third case was *R v Messingham* (2) in which there was a count against a mother and son of receiving stolen goods. The evidence was that the son had received the goods first from the thief and later handed them to his mother. Both were convicted and it was objected on behalf of the mother that the receiving by her son was complete before the mother took any part in the transaction. The objection was considered informally at a meeting of the judges who were of opinion 'that on the joint charge it was necessary to prove a joint receipt, and as the mother was absent when the son received it was a separate receipt by him'—of which, however, it appears that he was rightly convicted although the charge was laid against him and his mother together. It would appear that this opinion, which was followed in the decision of the Court for Crown Cases Reserved in *R v Dovey and Gray* (3), was based on the view that the successive receivings were not sufficiently coincident in time or place to constitute one offence for the purpose of the rule against duplicity. Since the receivings on both the occasions could not be charged in the one count the prosecution were restricted to relying on that which happened first in point of time; and since the mother was not acting together with the son at the first receiving she was entitled to be acquitted of this and not to be proceeded against in respect of the second receiving, although the son was rightly convicted of receiving on the first occasion independently of his mother. This technical rule in cases of receiving was reversed by s 14 of the Criminal Procedure Act 1851, passed in the same year as the decision in *R v Dovey and Gray*.

In my view, these cases are no authority for the propositions of law stated in *Scaramanga* and *Parker* and followed in *R v Holley*, and in the instant case *Scaramanga* and *Parker* and the subsequent cases which follow them should be overruled, and this appeal should be allowed and the respondent's conviction on the count of wounding contrary to s 18 of the Offences against the Person Act 1861 restored.

**LORD SALMON:** I have read the speech of my noble and learned friend, **LORD DIPLOCK**. For the reasons he gives I agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors: Director of Public Prosecutions; Sharpe, Pritchard & Co.

Reported by G F L Bridgman Esq, Barrister.

(1) (1841), 2 Mood & R 360.

(2) (1830), 1 Mood CC 357.

(3) (1851), 15 JP 69.



## CHANCERY DIVISION

(PLOWMAN, J)

1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 19th, May 1972

## DOWTY BOULTON PAUL LTD v WOLVERHAMPTON CORPORATION

*Town and Country Planning—Appropriation of land—Power to override easements and other rights—Conveyance by local authority of land to company—Re-development of area—Appropriation of conveyed land to housing purposes—Town and Country Planning Act, 1971, s 127 (1) (2).*

In 1935 the corporation bought a site of some 753 acres which, with another parcel of 72 acres, was appropriated for the purpose of a municipal aerodrome. By a conveyance dated 30th November 1936, the corporation conveyed to the plaintiffs, a company manufacturing aircraft parts who wished to establish a factory, some 23½ acres adjoining the airfield, together with a right for the plaintiffs to have access to and use of the airfield for test and delivery flights for 99 years or so long as the corporation should maintain the airfield as a municipal aerodrome whichever should be the longer. The corporation covenanted by clause 5 of the conveyance, without prejudice to their rights to dispose of or deal with the land in and around the airport 'not in the exercise thereof unreasonably to affect the rights of the use of the airfield hereby granted to the plaintiffs . . .'. For the next twenty years the plaintiffs made regular use of the airfield, but later they ceased to manufacture aircraft and by the date of these proceedings used the airfield only for executive flights. By the end of the 1960's the corporation no longer required a municipal aerodrome, and, taking the view that there was an acute shortage of housing in their area, applied for planning permission for a re-development of the whole airfield site. In January 1971, the corporation passed a resolution purporting to appropriate the whole of the airfield to housing purposes under the Town and Country Planning Acts, 1962 to 1968. On the hearing of the plaintiffs' summons for a declaration that the corporation were not entitled to vary the purposes for which the land comprising the airfield had originally been appropriated so as to interfere with the plaintiffs' right under the conveyance,

**HELD:** the corporation were the sole judges of whether the land was still required for the purposes for which it had originally been appropriated and as long as the corporation acted bona fide their decision could not be challenged; the rights given to the plaintiffs by the conveyance of November 30, 1936, fell within the Local Government Act 1933, s 163 (1), proviso (ii), and were unaffected by an appropriation under that section; accordingly, the corporation could appropriate the land to different purposes subject to the payment of compensation.

**ACTION** by the plaintiffs' Dowty Boulton Paul Ltd, against the defendants, Wolverhampton Corporation. The plaintiffs also issued an originating summons which was heard, with the action. By their action, the plaintiffs claimed, inter alia (1) a declaration that on the true construction of conveyances dated 30th November, 1936, and 23rd November, 1938, and an agreement dated 19th October, 1953, they were entitled to use the defendants airfield for so long as the plaintiffs used their factory adjoining the airfield and required the airfield for the purposes set out in the conveyances and agreement; (2) a declaration that for so long as they used their factory in accordance with the conveyances and agreement and required the airfield for the purposes there set out, in the event that the defendants were in breach of contract and failed to maintain the airfield in accordance with their contractual obligations, the plaintiffs were entitled to maintain the airfield and recover the costs as damages; alternatively, (3) and order that the defendants use all reasonable endeavours to maintain the airfield fit for use. By their summons the plaintiffs claimed declarations (1) that on the true construction of ss 81 and 87 of the Town and Country Planning Act 1962, and s 163 (as amended) of the Local Government Act, 1933, (2) that on the true construction of an

agreement dated 26th August 1935, and (3) that on the true construction of the conveyance dated 30th November, 1936, the defendants were not entitled to vary the appropriation of the land the subject of such agreement and conveyance in breach of covenant so that the land could be used for a purpose other than that of an airfield. The defendants in their amended defence stated that they had by resolution passed on 4th January, 1971, appropriated the airfield for planning purposes under the Town and Country Planning Acts, 1962 to 1968, and admitted that they had, since 1962, been considering the redevelopment of the airfield and other land in its neighbourhood, and had submitted a formal application for planning permission to the Department of the Environment. They further alleged that, on the facts, the plaintiffs were not entitled to the relief claimed, and that, under the powers vested in them by s 81 of the Town and Country Planning Act, 1962, they were, or would, on the grant of planning permission, be entitled to interfere with the plaintiffs' rights subject to the payment of proper compensation, which they were and had at all times been willing to pay. The facts are set out in the judgment.

*K R Bagnall and Robert Pryor for the plaintiffs.*

*Jeremiah Harman QC and Elizabeth Appleby for the defendants.*

*Cur adv vult*

19th May. **PLOWMAN J** read the following judgment: This is a dispute concerning Wolverhampton Aerodrome and its future. The defendants, Wolverhampton Corporation, take the view that it has had its day as a municipal airport and wish to use it for housing development in view of the need for housing accommodation. The question which I have to decide is whether they are entitled to do so having regard to their commitments to the plaintiffs. I should make it clear at the outset that I am not concerned with any question of policy or of local politics, but only with the legal aspects of the affair.

The history of the matter goes back to 1935, when the defendants were proposing to establish a municipal aerodrome. At the same time, they were anxious to attract new industry to the area. This coincided with the wish of the plaintiffs, whose business was the manufacture of aircraft and aircraft parts and equipment, to find a suitable airfield in the vicinity of which they could set up a factory. The parties came together and negotiations ensued. Wolverhampton Airfield (or the Barnhurst site, as it was then known) was selected as the site for the proposed airfield, in preference to an alternative site at Perton, largely in order to meet the plaintiffs' requirements and because the defendants wanted the plaintiffs to come to Wolverhampton. The Barnhurst site was already owned by the defendants, who had acquired it in the 1890s for sewage disposal purposes, but it was not large enough for the proposed airfield, and the defendants therefore proposed to acquire, compulsorily if necessary, an additional 72 acres of land and incorporate it with the Barnhurst site.

The negotiations between the plaintiffs and the defendants led to a written agreement dated 26th August 1935, to which I must briefly refer, although it was superseded by a conveyance to which I will refer in a moment. The agreement was made between the defendants (therein called 'the corporation'), of the one part, and Boulton Paul Aircraft Ltd (called 'the company'), of the other part. Boulton Paul Aircraft Ltd was the name of the plaintiffs at that time. It changed when they were taken over by the Dowty Group in 1961 to its present title. The agreement recites:

Whereas the corporation have decided subject to such certificates consents etcetera as may be necessary to establish a municipal aerodrome on a piece of land known as "the Barnhurst" as shewn edged round with pink on the plan

hereto annexed which site is the property of the corporation and on other adjoining land hereinafter referred to not now belonging to the corporation which piece of land and adjoining land are hereinafter called "the aerodrome". And whereas the corporation propose to acquire the said adjoining land being seventy-two acres or thereabouts as shown edged grey on the said plan being the estimated extent of land necessary to add to the lands now owned by them to obtain a licence to use the said lands as an aerodrome. And whereas the company are manufacturers of aircraft and intend to establish a factory on land of the corporation near the aerodrome in accordance with the terms hereinafter referred to. Now therefore it is agreed as follows:—1. The corporation will negotiate for the acquisition of the said adjoining seventy-two acres of land hereinbefore mentioned and unless they can acquire the same with vacant possession by agreement they will forthwith take all necessary steps to obtain a compulsory purchase order for the acquisition thereof.'

Clause 3 provides:

'Subject to the terms of clause 11 hereof the corporation will grant to the company and the company will accept and enter into a lease of a site on the land of the corporation on the western side of the aerodrome as shewn coloured brown on the said plan (hereinafter called "the site") containing twenty-three and one-half acres and subject to the same not being required as part of the adjoining highway of the land coloured blue on the said plan containing an area of 0.8 acres or thereabouts for a term of ninety-nine years at a yearly rental equivalent to four per centum of the present value of the said site as determined by the district valuer for the purpose of building a factory thereon such lease to be in the form set out in the schedule hereto and the corporation agree to indemnify the company against any road-making charges which may become payable in respect of the frontage of the said land to Pendeford Lane.'

Clause 5 provides:

'THE corporation subject to the terms of clause 11 hereof will allow the company to have the use of the aerodrome when prepared for use and ready for the purposes of the company and when licensed as aforesaid so far as a licence is necessary to enable the company to use the aerodrome as hereinafter provided free of charge except as hereinafter provided for the following purposes during the continuance of their lease:—(a) Test and delivery and other flights in connection with their business as designers manufacturers and repairers of aircraft. (b) Air flying in connection with their business of running a flying training school ...'

In fact, the lease referred to was never granted. Instead, the defendants conveyed the factory site to the plaintiffs by a conveyance dated 30th November 1936, which is the crucial document in this case and I must refer to it in some detail. It is made between the defendants, (therein called 'the corporation'), of the one part, and the plaintiffs (called 'the company'), of the other part. It recites that the corporation are the estate owners in respect of the fee simple of the property conveyed and that the corporation have agreed with the company for the sale of the property for the sum of £1,645. In consideration of that sum of money, the corporation granted to the company the 23½ acres of land in question, together also with a right of way over certain land shown on the plan, for a period of 99 years from 1st December 1935

'or as long as the corporation shall maintain the airport as a municipal

aerodrome whichever shall be the longer to hold unto the company in fee simple ..'

In cl 2 of this deed there are a series of covenants by the company, which covenants with the corporation, inter alia, as follows:

'(ii) That it will without undue delay proceed to erect a factory upon the said piece of land ... that it will submit plans elevations and specifications of the said factory to be approved by the corporation and that such factory shall cost not less than £50,000 ...'

Then, in sub-cl (viii):

'That it will use the said factory and any other buildings erected on the land hereby assured for the purpose of designing manufacturing assembling and repairing aircraft and aeronautical equipment or parts thereof and accessories thereto and for the purpose of carrying on a school for the training and teaching of flying and for no other purpose without the written consent of the corporation first obtained such consent not to be unreasonably withheld.'

Sub-clause (ix) provides:

'That it will not do or permit to be done on the property hereby assured or any part thereof anything which may be or become a nuisance or cause damage to the corporation or the tenants or occupiers of other property in the neighbourhood Provided always that nothing herein contained shall be deemed to prevent the company from carrying on in a reasonable and proper manner on the property hereby assured its said business of designing manufacturing assembling and repairing aircraft and aeronautical equipment and parts thereof and accessories thereto or from carrying on in a reasonable and proper manner on the property hereby assured a school for the training and teaching of flying or from using the airport in connection with such business or businesses as aforesaid.'

At the end of cl 2 there is a proviso which is as follows:

'Provided always and it is hereby agreed and declared that the covenants by the company hereinbefore contained except sub-clause (xi) of this clause and each and every one of them shall remain in force and be binding upon the company and so far as practicable the land and premises hereby assured for a period only of ninety-nine years from [1st December 1935] or so long as the corporation shall maintain the airport as a municipal aerodrome whichever shall be the longer.'

In cl 3 there are covenants by the corporation with the company. They include the following:

'(ii) That they will allow the company to use the airport when prepared for use and ready for the purposes of the company and licensed as an aerodrome (provided that the corporation shall not be obliged to license the aerodrome for night flying or as a customs aerodrome) so far as a licence is necessary to enable the company to use the airport for such purposes as are hereinafter in this clause mentioned free of charge except as hereinafter provided for the following purposes namely:—(a) For the purpose of test delivery and other flights in connection with their business of designing manufacturing assembling and repairing aircraft and parts thereof and accessories thereto. (b) For the purpose of flying in connection with their business of carrying on a school for

the training and teaching of flying. Provided that such user shall be subject to the reasonable requirements of the corporation for their use of the airport as a municipal aerodrome for flying purposes . . . Provided further that the company shall pay a rental of £50 per annum in respect of the user specified in paragraph (a) of this sub-clause and a further rental of £50 per annum in respect of the user specified in paragraph (b) of this sub-clause while such users respectively continue. (iii) That subject to a licence for the airport to be used as an aerodrome being obtained and to the consent of any government department to the raising of lbans and in any other matter which may be necessary they will do all in their power to keep and maintain the surface and boundary fences of the airport in such fit and proper state of repair and condition as will enable the company to use the airport as provided by paragraph (a) of sub-clause (ii) of clause 3 hereof.

At the end of the corporation's covenants there is this proviso:

'Provided always and it is hereby agreed and declared that the covenants by the corporation contained in sub-clauses (ii) to (vi) (both inclusive) of this clause and each and every one of them shall remain in force and be binding upon the corporation for a period only of ninety-nine years from [1st December 1935] or so long as the corporation shall maintain the said Wolverhampton Airport as a municipal aerodrome whichever shall be the longer.'

Finally, I read cl 5, which is as follows:

'Without prejudice to the corporation's right to use dispose of or deal with their lands in and around the airport and the airport generally as and for such purposes as they shall from time to time think fit the corporation shall not in the exercise thereof unreasonably affect the rights of the use of the airport hereby granted to the company.'

That conveyance was modified in some respects by an agreement dated 19th October 1953, but I need only notice that the permitted user of the plaintiffs' factory was extended to light industrial purposes and their right to use the airport was extended correspondingly.

For something like 20 years the plaintiffs manufactured aircraft at the factory and made extensive use of the airfield. They then ceased to manufacture complete aircraft, and of recent years have been manufacturing aircraft equipment, specialising in power hydraulic systems for aircraft, including the Concorde. Consequently, they have made much less use of the airfield. They never in fact operated a flying training school as contemplated by the 1936 conveyance, and latterly their use has been confined to executive flights by their own aircraft and visiting aircraft.

This does not, of course, mean that their airfield rights have ceased to be of any value to them. Of the 99 years referred to in the 1936 conveyance, over 60 years are unexpired and, in the course of the next 60 years, this Wolverhampton airfield may well again become of vital importance to the plaintiffs. Equally, of course, it may not. It all depends on future developments in flying, which no one can foresee. Although the plaintiffs do not at the present moment manufacture aircraft, they still have the skills, the know-how, and the men to do so, should their services be required. From the plaintiffs' point of view, therefore, their rights under the 1936 conveyance are of incalculable value to them if they are to maintain their eminent position in the aircraft industry.

The defendants, on the other hand, say that they no longer require the airfield as a municipal aerodrome. Their view is that there is an urgent and overriding need for houses for people to live in. There are some 3,000 people on their housing



list and they have applied for planning permission for a scheme of comprehensive development of a large area of land of which the aerodrome forms only part. Accordingly, when their agreement with their airfield managers, Don Everall (Aviation) Ltd, expired, they did not renew it, and for over a year now the airfield has been closed. They claim that they are entitled to extinguish the plaintiffs' airfield rights under the 1936 conveyance, subject to the payment of compensation; the plaintiffs claim that they have no power to do so, and they ask for relief which will ensure the continuance of those rights.

I must now examine the legal position. The defendants' claim is based on s 81 of the Town and Country Planning Act, 1962, which is now s 127 of the Town and Country Planning Act, 1971. That section provides:

'(1) The erection, construction or carrying out, or maintenance, of any building or work on land which has been acquired or appropriated by a local authority for planning purposes, whether done by the local authority or by a person deriving title under them, is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves interference with an interest or right to which this section applies, or involves a breach of a restriction as to the user of the land arising by virtue of a contract . . .

'(2) This section applies to the following interests and rights, that is to say, any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.'

Subsection (3) contains a provision for the payment of compensation. Subsections (4) and (5) are not relevant.

It is common ground that the plaintiffs' airfield rights fall within sub-s (2) and the defendants, as I have said, have applied for planning permission, but the Minister is withholding his decision pending the result of the present case. It is to be observed that the section applies if and only if the land in question has been acquired or appropriated by the defendants 'for planning purposes'.

The factual position with regard to appropriations is as follows. The relevant part of the Barnhurst site originally acquired for sewage disposal purposes was appropriated for aerodrome purposes in 1935, as was the additional 72 acres. In June 1952, 38 of those 72 acres were re-appropriated for sewage disposal purposes. On 4th January 1971 the defendants passed the following resolution 'It is headed 'Wolverhampton Airport', and two paragraphs of it are relevant:

'(a) That the decision of the council to discontinue the provision of a municipal airport at the expiration of the current management agreement with Don Everall (Aviation) Ltd on 31st December 1970, be adhered to and that no temporary lease of the airport for use as a private airfield pending re-development be granted. (b) That approximately 213 acres of land held by the corporation for aerodrome purposes under the Civil Aviation Act, 1949, be appropriated for planning purposes under the Town and Country Planning Acts, 1962 to 1968.'

The 213 acres there mentioned is the land with which I am now concerned. The plaintiffs' case is that that was not a valid appropriation for reasons which I must now consider.

It is well settled that, in the absence of statutory authority, land of a local authority appropriated for one purpose cannot be appropriated to another purpose: see

*Attorney-General v Hanwell Urban District Council* (1), *Attorney-General v Pontypridd Urban District Council* (2), *Attorney-General v Westminster City Council* (3). The plaintiffs claim that there is no statutory authority which is available to the defendants in the present case. The defendants, however, claim that s 163 (1) of the Local Government Act, 1933, confers the necessary authority. Section 163 (1), so far as material, provides:

'Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land: Provided that . . . (ii) the appropriation of land by a local authority shall be subject to any covenant or restriction affecting the use of the land in their hands.'

That, as I understand it, and as applied to the present case, is saying in effect, first, that the defendants, with the consent of the Minister, can appropriate land hitherto appropriated for aerodrome purposes for planning purposes if it is no longer, required for aerodrome purposes, and, secondly, that any such re-appropriation is not of itself to affect the plaintiffs' existing rights over the airfield, or, in other words, that the plaintiffs' rights do not prevent appropriation.

The plaintiffs dispute the defendants' claim to be entitled to rely on s 163, because they say, the airfield is still required for aerodrome purposes. The way counsel for the plaintiffs put it was this. Speaking of the 1936 conveyance, he said: 'Whilst that contract stands, they (that is to say, the defendants) still require it for the purposes of the contract'. I am unable to accept that submission. In the first place the defendants are, in my judgment, sole judges of the question whether or not the land is still required for the purposes for which it has been appropriated and their decision cannot be challenged in the absence of bad faith. That point is, I think, concluded by *Attorney-General v Manchester Corpn* (4). That was a case on s 95 of the Public Health Acts Amendment Act, 1907, the relevant part of which is as follows:

'any lands acquired by a local authority and not required for the purposes for which those lands have been acquired may be appropriated for any purpose approved by the Local Government Board . . . Nothing in this section shall affect any rights acquired . . . under any agreement in writing . . .'

MAUGHAM J said:

'In the first place the question arises, What is the meaning of the phrase "not required for the purposes for which those lands have been acquired"? Who is to be the judge of that? Is it a question of fact on which the court may express an opinion, or is it a question on which the determination of the local authority is to prevail? In answering that question, I think that I have to compare s. 175 of the Public Health Act, 1875. That section, after providing power to purchase, goes on to say: "Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold at the best price that can be gotten for the same, and the proceeds of such sale shall be applied towards discharge, by means of a sinking fund or otherwise, of any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or if no such principal moneys are outstanding shall be carried

(1) [1900] 2 Ch. 377.

(2) 70 JP 394; [1906] 2 Ch 257.

(3) 88 JP 145; [1924] 2 Ch 416; [1924] All ER Rep 162.

(4) [1931] 1 Ch 254; [1930] All ER Rep 653.

to the account of such fund or rate". I think that in such a case, either under s. 175 of the earlier Act, or under s. 95 of the amending Act, the local authority, acting in good faith, must be the sole judges of whether the land is no longer required, or is not required for the purpose for which the land was acquired. Of course they must act honestly. I need hardly say that the contrary is not suggested here. But I do not see any ground for thinking that the court can substitute its judgment upon such a question for that of the local authority who are given by these Acts wide powers of local government. Accordingly, I must take it that, in the circumstances of this case, it has been determined in good faith by the corporation that the land in question is not required for the purpose for which it was acquired in 1875.

Counsel for the plaintiffs' answer to this is to say that it was impossible for the defendants to reach an honest decision that the land was no longer required for aerodrome purposes when it was obviously still required for the purposes of the 1936 conveyance. Again I disagree. The airfield rights conferred on the plaintiffs by the 1936 conveyance were conferred by covenant or restriction and are therefore within proviso (ii) to s 163 (1) of the Act of 1933, that is to say, they are unaffected by an appropriation under the section which contemplates an appropriation notwithstanding the existence of such rights. It must follow, in my judgment, that the preservation of those rights is not a purpose for which the aerodrome is still required. In my judgment, the only relevant purpose for which the appropriations with which I am concerned were made was the provision of a municipal aerodrome.

Another point arises on s 163. Under that section the approval of the Minister is required to an appropriation. That requirement has been modified by s 23 of the Town and Country Planning Act 1959, and there is a dispute whether, in the light of that modification, the Minister's consent is or is not necessary in the present case. No such consent was in fact obtained. Section 23, so far as material, is as follows:

'(1) Subject to the following provisions of this section, where by any enactment—(a) power is conferred on any authority to whom this Part of this Act applies, or on any class of such authorities, to appropriate land for any purpose, whether the purpose is defined in the enactment specifically or by reference to some other power exercisable by the authority or class of authorities in question, but (b) that power is so conferred subject to a provision (in whatever terms the provision is expressed, and whether it is contained in the same or in any other enactment) that the power is not to be exercised except with the consent of a Minister specified in that provision, or for a purpose approved by a Minister so specified, with or without a further provision enabling conditions to be imposed by such a Minister in respect of the exercise of the power, the enactment shall have effect, in relation to any exercise of the power after the commencement of this Act by an authority to whom this Part of this Act applies, as if it conferred that power free from any such provision as is mentioned in paragraph (b) of this subsection.

'(2) The exercise after the commencement of this Act, by any authority to whom this Part of this Act applies, of any power of appropriation in relation to which the preceding subsection has effect shall be subject to the following provisions, that is to say . . . (b) land which has been acquired (whether before or after the commencement of this Act) by an authority to whom this Part of this Act applies, and has been so acquired by that authority in the exercise (directly or indirectly) of compulsory powers, and has not subsequently been appropriated by that authority for any purpose other than that for which it was so acquired shall not be appropriated by that authority for any other purpose except with the consent of the Minister who, at the time of the appropriation, is the Minister

<b>HACKNEY CARRIAGE</b> – Licensing – Duty of licensing authority – Obligation to act fairly towards all persons whose interests are affected by decisions of authority – Town Police Clauses Act, 1847, s 37. <b>R v Liverpool Corporation. Ex parte Liverpool Taxi Owners Association</b> .. CA 491
<b>HIGHWAY</b> – Obstruction – Nuisance – Parking of vehicle for long period – Removal of part of highway from public use – Collision between motor cycle and parked vehicle – Injury to pillion passenger – Collision due wholly to negligence of motor cyclist – Obstruction not a source of danger. <b>Dymond v. Pearce</b> .. CA 397
<b>HOUSING</b> – Obtaining possession of council property from trespassers – Competency of proceedings – Proceedings instituted by authorised committee – 'Management of housing accommodation' – Cost of proceedings – 'Blanket' decision to institute. <b>London Borough of Southwark v Peters</b> .. CA 187
<b>HUSBAND AND WIFE</b> – Maintenance of wife – Assessment of weekly payment – Consideration of husband's potential earning capacity – Jurisdiction of court. <b>McEwan v McEwan</b> .. PDA 527
<b>HUSBAND AND WIFE</b> – Maintenance of wife – Provisional maintenance order – Jurisdiction – Husband resident and matrimonial offences alleged to have been committed outside United Kingdom – Wife ordinarily resident in England – Maintenance Orders (Facilities for Enforcement) Act, 1920, s 3 (1) – Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 1 (2) (a). <b>Collister v Collister</b> .. Fam Div 163
<b>HUSBAND AND WIFE</b> – Matrimonial home – Rights of occupation – 'Regulation' of exercise by spouse of right to occupy dwelling-house – Right wholly to exclude spouse therefrom – Matrimonial Homes Act, 1967, s 1 (2). <b>Tarr v Tarr</b> .. HL 484
<b>HUSBAND AND WIFE</b> – Summary proceedings – Maintenance of child – 'Child of the family' – Acceptance – Objective test – Circumstances constituting acceptance – Time of acceptance – Withdrawal – Liability of another person – Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s 16 (1). <b>Snow v Snow</b> .. CA 54
<b>INDECENT EXPOSURE.</b> See CRIMINAL LAW.
<b>INDECENT PHOTOGRAPHS.</b> See CUSTOMS & EXCISE.
<b>INDICTMENT.</b> See CRIMINAL LAW.
<b>INFANT.</b> See ADOPTION; CHILD.
<b>INSANITY</b> – See CRIMINAL LAW.
<b>LANDLORD AND TENANT</b> – Small tenement – Recovery – Application to justices for warrant – Notice of application – Service – Substituted service – Need to prove due diligence by landlord in seeking tenant – Small Tenements Recovery Act, 1838, s 2. <b>Stoker v Stansfield</b> .. QBD 281
<b>LICENSING</b> – Club – Special hours certificate – Premises adapted for providing substantial refreshment for members – Licensing Act, 1964, s 78 (b). <b>Porter v Aberystwyth Justices</b> .. QBD 285
<b>LICENSING</b> – Gaming licence. See EVIDENCE; GAMING.
<b>LICENSING</b> – Knowingly selling intoxicating liquor to person under 18 – Sales by barman – Delegation by licensee of control of bar to barman – Licensee present in another bar on premises – No actual knowledge of sale on part of licensee – Liability of licensee – Licensing Act, 1964, s 169 (1). <b>Howler v Robinson</b> .. QBD 562
<b>LICENSING</b> – Licensing planning area – Certificate of non-objection – Application for grant – 'Equation of barrelage' policy adopted by committee – Need for applicant to acquire licence in suspense – Purchase from current owner – Refusal of certificate on ground that applicant had not purchased licence – Validity – Licensing Act, 1964, s 119 (2). <b>R v Birmingham Licensing Planning Committee. Ex parte Kennedy</b> .. CA 459
<b>LICENSING</b> – Permitted hours – Exemption order – Special occasion – Club holding licence covering supply to members, bona fide guests, and persons attending dinners, dances, and similar functions – Function to be held by outside local organisation – Licensing Act, 1964, s 74 (4). <b>R v Metropolitan Police Commissioner Ex parte Ruxton</b> .. QBD 175
<b>LICENSING</b> – Permitted hours – Exemption order – Special occasion – Local football match – Match occurring nearly every week – Discretion of justices – Licensing Act 1964 (c 26), s 74 (4). <b>R v Llandiloes (Lower) Justices. Ex parte Thorogood</b> .. QBD 67
<b>LOCAL AUTHORITY</b> – Declaration – Registration by defendant of claims to properties under Commons Registration Act, 1965 – Declarations sought by authority that defendants' claims not valid – Jurisdiction of court. <b>Thorne Rural District Council v. Bunting</b> .. ChD 355

<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner.		
<b>Dutton v Bognor Regis United Building Co Ltd</b> .. .. .	CA	201
<b>LOCAL GOVERNMENT</b> - Elections. See ELECTIONS.		
<b>LOTTERY.</b> See GAMING.		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1).		
<b>R v Coleshill Justices. Ex parte Davies</b> .. .. .	QBD	51
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine.		
<b>R v Southampton Justices. Ex parte Briggs</b> .. .. .	QBD	237
<b>MAGISTRATES</b> - Warrant - Non-payment of fine and compensation order - Warrant for committal to prison - Defaulter already remanded in custody on other charges - No knowledge on part of justices - Warrant not executed during remand in custody - Acquittal of defaulter - Execution of warrant - Defaulter taken to prison to serve outstanding term in respect of original committal - Validity of execution in view of delay - Need for warrant to be delivered to governor of prison - Magistrates' Courts Rules, 1968, r 80 (5).		
<b>R v Leeds Governor. Ex parte Huntley</b> .. .. .	QBD	551
<b>MARKET</b> - Statutory monopoly - Injunction to restrain unlicensed person holding market - Birmingham Corporation (Consolidation) Act, 1883, s 89.		
<b>Birmingham Corporation v. Perry Bar Stadium Ltd</b> .. .. .	ChD	359
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2).		
<b>Northern Ireland Trailers Ltd v County Borough of Preston</b> .. .. .	QBD	149
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42.		
<b>Northern Ireland Trailers Ltd v County Borough of Preston</b> .. .. .	QBD	149
<b>OBSCENITY.</b> See CRIMINAL LAW; CUSTOMS AND EXCISE.		
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<b>PUBLIC ORDER</b> - Insulting behaviour conducive to breach of peace - 'Insulting' - Conduct displeasing and annoying to other people - Public tennis match - Disruption of match by appellant jumping over barrier and running on court - Public Order Act, 1936, s 5, as replaced by Race Relations Act, 1965, s 7.		
<b>Brutus v Cozens</b> .. .. .	QBD 390; HL 636	
<b>PUBLIC ORDER</b> - Public place - Open space to which public have access - Tennis court - Grounds consisting of courts, administrative buildings, and partly covered stands around one court - Match disrupted on that court - Public Order Act, 1936, s 9.		
<b>Cozens v Brutus</b> .. .. .	QBD	390
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs.		
<b>Riggall v Hereford County Council</b> .. .. .	QBD	172
<b>RACE RELATIONS</b> - Housing - Council houses - Tenants restricted to British subjects - Validity - Action for declaration by local authority - Competency - Race Relations Act, 1968, s 2 (1), s 19 (2) (10).		
<b>London Borough of Ealing v Race Relations Board</b> .. .. .	HL	112
<b>RACE RELATIONS</b> - Provision of facilities - Discrimination - Members' club - Refusal to admit coloured man as member - Members of club 'section of public' - Impersonal quality distinguishing them from public at large - Clubs where admission by invitation - Race Relations Act, 1968, s 2 (1).		
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<b>RATING</b> - Rateable occupation - Unoccupied premises - House held for eleven months by church available for occupation by minister - General Rate Act, 1967, sched 1, para 2 (f).		
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<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Capricious, frivolous, or vexatious action - Rent Act, 1968, s 72 (1).		
<b>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</b> .. .. .	CA	367



<b>RENT CONTROL</b> - Contract referred to tribunal - Reference by local authority - Setting aside - Matters which must be shown - Need of tenants' consent to reference - Reference of number of contracts together - Rent Act, 1968, s 72 (1). <b>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</b> ..	<b>QBD</b>	<b>11</b>
<b>RIGHT OF WAY</b> - Land sold by Secretary for Air - Conveyance of land 'freed from rights' - Application to rights of way - Defence Act, 1842, s 14. <b>Attorney-General v Shonleigh Nominees Ltd</b> ..	<b>CA</b>	<b>407</b>
<b>RIVER</b> - Pollution - 'Causes' - Common sense meaning - Liability in absence of negligence or knowledge - Novus actus interveniens - Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a). <b>Alphacell Ltd v Woodward</b> ..	<b>HL</b>	<b>505</b>
<b>ROAD TRAFFIC</b> - Causing death by dangerous driving - Evidence - Previous drinking - Admissibility - Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit - Evidence of substantial excess rightly admitted on major charge - Road Traffic Act, 1960, s 1. <b>R v Thorpe</b> ..	<b>CA</b>	<b>301</b>
<b>ROAD TRAFFIC</b> - Disqualification - Mitigating circumstances - Circumstances which may be considered - Gravity or triviality of previous convictions - Road Traffic Act, 1962, s 5 (3). <b>Lambie v Woodage</b> ..	<b>HL</b>	<b>554</b>
<b>ROAD TRAFFIC</b> - Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit - Breath test - Requirement to provide specimen - 'Person driving or attempting to drive' - Pursuit by constable after suspicion - Requirement when person no longer driving or attempting to drive - Road Safety Act, 1967, s 2 (1). <b>Sakhuja v. Allen</b> ..	<b>HL</b>	<b>414</b>
<b>ROAD TRAFFIC</b> - Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit - Specimen of blood for laboratory test - Analyst's certificate of proportion of alcohol - Admissibility in evidence - Failure to serve copy on defendant - Waiver - No objection to evidence before close of case for prosecution - Road Traffic Act, 1962, s 2 (2). <b>R v Banks</b> ..	<b>CA</b>	<b>306</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - 'Accident' - Broken down car pushed by other car - Interlocking of bumpers - Breath test - Damage to both cars - Road Safety Act, 1967, s 2 (2). <b>R v Morris</b> ..	<b>CA</b>	<b>194</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Breath specimen - Requirement to provide - Defendant in hospital. Words spoken by constable in honest and reasonable belief that they would be understood - Failure by defendant to hear or comprehend request - Validity of requirement - Road Safety Act, 1967, s 3 (2) (b). <b>R v Nicholls</b> ..	<b>CA</b>	<b>481</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Disqualification - Special reasons - Vehicle parked on highway - Driving of vehicle few yards from highway to private parking place - Road Traffic Act, 1962 s 5 (1). <b>James v Hall</b> ..	<b>QBD</b>	<b>385</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Disqualification - Special reasons - Vehicle parked on highway - Vehicle driven from one parking place to another - Route covering 200 yards along busy street - Potential source of danger to other road users - Road Traffic Act, 1962, s 5 (1). <b>Coombs v Kehoe</b> ..	<b>QBD</b>	<b>387</b>
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Laboratory test - Requirement to provide specimen - 'Person driving or attempting to drive' - Requirement made after driving ceased - Need only for requirement to be closely related to episode of driving - Road Safety Act, 1967, s 3 (3) (4). <b>Brooks v Ellis</b> ..	<b>QBD</b>	<b>627</b>
<b>ROAD TRAFFIC</b> - Insurance - Third-party insurance - Policy - Charges of using car and permitting use without insurance - Onus of proof of existence of valid cover on defendant - Road Traffic Act, 1960, s 201 (1). <b>Leathley v Drummond. Leathley v Irving</b> ..	<b>QBD</b>	<b>548</b>
<b>ROAD TRAFFIC</b> - Motorway - Hard shoulder - Part of verge - Marginal strip - Part of carriageway - Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f). <b>Wallwork v Rowland</b> ..	<b>QBD</b>	<b>137</b>
<b>ROAD TRAFFIC</b> - Motorway - Prohibition against stopping on verge - Stopping permitted 'by reason of any accident, illness or other emergency' - 'Emergency' - Need for element of suddenness - Danger alleged to constitute emergency not apparent before driver got on motorway - Drowsiness - Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9. <b>Higgins v Bernard</b> ..	<b>QBD</b>	<b>314</b>

<b>ROAD TRAFFIC</b> - Regulations relating to construction, etc., of vehicles - Using vehicle on road in contravention of regulations - 'Using' - Vehicle driven by person other than owner's servant at owner's request - Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64. <i>Crawford v Houghton</i> .. . . .	QBD	234
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Pilotage by unlicensed pilot after offer - Ship moving from one mooring to another - Pilotage district byelaws - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws Part IX, byelaw 2. <i>McMillan v Crouch</i> .. . . .	QBD 179; HL	643
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Ship moving from mooring to discharge berth - Pilotage by unlicensed pilot after offer - General offer insufficient - Need of specific offer communicated in relation to particular movement of ship - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws, Part IX, byelaw 2. <i>Montague v Babbs</i> .. . . .	QBD	144
<b>SHOP</b> - Sunday trading - Offence - 'Place where any retail trade or business is carried on' - Premises other than shop - Market stalls - Whether sufficient degree of permanency - Question of fact and degree - Stalls erected on Saturday and taken down after trading on Sunday - No defined space for stall marked out on market site - Possibility of components of stalls varying from week to week - Shops Act, 1950, ss 47, 58. <i>Maby v Warwick Borough Council</i> .. . . .	QBD	631
<b>TOWN AND COUNTRY PLANNING</b> - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a). <i>McDonald v Howard Cook Advertising Ltd</i> .. . . .	QBD	79
<b>TOWN AND COUNTRY PLANNING</b> - Appropriation of land - Power to override easements and other rights - Conveyance by local authority of land to company - Re-development of area - Appropriation of conveyed land to housing purposes - Town and Country Planning Act, 1971, s 127 (1) (2). <i>Dowty Boulton Paul Ltd v Wolverhampton Corporation</i> .. . . .	ChD	677
<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Land in area zoned for residential building - No prospect of permission being given for that use - Land Compensation Act, 1961, s 16 (2). <i>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</i> .. . . .	CA	93
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Mining operations - Notice specifying substantial area - Actual working only in two smaller areas within specified area - Some operations more than four years before service of notice - Town and Country Planning Act, 1962, s 45 (1) (2). <i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. . . .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Notice to be served within four years from carrying out of development - Mining operations - Initial working of area more than four years prior to notice - Subsequent working of area within four-year period - Whether new development or continuation of original development - Validity of notice - Town and Country Planning Act, 1962, s 12 (1), s 45 (2). <i>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</i> .. . . .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service on occupier of land affected - 'Occupier' - Licensee of caravan site - Right to be served with notice - Control over site - Duration of enjoyment - Town and Country Planning Act, 1962, s 45 (3). <i>Stevens v London Borough of Bromley</i> .. . . .	CA	261
<b>TRADE DESCRIPTIONS</b> - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <i>Nalsh v Gore</i> .. . . .	QBD	1
<b>TRADE DESCRIPTIONS</b> - False description - Price - Misleading - 4d refund label on bottle - Refusal of refund - Trade descriptions Act, 1968, s 11 (2). <i>Doble v David Greig Ltd</i> .. . . .	QBD	469
<b>YOUTHFUL OFFENDER</b> , See CRIMINAL LAW; MAGISTRATES.		

concerned with the function for the purposes of which the land was acquired by the authority.'

In other words, and as applied to the facts of the present case, the question is whether the 72 acres to which I have previously referred were acquired by the defendants 'in the exercise (directly or indirectly) of compulsory powers'. I will refer in a moment to s 30 (5) of the 1959 Act, which throws further light (if that is the right word) on the meaning of that expression, but I must first say something more about the facts.

In 1935 a compulsory purchase order in respect of the 72 acres was made pursuant to the Public Works Facilities Act, 1930, and sealed. There is some doubt whether it was ever submitted for confirmation, but it was never in fact confirmed. Instead, a contract was negotiated with the owner for the purchase of a much larger area known as the Pendeford Estate and comprising 753 acres in all (including the 72 acres) and the 72 acres were acquired under that contract. As a matter of fact, therefore, the 72 acres were not acquired in the exercise of compulsory powers, at any rate directly.

As to the use of the word 'indirectly' in s 23 (2) of the 1959 Act, counsel for the plaintiffs submitted that the mere making of the compulsory purchase order by the defendants, although never confirmed, was an indirect exercise of compulsory powers. Counsel for the defendants, on the other hand, submitted that the word 'indirectly' was referable to a case where land was acquired for the purposes of one local authority by the exercise of compulsory powers by another local authority (for example, under s 28 of the Town and Country Planning Act, 1968). I prefer counsel for the defendants' suggestion, because the subsection appears to me to predicate that compulsory powers shall in fact have been exercised and not merely threatened.

I turn then to s 30 (5) of the 1959 Act, which provides:

'For the purposes of this Part of this Act land shall be taken to have been acquired by an authority in the exercise (directly or indirectly) of compulsory powers if it was acquired by them compulsorily or was acquired by them by agreement at a time when they were authorised by or under an enactment to acquire the land compulsorily ...'

Counsel for the plaintiffs argues, as I understand it, that the 72 acres were acquired by agreement at a time when the defendants were authorised by or under an enactment (namely, the Public Works Facilities Act 1930) to acquire the land compulsorily, and therefore it must be taken to have been acquired in the exercise (directly or indirectly) of compulsory powers. In my judgment, however, what the latter part of what I read of s 30 (5) is referring to is the case where the land has been acquired by agreement at a time when its purchase had been authorised either by a special Act of Parliament or by the confirmation of a compulsory purchase order. The authority conferred by the confirmation of a compulsory purchase order can, I think, properly be described as an authority conferred 'under an enactment', that is to say, pursuant to the authority of the general Act under which the compulsory purchase order was made.

In the result, I hold that the Wolverhampton Airfield has been validly appropriated for planning purposes, and that, subject to planning permission and to the payment of compensation, the defendants will be entitled to proceed with their housing scheme notwithstanding its effect on the plaintiffs' rights over the airfield.

That being so, I must dismiss the plaintiffs' action and also its originating summons, since in both cases the plaintiffs are claiming relief on the basis that the defendants are not entitled to bring their rights in respect of the airfield to an end.

Finally, there is one other matter to which I must refer. In paragraph 3 of their reply and the particulars delivered thereunder, the plaintiffs charge the defendants with having acted *mala fide* in purporting to appropriate the airfield for planning purposes on 4th January 1971. It is said that their true intention was to avoid the burden of maintaining the airport so as to comply with their agreement with the plaintiffs and that they do not genuinely require the airport for housing and ancillary development at the present time.

I have no hesitation in rejecting any suggestion of *mala fides*. I have seen the defendants' town clerk, Mr Williams, and their engineer, surveyor and planning officer, Mr Schofield, in the witness box. Both were completely honest witnesses, [His LORDSHIP quoted extracts from their evidence, and said: I accept that evidence as representing the honest opinion of the defendants and their officers. There was no bad faith on their part.]

*Action and summons dismissed.*

Solicitors: Gregory, Rowcliffe & Co, for Midwinter, Jones & Co, Cheltenham; Sharpe, Pritchard & Co, for Town Clerk, Wolverhampton.

Reported by Philippa Price, Barrister.

### HOUSE OF LORDS

(LORD WILBERFORCE, LORD PEARSON, LORD SIMON OF GLAISDALE, LORD CROSS OF CHELSEA AND LORD SALMON)

20th, 22nd June, 19th July

#### DIRECTOR OF PUBLIC PROSECUTIONS v WHYTE AND ANOTHER

*Criminal Law—Obscene publication—Corruption—Further corruption of corrupted readers—Addicts to obscene literature—Obscene Publications Act, 1959, s 2 (1), as amended by Obscene Publications Act, 1964, s 1 (1).*

The respondents were charged before justices with having obscene books for publication for gain contrary to s 2 (1) of the Obscene Publications Act, 1959, as amended. They found that the contents of the books included written descriptions or pictorial representations of sexual activity, ranging from normal sexual intercourse between male and female to such deviant sexual behaviour as intercourse per oram, intercourse per anum, acts between males, acts between females, and sexual play between or within groups of persons; there were also in the said books some instances of sadistic and violent behaviour. They further found that the likely readers of the books and the regular customers of the respondents' shop were inadequate, pathetic, dirty-minded men, seeking cheap thrills, addicts to the type of material in question, whose morals were already in a state of depravity and corruption. They entertained grave doubts whether the minds of such persons could be said to be open to any immoral influence which the books were capable of exerting, and, accordingly, dismissed the informations preferred against the respondents.

**Held:** the purpose of the Obscene Publications Acts was to prevent the depraving and corrupting of men's minds by obscene publications, and it could never have been intended to except from their protection a body of citizens merely because in different degrees they had previously been exposed, or had exposed themselves, to obscene material and were so corrupt that 'hard pornography' could have no further corruptive effect on them; the Act was not merely concerned with the once for all corruption of the wholly innocent, it equally protected the less innocent from further corruption and the addict from feeding or increasing his addiction; therefore, the decision of the justices was wrong and the case would be remitted to them with a direction to convict.

APPEAL by the Director of Public Prosecutions against a decision of a Divisional Court of the Queen's Bench Division dismissing an appeal by the prosecutor against a decision of Southamptom justices dismissing ten informations against the respondents Patrick Thomas Whyte and his wife Pearl Rosemary Whyte charging them with having obscene articles for publication for gain contrary to s. 2 (1) of the Obscene Publications Act 1959, as amended by s. 1 (1) of the Obscene Publications Act 1964.

*J G Le Quesne QC* and *J A C Spokes* for the appellant.

*J H Inskip QC* and *I A Kennedy* for the respondents.

Their Lordships took time for consideration.

19th July. The following opinions were delivered.

**LORD WILBERFORCE:** The respondents, who are husband and wife, run a bookseller's shop in St Mary Street, Southampton. The shop was searched by police officers in February 1971 and a large number of books and magazines was seized. This resulted in charges being brought, through ten informations, against each respondent under s. 2 (1) of the Obscene Publications Act 1959 (as amended). This section makes it an offence to have for publication for gain an obscene article, which includes a book or magazine. An article is deemed to be obscene if its effect is, if taken as a whole, 'such as to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained in it' (s. 1 (1) of the Act of 1959). Each information related to a separate book or magazine which was among those found in the shop and seized by the police. All the informations were dismissed by the magistrates, and, on appeal by way of Case Stated, that decision was affirmed by a majority of the Divisional Court of the Queen's Bench Division. The question certified for decision by this House, pursuant to s. 2 (2) of the Administration of Justice Act 1960, is: 'Whether on the facts found and on the inferences drawn the justices were bound to convict.'

There is no doubt that the respondents had the books for publication for gain, and the only question was, and is, whether they were 'obscene'. The Act, as is well known, has replaced the common law definition, or conception, of obscenity by one of its own in terms I have cited above. Both the policy and the language of the Act have been plentifully criticised: the former we cannot question, and with the latter we must do our best. One thing at least is clear from this verbiage, that the Act has adopted a relative conception of obscenity. An article cannot be considered as obscene in itself: it can only be so in relation to its likely readers. One reason for this was no doubt to exempt from prosecution scientific, medical or sociological treatises not likely to fall into the hands of laymen, but the section is drafted in terms wider than was necessary to give this exemption, and this gives the courts a difficult task. For, in every case, the magistrates, or the jury, are called on to ascertain who are likely readers and then to consider whether the article is likely to deprave and corrupt them.

Before I attempt further analysis of these words, in order to narrow the issue, I state some further facts. These as found by the justices are set out in the Case Stated. There are, to my mind, two salient facts, or groups of facts. First, the respondents' shop is a general bookseller's shop open to the public. It is in an ordinary shopping area, opposite a technical college, and near blocks of council flats and maisonettes. Other books than pornographic books are offered for sale, and it seems a fair inference from what the justices have found that the latter were placed in a distinct part of the shop, but not in a locked case or closed cupboard. Each of those seized bore a label 'Adults only'—words which may operate as an attraction rather than as a deterrent. Secondly, there can be no doubt that the books were what may be



called pornography of the hardest quality, or, in the ordinary sense of the word, obscene. No defence of 'public good' was, or could be, put forward. To make good this assertion, and to show the strength of it, I must quote from the justices' finding. They say:

'Their contents included written descriptions or pictorial representations of sexual activity, ranging from normal sexual intercourse between male and female to such deviant sexual behaviour as intercourse per oram, intercourse per anum, acts between males, acts between females, and sexual play between or within groups of persons; there were also in the said books some instances of sadistic and violent behaviour.'

One would think that if this section were to have any impact at all, it must hit such a case as this. So the process by which the justices reached a contrary conclusion requires some careful examination.

They proceed first, quite correctly, to determine the likely readers in the light of relevant circumstances. The police had kept observation of the shop and were able to ascertain 'the sex and age of persons visiting [it] as customers or prospective customers'. The justices found that the customers were principally men of middle age and upwards who came there regularly to make purchases. These comprised the large majority although there were occasionally some middle aged women and from time to time younger persons. When younger persons approached or entered the shop, efforts were made to exclude them either totally, or from the part of the shop where the pornography was placed. The female respondent applied this policy to those who appeared to be under 21, the male respondent to those who appeared to be under 18, so presumably he let in those between 18 and 21; the findings do not cover the likelihood of access by persons in fact, although not in appearance, under the specified ages or those slightly but not much older. It is not found how successful their efforts were.

On these facts the justices made findings as to the likely readers of the relevant books. They were, that young persons (undefined) were possible but not probable readers and that the persons 'likely' or 'most likely' to purchase them were males of middle age and upwards.

I must say of these findings that I regard them as unsatisfactory almost to the point of error in law. I doubt the validity of an approach which seeks the 'most likely' readers and then rejects others than the 'most likely' as not likely. It looks very much as if the justices thought that their task was to identify a category of most likely readers, but this is not what the Act requires, or permits. Account ought to be taken of other persons, less likely perhaps than the main category, to read the books, if these others were also likely to do so. In the case of a general shop, open to all and sundry, and offering all types of books, common sense suggests the conclusion that likely readers are a proportion of all such persons as normally resort to such shops, and it would require strong evidence to justify a conclusion that the likelihood of reading the books was confined to one definable category. I have grave doubts whether the evidence here which, as one would expect, leaves open a number of gaps, justifies any such limitation as has been made. But we are here in the realm of fact, and allowing, as we must, for the fact that the findings are stated by laymen and not lawyers we are not entitled to reject what I think on a fair reading of the case has been found, namely, that the likely readers of the relevant books were men of middle age and upwards, many of whom were regular customers, and no others. So the critical question to be asked is whether the effect of the articles is such to deprave and corrupt these likely readers.

My Lords, I do not think that any extended discussion of the expression 'to deprave and corrupt' would be profitable, or is needed in the context of the present case.

But there are considerations relevant to the manner in which the justices have applied it. It is well known that the words (deprave and corrupt) are derived from the judgment of COCKBURN CJ in *R v Hicklin* (1) where he said:

'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'

The Obscene Publications Act 1959 adopted the expression 'deprave and corrupt' but gave a new turn to it. Previously, although appearing in COCKBURN CJ's formula, the words had in fact been largely disregarded; the courts simply considered whether the publication was obscene and the tendency to deprave and corrupt was presumed (see *Crowe v Graham* (2), per WINDEYER J citing Professor Glanville Williams). But the Act of 1959 changed all this. Instead of a presumed consequence of obscenity, a tendency to deprave and corrupt became the test of obscenity and became what had to be proved. One consequence appears to be that the section does not hit 'articles' which merely shock however many people. It can only have been the pressure of Parliamentary compromise which can have produced a test so difficult for the courts. No definition of 'deprave and corrupt' is offered—no guideline as to what kind of influence is meant. Is it criminal conduct, general or sexual, that is feared (and we may note that the articles here treated of sadistic and violent behaviour) or departure from some code of morality, sexual or otherwise, and if so whose code, or from accepted or other beliefs, or the arousing of erotic desires 'normal' or 'abnormal', or as the justices have said 'fantasies in the mind'. Some, perhaps most, of these alternatives involve deep questions of psychology and ethics; how are the courts to deal with them? Well might they have said that such words provide a formula which cannot in practice be applied. What they have said is, first, that no definition of 'deprave and corrupt' can be provided (*R v Calder & Boyars Ltd* (3)), though the words are meant to be strong and emphatic (see *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* (4) per LORD REID and LORD SIMON OF GLAISDALE); secondly, that judges or juries must decide for or against a tendency to deprave and corrupt as a question of fact and must do so without expert, i.e. psychological or sociological or medical, advice (*R v Anderson* (5)). I simply state this attitude as a fact; it is not appropriate to endorse or to disapprove it on this present occasion. I have serious doubts whether the Act will continue to be workable in this way, or whether it will produce tolerable results. The present is, or in any rational system ought to be, a simple case, yet the illogical and unscientific character of the Act has forced the justices into untenable positions.

Let us see what they have done. Having confined the class of likely readers to males of middle age and upwards they have held that they were not satisfied that the books would have a tendency to deprave and corrupt a significant proportion of them. They reached this result by a process of inference; none of the readers was called to the witness box. The process was (i) 'the significant proportion of future recipients of the said articles were going to be the hard core (note the conclusory words) of regular customers of the said shop'; (ii) the regular customers they saw as 'inadequate, pathetic, dirty-minded men, seeking cheap thrills—addicts to this type of material, whose morals were already in a state of depravity and corruption'; (iii) there was

(1) (1868), LR 3 QB 360; sub nom *Scott v Wolverhampton Justices* 32 JP 533.

(2) (1968), 41 ALJR 402.

(3) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

(4) [1972] 2 All ER 898.

(5) [1971] 3 All ER 1152; [1972] 1 QB 304.

grave doubt 'whether such minds could be said to be open to any immoral influences which the said articles were capable of exerting'.

My Lords, I appreciate genuinely the efforts which the justices made to administer this legislation; it is obvious that they gave the case a great deal of attention and thought. It is no reflection on their ability that in this very difficult task they fell into error. But, in my opinion, the process I have just stated was erroneous in itself and the facts to which it was applied lead clearly to the conclusion that the respondent should have been convicted. Putting aside the considerable deficiencies in the factual basis of the process (is it really to be supposed that every, or with minor exceptions, every male of 40 and upwards who has visited or may visit this shop is of the character described—what is meant by 'significant proportion'—), to state as a proposition that all these men are incapable of being depraved and corrupted because they are addicts is not a finding of fact, but an assumption contrary to the whole basis of the Act. The Act's purpose is to prevent the depraving and corrupting of men's minds by certain types of writing; it could never have been intended to except from the legislative protection a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the 'obscene' material. The Act is not merely concerned with the once for all corruption of the wholly innocent, it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction. To say this is not to negate the principle of relative 'obscenity'; certainly the tendency to deprave and corrupt is not to be estimated in relation to some assumed standard of purity or some reasonable average man. It is the likely reader. And to apply different tests to teenagers, members of men's clubs, or men in various occupations or localities would be a matter of common sense. But the argument here is not: 'Well, nobody reads this until he is over 40 and by then he won't come to any harm'. It is quite different. It assumes the possibility of corruption by the articles in question, indeed the fact of it is found, and argues from that to an absence of corrupting tendency. The passage contains its own refutation. These very men, it states, are depraved and corrupted by these very articles. In itself it proves the case: it should have led to conviction.

I need only mention one other point. It was argued that the justices' finding was only of a limited tendency: they found, it was said, that the readers would find these articles fascinating, enabling them to engage in private fantasies of their own, but not involving overt sexual activity of any kind. This, it was said, could not amount to a depraving or corrupting tendency. I reject this argument entirely. In the first place, it is factually speculative and, in relation to a variety of customers, almost certainly unsound. Secondly, it appears, on one interpretation, to suggest the sexual activity, unspecified it is true, but also possibly deviant, might legitimately be provoked so long as not 'overt'. Thirdly, in any event, there is no basis for the argument that even if the effect was only on the mind and not, directly, on action, that is outside the Act. But at least since *R v Hicklin* (1) and, as older indictments clearly show, from earlier times, influence on the mind is not merely within the law but is its primary target (see particularly *COCKBURN CJ*). The justices themselves thought that just this tendency had actually depraved and corrupted the readers: in my opinion, as to this, they were right.

I would allow the appeal and remit the case to the justices with a direction to convict.

**LORD PEARSON:** The relevant sections of the Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964, are as follows:

(1) (1868), LR 3 QB 360; sub nom *Scott v Wolverhampton Justices* 32 JP 533.

'1.—(1) For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

'(2) In this Act "article" means any description of article containing or embodying matter to be read or looked at or both . . .

'(3) For the purposes of this Act a person publishes an article who—(a) distributes, circulates, sells, lets on hire, gives or lends it, or who offers it for sale or for letting on hire . . .

'2.—(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable . . .'

The definition in s 1 (1) of an obscene article is evidently based on the traditional test of obscenity which was formulated by COCKBURN CJ in *R v Hicklin* (1). There are three points which are material for the instant case.

(i) The question whether an article is obscene depends not only on its inherent character but also on what is being or is to be done with it. Suppose that there is a serious book on psychopathia sexualis designed to be read only by medical men or scientists concerned with such matters, and that it is kept in the library of a hospital or university and so far as possible reserved for use by such medical men or scientists. Such a book should not be regarded as obscene for the purposes of the Act, because it is not likely to come (though possibly it might come) into the hands of anyone who might be corrupted by it. In *R v Hicklin* COCKBURN CJ, intervening in the argument, said:

'A medical treatise, with illustrations necessary for the information of those for whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.'

(ii) The words 'deprave and corrupt' in the statutory definition refer, in my opinion, to the effect of an article on the minds (including the emotions) of the persons who read or see it. Of course, bad conduct may follow from the corruption of the mind, but it is not part of the statutory definition of an obscene article that it must induce bad conduct. In *R v Hicklin* COCKBURN CJ said:

'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.'

(iii) A third point to be noticed in the statutory definition is that there is no requirement as to the number of persons, or as to the proportion of its readers, which the article will tend to corrupt and deprave. The word 'persons' is plural, but it may include the singular. I think in some cases the rule *de minimis non curat lex* would suitably be applied. In *R v Calder and Boyars* (2) it appears that:

'Thirty defence witnesses gave evidence to the effect that the tendency of the book was not to deprave and corrupt but the reverse; that it gave a graphic,

(1) (1868), LR 3 QB 360; sub nom *Scott v Wolverhampton Justices* 32 JP 533.

(2) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

compassionate and condemnatory description of the depths of depravity and degradation in which life was lived in Brooklyn, and that the only effect it would produce on any but a minute lunatic fringe of readers would be horror, revulsion and pity . . .

The judgment of the court, delivered by SALMON LJ, contains this sentence:

'This court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it.'

That would indeed have been a suitable direction in that case, because, on a favourable view, the book could have been regarded as tragic and pathetic rather than pornographic and, if the readers of the book likely to be corrupted by it were only a 'minute lunatic fringe' rather than a significant proportion, the book could not fairly be regarded as obscene. The 'minute lunatic fringe' would be negligible. But I do not think the phrase 'significant proportion' can safely be transplanted to cases of a different character. There is the danger, for instance, of leading a bookseller to believe that, so long as he sells a comparatively large number of copies of a pornographic book to persons not likely to be corrupted by it, he can with impunity sell a comparatively small number of copies to persons who are likely to be corrupted by it. In such a case, if the comparatively small number of copies is not so small as to be negligible, the statutory definition should be applied according to its terms: the book's effect, taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read it. 'Persons' means some persons. COCKBURN CJ in *R v Hicklin* (1) did not suggest any requirement as to the number of persons, or as to the proportion of its readers, which a book might tend to deprave and corrupt.

At the material time the respondents were carrying on a bookshop business, and their bookshop was in a shopping street along with other small shops, and opposite to it were the technical college buildings, and behind those buildings were blocks of council flats and maisonettes. Part of the stock of the bookshop consisted of pornographic books, and these were exposed for sale and sold there.

The contents of the pornographic books included written descriptions and pictorial representations of sexual activity ranging from normal sexual intercourse to 'deviant' (which means perverted) sexual activity between male and female, between males, between females, and between or within groups of persons, with some instances of sadistic and violent behaviour. If the contents of the pornographic books had been confined to normal sexual behaviour, the case would have been of a different kind and I express no opinion as to what the decision should be in a case of that kind. In the present case the contents of the pornographic books were as stated. There could hardly be anything more obviously obscene than that collection of pornographic books exposed for sale and sold in that shop.

How did the justices come to decide that that collection of books in that shop was not obscene? I think they were obsessed by the phrase 'significant proportion' which had been used by the Court of Appeal in *R v Calder and Boyars* (2) in relation to a book of a different kind, and they carried out a process of selection and rejection. First, they isolated the group of customers 'most likely' to buy the pornographic books, namely, males of middle age and upwards, and put aside the other groups of customers, namely, (i) women customers, (ii) young customers who appeared to the female respondent while she was in the shop to be not under 21 years of age or to the male respondent if he was in sole charge of the shop to be not under 18 years of age and

(1) (1868), LR 3 QB 360; sub nom *Scott v Wolverhampton Justices* 32 JP 533.

(2) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.



consequently were allowed to go into the part of the shop where the pornographic books were displayed and so had the opportunity of inspecting them and presumably buying them if so inclined, (iii) the customers who were not so young but not yet middle aged. Secondly, there was another selection made. Within the class of middle aged male customers it was decided that 'the significant proportion' of future recipients of the pornographic books would be 'the hard core of regular customers'. This involved putting aside all new customers coming to the shop for the first time or the first few times before they became regular customers. Thirdly, it was decided that the hard core of regular customers would be 'most likely' to fall within the classification of persons who 'might find the articles fascinating, enabling them to engage in private fantasies of their own, but not involving overt sexual activity of any kind'. This involved putting aside any of the regular customers falling within the classification of persons who 'might find the articles stimulating to the point where they were driven to indulge in sexual activity of a normal or abnormal kind'.

The justices' process of selection and rejection resulted in the delimitation of a main group of customers for the pornographic books with all minor groups eliminated. In my opinion, that was not a proper application of the statutory definition, which says nothing about a main group or a significant proportion. The statutory definition has been set out above. It refers to 'persons', which means some persons, though I think in a suitable case, if the number of persons likely to be affected is so small as to be negligible—really negligible—the *de minimis* principle might be applied. But if a seller of pornographic books has a large number of customers who are not likely to be corrupted by such books, he does not thereby acquire a licence to expose for sale or sell such books to a small number of customers who are likely to be corrupted by them. On that ground, even if it stood by itself, I would say that the justices' reasoning was incorrect in law. There is, however, a second ground also.

As I have said, the justices found that the regular customers would be most likely to fall within the classification of persons who 'might find the articles fascinating, enabling them to engage in private fantasies of their own, but not involving overt sexual activity of any kind'. I am not sure what is meant by 'overt' sexual activity, but I do not think it matters. The justices 'saw regular customers as . . . addicts to this type of material, whose morals were already in a state of depravity and corruption', and the justices 'entertained grave doubts whether such minds could be said to be open to any immoral influences which the said articles were capable of exerting'. But, in my opinion, the words 'deprave and corrupt' in the statutory definition, as in the judgment of COCKBURN CJ in *R v Hicklin* (1), refer to the effect of pornographic articles on the mind, including the emotions, and it is not essential that any physical sexual activity (or any 'overt sexual activity', if that phrase has a different meaning) should result. According to the findings the articles did not leave the regular customers unmoved. On the contrary, they fascinated them and enabled them to engage in fantasies. Fantasies in this context must, I think, mean fantasies of normal or abnormal sexual activities. In the words of COCKBURN CJ, the pornographic books in the respondents' shop suggested to the minds of the regular customers 'thoughts of a most impure and libidinous character'.

In my opinion, on the facts found by the justices the articles were obscene and the respondents ought to have been convicted. I would allow the appeal and remit the case to petty sessions with a direction to convict.

**LORD SIMON OF GLAISDALE:** It is with considerable misgiving that I have come to the conclusion that this appeal should be dismissed.

(1) (1968), LR 3 QB 360; sub nom *Scott v Wolverhampton Justices* 32 JP 533.

In the first place, I do not believe that, in enacting the Obscene Publications Act 1959, Parliament contemplated that it was opening the way to a defence that likely exposés to obscene publications were so corrupt that 'hard pornography' could have no further corrupting effect on them. The intention of the Act was rather, as it strikes me, on the one hand to enable serious literary, artistic, scientific or scholarly work to draw on the amplitude of human experience without fear of allegation that it could conceivably have a harmful effect on persons other than those to whom it was in truth directed, and on the other to enable effective action to be taken against the commercial exploitation of 'hard pornography'—obscene articles without pretension to any literary, artistic, scientific or scholarly value. From their description by the justices, the articles in question in this appeal seem to have been just such 'hard pornography'.

In the second place, I suspect that the evidence before the justices was inadequate to justify conclusions that an insignificant proportion of likely exposés were other than already irredeemably depraved and corrupt or incapable of further or baser depravity and corruption. Moreover, the language in which the justices have explained themselves also makes me uneasy lest they have missed crucial steps in the argument by which they could arrive at their conclusion. I need not enlarge on this aspect, since it forms the basis of judgment of those of my noble and learned friends who would allow this appeal.

But in the end I find myself in agreement with the views expressed by my noble and learned friend, LORD SALMON, whose draft speech I have had the advantage of reading and with which I agree. I think that in amending the law in such a way that obscenity is to be tested by the effect on likely exposés, a defence is available not merely that the likely exposé is too aesthetic, too scientific or too scholarly to be likely of corruption by the particular matter in question, but also that he is too corrupt to be further corrupted by it. I would, however, express my concurrence with the view of MACKENNA J in the court below that the language of the statute is apt to extend to the maintenance of a state of corruption which might otherwise be escaped, and with that of ASHWORTH J that a person can be re-corrupted (though I agree with my noble and learned friend, LORD SALMON, that this is rather an insight into human experience than a proposition of law).

And although, no doubt, the Case stated by the justices can be faulted in a number of respects if it is scrutinised as if its validity depended on its linguistic accuracy, cogency and consistency, I do not think that this is the right way to read a statement by lay justices. To adopt an expression from another branch of the law, they are entitled to a 'benevolent construction'. They are not bound to set out, in the way required of a professional judge, their entire chain of reasoning. Whatever I may suspect, it might well be that they did have evidence which supported their findings of fact and the inferences which they drew. It is for the appellant to show that such findings were unsupported by evidence and did not themselves support the inferences drawn: this, in my view, the appellant has failed to do.

The justices in the end asked themselves the right questions. These were:

- '(i) Who were the persons likely to read and see the articles, the subject of the informations? (ii) Was it established to our satisfaction that the said articles would have a tendency to deprave and corrupt a significant proportion of such persons?'

It is true that the expression 'significant proportion' does not appear in the statute, but was taken from *R v Calder and Boyars* (1). But the statute must be explained to a jury, and to use expressions like 'de minimis' would merely confuse them. For the reasons given the judgment of the Court of Appeal in that case, with which I

(1) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

respectfully agree, 'significant proportion' is a helpful and accurate gloss on the statute. Although the substitution of a judicial gloss for the words of a statute is to be exercised with great caution and reserve, I cannot think that what would, in my view, be an unimpeachable direction to a jury, invalidates a conclusion of justices.

I would therefore dismiss the appeal.

**LORD CROSS OF CHELSEA:** In April 1971, the chief inspector of the Hampshire Constabulary preferred a number of informations against the respondents, who carried on the business of booksellers in St Mary Street, Southampton, charging them with having certain obscene books for publication for gain contrary to s 2 (1) of the Obscene Publications Act 1959 (as amended). The books in question—the contents of which are described in para 5 of the Stated Case—are so-called 'hard pornography'. Their purpose is to excite the reader sexually; they are devoid of literary or artistic merit; and in the ordinary sense of the word they are undoubtedly 'obscene'. The Act, however, defines an obscene book as one the effect of which is such as to tend to deprave and corrupt persons who are likely to read it and the justices who heard the informations dismissed them because they were not satisfied that the books in question would tend to deprave and corrupt a significant proportion of those likely to read them.

At the request of the prosecutor they stated a Case for the opinion of the court and on 14th February 1972 the Divisional Court (MELFORD STEVENSON and FORBES JJ, MACKENNA J dissenting) upheld their decision. The Director of Public Prosecutions then took over the conduct of the case for the prosecution, and on the 18th February the Divisional Court certified that a point of law of general public importance was involved in the decision, namely: 'Whether on the facts found and the inferences drawn the justices were bound to convict'. The court refused leave to appeal to this House, but leave to appeal was later granted by the Appeal Committee.

There is no doubt that the justices had to answer two questions: first, what persons were likely to read these books; and, secondly, whether they were satisfied that they would tend to deprave and corrupt a significant proportion of such persons. They answered the first question by saying that the likely readers of the books were men of middle age and upwards. The facts found by them in para 4 of the Case undoubtedly show that the majority of the readers would be middle aged or elderly men but it does not follow from that that there could be no other likely readers. I am far from sure that the justices appreciated this, for having found in para 4 (k) that the persons 'most likely' to have bought the books were males of middle age or upwards they go on in para 6 to describe males of middle age and upwards as 'the likely' readers of the books. If they did not appreciate that it did not follow from the fact that members of a certain class were 'the most likely' readers of the books that other persons could not be 'likely' readers of them and that they could only exclude such other persons if they were numerically negligible as compared with the middle aged and elderly male readers then it may be that they would not have excluded all others—and in particular would not have excluded young men over 18 years—from the category of likely readers. But we do not know what evidence was before them and the Case is not drawn with such care in the use of language as to make it safe to rely heavily on the change from 'most likely' to 'likely' to which I have referred. So although I doubt very much whether the finding that the only likely readers were middle aged or elderly men was justified I cannot say that it was a finding at which no reasonable man could have arrived.

The justices—after describing the books in para 5—proceeded in para 6 to consider what different effects the reading of the books might possibly have on those whom they had found to be the likely readers of them. For this purpose they divided them into the following four classes:

'(i) Some might find the articles offensive and repulsive. (ii) Others might find the articles fascinating, enabling them to engage in private fantasies of their own, but not involving overt sexual activity of any kind. (iii) Others might find the articles stimulating to the point where they were driven to indulge in sexual activity of a normal or abnormal kind. (iv) Others might react to the articles in a wholly negative way, seeing them merely as worthless creations and being quite unaffected by their contents.'

By 'private fantasies' in (ii) I take the justices to mean that the reader would imagine himself in the situations described or depicted in the books. It is, I think, reasonable to suppose—and counsel for the respondents was prepared to concede—that the production of such fantasies would in some cases be accompanied or followed by masturbation. Having divided the readers into these four classes the case proceeds as follows:

'Although a very small number of the potential customers of the said shop might conceivably have come to fall within the classifications mentioned at (i), (iii) and (iv) supra, we were of the view that the significant proportion of future recipients of the said articles were going to be the hard core of regular customers of the said shop, and, further, that these last mentioned persons would be most likely to fall within the classification mentioned at (ii) supra.'

In this passage the justices have clearly used the words 'significant proportion' inaccurately. A significant proportion of a class means a part which is not numerically negligible but which may be much less than half; but when they talk in this passage of 'the significant proportion' of future readers they must—if sense is to be made of what they say—mean 'the great majority' of the future readers. The conclusion at which they arrive in this passage is, as I understand it, that substantially all the likely readers of the books would be affected by them in the manner set out in (ii). How many readers might fall into categories (i) and (iv) is of no importance since the books could have no tendency to deprave or corrupt them. The justices do not say why they thought that none or substantially none of the middle aged or elderly men who enjoy reading the books would be stimulated by them to indulge in sexual activity. The question is not one which it is easy for an ordinary magistrate or judge or juror to answer without the help of the evidence of experts. Unaided by such evidence I would not myself have thought it right to leave category (iii) entirely out of account; but I am not prepared to say that the decision of the justices on this point was one which they could not reasonably come to. Finally, they had to consider whether they were satisfied that a significant proportion of the middle-aged and elderly men who would enjoy reading the books and would react to their reading in the manner described in (ii) would tend to be depraved or corrupted by the books. They express their finding on this point in the following words:

'We saw regular customers as inadequate, pathetic, dirty-minded men, seeking cheap thrills—addicts to this type of material, whose morals were already in a state of depravity and corruption. We consequently entertained grave doubts as to whether such minds could be said to be open to any immoral influences which the said articles were capable of exerting.'

In this passage the justices, are, as I see it, saying two things: (i) Such readers, if not already in a state of depravity and corruption, would have tended to be depraved and corrupted by reading these books; but (ii) those whom we find to be the only likely readers of these books are already in a state of depravity and corruption by reason of their addiction to reading of this sort and we are not satisfied that the reading of these particular books would make them any worse than they are already.

Counsel for the respondents made three submissions to us with regard to (i). First, he submitted that when the justices spoke of the morals of the likely readers being in a state of depravity and corruption they meant no more than that they had been 'led astray morally'. I can see no warrant for this suggestion. Secondly, he submitted that a book could not have a tendency to deprave and corrupt its reader within the meaning of the Obscene Publications Act if it was not shown to have caused him to behave in a way which affected other people. I cannot accept that submission. 'Depravity' and 'corruption' are conditions of the mind though evidence of behaviour may be needed to establish their presence. Moreover, one cannot infer from the fact that the reading of a book does not immediately result in outward acts affecting others that the subsequent conduct of the reader will not have been imperceptibly affected for the worse by what he read in the past. Lastly counsel submitted that 'depravity' and 'corruption' are strong words and that in this day and age ordinary decent people, though they might be disgusted at the thought of elderly men buying books of this sort in order to arouse sexual fantasies and thereby to relieve themselves by masturbation, would nevertheless hesitate to say that such men were 'depraved' or 'corrupted'. As to this I would only say that the view on this point taken by these justices appears to me to be one which can reasonably be taken. Whether it is the only view, which can reasonably be taken does not arise for decision in this appeal.

The final question in the case is whether the train of reasoning set out in (ii) above which led the justices to acquit the respondents can be supported. I think that it is fallacious for two reasons. First—although the Obscene Publications Act was no doubt the outcome of a compromise between opposing schools of thought—I cannot believe that the staunchest supporters of the 'permissive' view meant it to be a defence for a bookseller to say: 'I have been selling books of this sort to this group of readers for a long time. I admit that as a result of their reading they have become depraved. Fortunately for me, however, they have now reached such a state of depravity that further reading of my books—though they still excite them—cannot be said to make them any worse than they are already.' I would not be prepared to read the words 'tends to deprave and corrupt' so as to lead to such a ludicrous result unless I was convinced that they admitted of no other construction. To my mind, they are well able to include 'maintaining' in a state of depravity and corruption. But quite apart from this the justices appear to me to have completely overlooked the fact that it takes time for a man to become 'depraved'. *Nemo repente fuit turpissimus*. The regular customers of this shop whom the justices found to be now in a state of depravity and corruption may have been far less deeply corrupted when they first saw books of this sort exposed for sale in the respondents' shop. Similarly a middle aged or elderly man who was not yet an addict of pornography might at any time see these books in the shop, be attracted by them, become a recruit to the band of regular readers, and in time become as depraved as the others. The justices appear to have treated the 'pornographic' section of this bookshop as though it was analogous to a clinic for drug addicts—a place in which the only purchasers of books were men who had become addicts of pornography elsewhere. There is nothing in the facts found to warrant such a view. If the justices had borne these considerations in mind they could not properly have come to the conclusion at which they arrived which is, in my judgment, wrong in law.

Consequently I would allow the appeal and remit the case to petty sessions with a direction to convict.

**LORD SALMON:** There can be no doubt but that the respondents were offering for sale pornographic books which are lewd, disgusting and obscene in the ordinary and colloquial meaning of those words. Nevertheless, the books are not obscene within the meaning of the Obscene Publications Act 1959, s 1 (1), unless they



'tend to deprave and corrupt persons likely to read them'. It is well settled that the question whether or not books do tend to deprave and corrupt persons likely to read them is not a question of law. It is essentially a question of fact to be decided by a jury or the justices according to whether the accused are tried on indictment or summarily.

It is a fundamental principle of our law that accused persons are entitled to be acquitted unless proved guilty of the offence charged beyond any reasonable doubt. This principle holds good however unattractive the accused or his trade may be and equally whether his trial takes place before a judge and jury or justices. The only right of appeal which a prosecutor ever has against an acquittal is by way of Case Stated from justices to the High Court of Justice. This is a right which should be used with circumspection and restraint; and I have no doubt that it usually is. Since this is the first time, so far as I know, that this House has ever had to consider such a case, it may be worth stating that this unique right of appeal is given solely to enable the High Court to correct mistakes of law plainly made by justices. If, but only if, the facts stated show that, in law, the offence charged was indisputably committed, then it follows that the justices must plainly have made a mistake in law. In such circumstances, but only in such circumstances, the High Court may, and indeed should, correct the mistake and direct the justices to convict. The High Court has no power to correct what it may consider to be a mistake of fact; the facts are solely for the justices. Whether there is any evidence to support a finding of fact is, however, a question of law. Such a question is sometimes raised by a case stated but it is not raised in the present case.

A number of informations were laid against the respondents charging them under s 2 (1) of the Act [as amended] with having obscene articles, namely, the books to which I have referred, for publication for gain. The respondents elected to be tried summarily. The justices acquitted the respondents on the ground that they were not satisfied that the books to which I have referred 'would have a tendency to deprave and corrupt a significant proportion of the likely readers of the same, having regard to all the circumstances and to the facts as found.'

It is evident from the Case Stated that the justices found in effect that the likely readers of the books were dirty minded old men who were already in such a state of depravity and corruption that there were grave doubts whether they could be further depraved or corrupted by the books in question.

The prosecutor appealed to the Divisional Court by way of Case Stated and that court by a majority dismissed the appeal. After the conduct of the prosecution was taken over by the Director of Public Prosecutions the court certified that a point of law of general public importance was involved in its decision, but refused to grant leave to appeal to this House. Leave to appeal was, however, granted by the Appeal Committee. The point of law as certified was: 'Whether on the facts found and on the inferences drawn the justices were bound to convict.' It is perhaps difficult, at first sight, to see how this could raise a point of law. When, however, one looks at the record, it is apparent that it was argued on behalf of the appellant that on the facts found and the inferences drawn, the justices were bound to convict by the decision of the Court of Criminal Appeal in *Shaw v Director of Public Prosecutions* (1). In that case the count containing the charge under s 2 (1) of the Act of 1959 did not come before this House. The only passage in the judgment of the Court of Criminal Appeal delivered by ASHWORTH J which is relevant to the present case is the following:

'Lastly, an argument was put forward that . . . the persons likely to read the article . . . were already corrupted and depraved. The fallacy in this argument is

that it assumes that a man cannot be corrupted more than once and there is no warrant for this.'

No doubt the point that a man may be corrupted more than once is unexceptionable as a factual proposition. I find insuperable difficulty, however, in understanding what justification there can be for elevating this into a point of law.

This appeal does not, of course, turn on whether there was evidence to support the justices' findings of fact, still less on whether your Lordships consider that the justices came to wrong conclusions of fact. For myself I strongly suspect that they did, but we have not had the advantage of hearing the evidence nor indeed of knowing what was the evidence which persuaded the justices to their conclusions. My Lords, like the Court of Appeal this House is bound to accept the justices' findings of fact and the sole question for your Lordships to decide is whether, on those findings of fact, the justices were, in law, bound to convict. Sceptical though I am about the correctness of those findings and much as I deplore the sale of books of this kind, I cannot persuade myself that there are any grounds for holding that the justices were in law bound to convict. I recognise that the Case is not stated with the greatest possible clarity. The true meaning of some of the findings is certainly debatable. No doubt, however, the usual practice was followed of submitting the draft Case to both sides. It would have been open to the appellant to suggest amendments to the draft or indeed to have asked the Divisional Court to send the Case back to the justices to elucidate the facts found or to find further facts. As it is we must, in my view, take the Case as we find it. If on a fair reading of the case as a whole it does not clearly contain findings of fact which make the acquittal impossible in law, this appeal should be dismissed.

It is plain from para 10 of the Case that the justices asked themselves the right questions:

First, who were the persons likely to read and see the articles, the subject of the informations? and, secondly, was it established to our satisfaction that the said articles would have a tendency to deprave and corrupt a significant proportion of such persons?

In answer to the first question the justices found that, on the evidence, the likely readers were males of middle age and upwards. It is true that in para 4 (k) they refer to males of middle age and upwards as the 'most likely' readers, but in para 6 they refer to them as the 'likely' readers. I do not consider that the use of the word 'most' in para 4 (k) can fairly be used to vitiate the justices' answer to the first question which they asked. MACKENNA J, in his dissenting judgment in the court below, seems to have recognised that the justices had found in para 4 (j) that young persons of 18 or 21 years of age or thereabouts were not among the likely readers. He does not question this finding. He concluded, however, that the justices had erred by disregarding persons between 21 and middle age who were likely readers of the books in question. It is true that there is no reference in the Case to this age group, but this is not a group of customers which can be called into existence by assuming it. For all we know the evidence of the police who kept watch on the respondents' shop may have been that the vast majority of persons resorting to it were regular customers of middle age and upwards and that the rest consisted of a few young persons under 21 who were kept out of that part of the shop in which the pornographic books were offered for sale. Although improbable, it is not impossible that the only persons interested in these books were dirty minded old men and a smattering of curious adolescents. In any event, there is no finding in the Case that the likely readers of the books in question were any persons other than males of middle age and upwards. I suspect that the justices may well have been wrong in not making such a finding, but I cannot

agree with MACKENNA J that there is any justification for ruling that they were wrong since their failure to make such a finding may have been justified by the evidence of which we know nothing. My Lords, I am therefore of the opinion that the justices' answer to the first question which they posed themselves cannot be challenged and that accordingly MACKENNA J was wrong in rejecting it.

The justices' answer to the second question which they asked themselves was as follows:

'we were not satisfied that the said articles would have a tendency to deprave and corrupt a significant proportion of the likely readers of the same, having regard to all the circumstances and to the facts found by us.'

The words 'a significant proportion' were taken from a passage in the judgment of the Court of Appeal (Criminal Division) in *R v Calder & Boyars Ltd* (1) which, in my opinion, correctly states the law on this topic. MACKENNA J suggested that this passage departed from what had been decided in *R v Barker* (2) and *R v Clayton and Halsey* (3). In this he was mistaken. In *R v Barker* and *R v Clayton and Halsey* the only counts under s 2 (1) of the Act of 1959 charged the defendants with publication by selling to a named person. Obviously the only question for the jury to consider on these counts was whether the article tended to deprave and corrupt the named individual to whom it was sold. Incidentally in each of those cases the jury convicted and the conviction was quashed on appeal. MACKENNA J in his dissenting judgment in the present case wrongly supposed that the defendants in *R v Calder & Boyars Ltd* (1) were charged with the sale of individual copies of a book called 'Last Exit from Brooklyn'; in fact the only count left to the jury involved the publication and sale of about 13,000 copies of that book. I cannot discover any grounds for holding that the justices erred in law in answering the second question as they did, although again I gravely doubt whether that answer and the findings of fact on which it was based were in fact right.

I entirely agree with what LORD PARKER CJ said in *Burke v Copper* (4):

'the submission here is that no Bench of justices properly directing themselves in law could reasonably have come to the conclusion which they did. The submission has to go to that length because the question of obscenity must be largely a question of degree and fact, and, therefore, for the justices; and I myself, would like to make it quite clear that this court would not superimpose their judgment of obscenity over that of the justices. At the same time, if it is clear that the justices must have gone wrong in law, this court will not hesitate to interfere. I would like to emphasise that because I object strongly to matters of this sort, which are eminently for the justices, being brought before this court to decide, and I trust that it will only be done in the extreme case.'

*Burke v Copper* (4) was indeed an extreme case in a sense in which the present is not. A large number of pornographic photographs described by LORD PARKER CJ as 'purely filth' had been seized by the police. The justices ordered one lot of them to be forfeited but not the others. Many of the photographs in respect of which an order for forfeiture was refused were indistinguishable from those which were forfeited and one of the photographs was common to each lot. 'All the photographs were liable to be sent to anybody, young boys, schoolchildren, young girls and anyone else on payment of the price'. Once there is such a finding as to the persons likely to see such photographs, there could not conceivably be any evidence on which any reasonable Bench of justices

(1) 133 JP 20; [1968] 3 All ER 644; [1969] 1 QB 151.

(2) 126 JP 274; [1962] 1 All ER 748.

(3) 127 JP 7; [1962] 2 All ER 500, [1963] 1 QB 163.

(4) 126 JP 319; [1962] 2 All ER 14.

could fail to convict. It is as if A, charged with assault causing actual bodily harm to B, were acquitted by justices who found that he had deliberately struck B and broken his jaw without any lawful excuse. The age and kind of person to whom indecent photographs or books are shown or sold is of the greatest importance in considering whether there is any material on which an acquittal or conviction by justices under s 2 (1) of the Act of 1959 can be allowed to stand on an appeal by way of case stated. The importance of these factors was also recognised not only in *Burke v Copper* (1) but also in *R v Barker* (2) and *R v Clayton and Halsey* (3).

In the present case there is no finding that the likely readers of the books were any persons other than males of middle age and upwards. On a fair reading of para 6 of the Case I consider that the justices concluded that these men were regular customers 'inadequate, pathetic, dirty-minded men seeking cheap thrills—addicts to the type of material, whose morals were already in a state of depravity and corruption' and that the only effect of these articles on all but an insignificant number of these men was that they found them 'fascinating, enabling them to engage in private fantasies of their own, but not involving overt sexual activity of any kind'. Accordingly the justices were not satisfied beyond reasonable doubt that the likely readers' minds were open to being depraved or corrupted by the immoral influences which the articles were capable of exercising on others, for example on young persons or indeed on almost anyone other than dirty-minded old men who were regular customers for pornographic literature. There is no finding that these dirty-minded old men were other than depraved and corrupted long before they became customers of the respondents, nor that what they found there made them any worse than they already were or kept them in a state of depravity or corruption from which they might otherwise have escaped. The justices' failure to be satisfied of the respondents' guilt, however regrettable it no doubt is, turns entirely on their view of the facts. No point of law arises. The appellant did not ask the Divisional Court, as he might have done, to remit the case to the justices for elucidation of their findings of fact which, as I have already indicated, are not as clear as they might be. Accordingly, I do not feel justified in inferring an error of law from any ambiguity which may remain in the case stated and thus avoid the consequences of what appears to me to be plainly nothing but a mistake of prosaic fact. However wrong the justices may have been on the facts, their view is a possible view and I know of no power in any court to overrule it. Accordingly, I agree with the majority decision of the Divisional Court. It is impermissible in law for an appellate tribunal, without even knowing what the evidence is, to impose its own views about what the facts probably are on the justices by ordering them to convict. It is most important to maintain this principle inviolate—far more important than that it may occasionally lead to a thoroughly unmeritorious defendant escaping conviction because of what is very probably a wrong finding of fact.

My Lords, I would dismiss the appeal.

*Case remitted to justices with direction to convict.*

Solicitor: Director of Public Prosecutions; J E Baring & Co.

Reported by G F L Bridgman Esq, Barrister.

(1) 126 JP 319; [1962] 2 All ER 14.

(2) 126 JP 274; [1962] 1 All ER 748.

(3) 127 JP 7; [1962] 3 All ER 500, [1963] 1 QB 163.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, JJ)

10th May 1972

## CAMBRIDGESHIRE AND ISLE OF ELY COUNTY COUNCIL v RUST

*Highway—Obstruction—Hawker or itinerant trader—Stall pitched on highway—Lawful excuse—Honest belief that facts such that, if true, pitching would have been lawful—Enquiries made by defendant from public bodies before pitching stall—No information that stall unlawful—No power in any authority to licence defendant to set up stall—Highways Act, 1959, s 127 (c).*

By s 127 of the Highways Act, 1959: 'If, without lawful authority or excuse . . . (c) a hawker or other itinerant trader . . . pitches a . . . stall . . . on a highway, he shall be guilty of an offence . . .'

In 1968 the respondent set up a stall for selling agricultural produce on a grass island which separated the main carriageway of a trunk road from a lay-by and formed part of the highway. Prior to setting it up, he made enquiries from police headquarters, the urban district council, the rural district council, the Ministry of Transport, and the district valuer, and did not receive any information that the setting up of the stall would be unlawful. The respondent was assessed to the general rate in respect of the stall. In June, 1971, the county council, as administering the highway, wrote to the respondent informing him that, since he had ignored requests from them to remove the stall, they had removed it themselves. The respondent then set up another stall on the island. The county council preferred an information against him, charging him that as a hawker or other itinerant trader he had without lawful authority or excuse pitched a stall on a highway, contrary to s 127 (supra). The justices found that the respondent had a lawful excuse within the meaning of the section and dismissed the information. The county council appealed.

**HELD:** in order to establish that he had a 'lawful excuse' within the meaning of the section it was necessary for the respondent to show that he honestly believed on reasonable grounds that the facts were of a certain order, and that, if the facts had been of that order, his conduct would have been lawful; in the present case there was no authority who could grant him a licence to do what he did, and, therefore, whatever the respondent himself believed, the justices were wrong in holding that he had a 'lawful excuse' within the meaning of the section; the appeal must, therefore, be allowed on that issue.

## CASE STATED by Wisbech justices.

On 27th July 1971 an information was laid by the appellants, Cambridgeshire and Isle of Ely County Council, charging the respondent, Walter Sidney Rust, that he, on or about 23rd June 1971 at Elm, being a hawker or other itinerant trader, without lawful authority or excuse pitched a stall on a highway, contrary to s 127 of the Highways Act 1959.

The justices were of opinion that, having regard to the facts found, the respondent had lawful authority or a lawful excuse to pitch a stall on the highway on 23rd June 1971; it appeared that he had taken the kind of steps that a reasonable person would take in the circumstances; the various persons he consulted purported to advise him that there would be no objection; having been duly rated and assessed as occupier of the premises comprising the stalls, he could properly claim that his occupation had been sanctioned; and even if that did not amount to a lawful authority, it could at least be regarded in the circumstances as a lawful excuse for his action in pitching the stall on the day in question. They dismissed the case against the respondent and the county council appealed.

J C C Blofeld for the appellants.

Michael Lewis for the respondent.



**LORD WIDGERY CJ:** This is an appeal by Case stated by justices for the county of Cambridgeshire and Isle of Ely in respect of their adjudication when sitting as a magistrates' court at Wisbech. On 13th December 1971 there was before them an information laid by the appellants, the Cambridgeshire and Isle of Ely County Council, acting by their clerk, against the respondent alleging that he on or about 23rd June 1971 at Elm in the said county, being a hawk or other itinerant trader, without lawful authority or excuse pitched a stall on a highway contrary to s 127 of the Highways Act 1959. By that section:

'If, without lawful authority or excuse . . . (c) a hawk or other itinerant trader or a gipsy pitches a booth, stall or stand, or encamps, on a highway, he shall be guilty of an offence . . .'

The facts are important and they are found in this form. The A47 trunk road in the parish of Elm has adjacent to it a lay-by big enough to accommodate a large number of vehicles of all sizes and types. The metalled portion of this lay-by is in the form of a roadway 21 feet wide parallel to the main carriageway and it is separated from the main carriageway by a grass area or island 73 feet wide and 450 feet in length. I take it that the 450 feet in length corresponds to the length of the lay-by itself.

The justices find that the highway at this point includes the lay-by and that the grass area or island is part of the highway. On that grass area or island there are lavatories erected by the county council for the use of the public using the road; there is an AA box and on that same island the respondent pitched his stall. He has been selling from a stall on this site since 1968, and he is obviously a man of some responsibility because, before he set up this stall and began his operations, he made a number of enquiries, somewhat misdirected, but nevertheless the sort of enquiries which a man of no great education might easily have made, before contemplating setting up a stall. He went to the divisional police headquarters at March and the sub-divisional station at Wisbech; he went to the offices of the March Urban District Council, the offices of the appellants at County Hall, and also to some office of the then Ministry of Transport in Cambridge, and for good measure he consulted the district valuer as well. We are not told what advice or interest those various authorities proffered or showed, but at any rate the justices find that nobody told him that he could not set up a stall on the island, so in 1968 set up the stall he did.

This was too much for the rural district council who, seeing the stall there, decided they would rate it and they did rate it and the respondent paid the general rate on the stall to the rural district council for a period. In 1971 the county council, who now are administering the trunk road as delegates of the Secretary of State for the Environment, became concerned at the existence of this stall, not perhaps so much because it was a danger in itself, but because they foresaw the prospect of stalls of this kind proliferating themselves on grass islands adjacent to major roads. On 23rd June the county council wrote to the respondent saying:

'On numerous occasions during the last two years, you have been requested by me, by other officers of the county council and by the police to remove your fruit and produce stall which you pitch from time to time on the lay-by at Guyhirne. As you are aware, the stall stands on the public highway and you have no right to pitch it there. Since you have ignored these requests I have today removed the stall and taken it to the county council highways depot.'

And indeed they had, on 23rd June.

As soon as the respondent discovered this he produced a temporary stall, put it on the grass island, and began to sell from it as before. It is for that reason that he is charged in this case with pitching the stall on that date, 23rd June.

The justices clearly support the respondent in the account he gives of having done what he could in his limited way to find out whether what he was doing was lawful or not. The justices were quite satisfied that a police officer had interested himself in this problem, had made certain enquiries as to what the law was, and had intimated to the respondent that, so far as he, the police officer, could discover, the respondent was not breaking the law.

The justices further find that even after the stall was removed and the letter written on 23rd June, the respondent still believed that he had lawful authority or excuse to pitch a stall on this site by virtue of the steps which he had taken in 1968, by virtue of the reaction of the police officer to whom I have referred, and by virtue of the fact that he had been paying rates in relation to his stall.

The issues as they arise before us are I think these. It is not suggested that that which the respondent did was not the pitching of a stall within the meaning of the section. The only question for us to decide is whether the justices were right in the conclusion which they reached that there was a lawful excuse for what was done. No one suggested that there was lawful authority for what the respondent had done because that would imply that some competent body had given him authority, and it is not suggested that any competent body, if there was a competent body, had in fact given authority at all. The argument on his behalf here and below is that in the circumstances found in the case he had a lawful excuse for what he had done.

Although the phrase 'lawful excuse' appears many times in the Highways Act 1959 and in many other statutes as well, there is a remarkable lack of authority on what it really means. The strongest case for the appellants is a decision of this court in *London Borough of Redbridge v Jaques* (1). That was a case where the trader had for many years, with the knowledge of the local authority and without any objection on their part, operated as a fruit and vegetable salesman from a stall erected on the back of a stationary vehicle standing on the highway. He had done this on Thursday afternoons and nobody objected because Thursday afternoon was closing day in the district, the shops were closed and no one had any cause to complain about the trader using the highway in that way. However in due course, for reasons which are not very clear, action was taken; he was charged with causing an obstruction under s 121 of the Highways Act 1959, which again brings in the qualification of lawful authority or excuse. The case, therefore, is on any view very close to the present one. LORD PARKER CJ, giving judgment and having referred to the findings of the justices in that case that the appellant council had condoned to and condoned the conduct of the respondent and in effect had given him a licence to trade from this position on the roadway, went on to say:

'It is implicit in that that the justices found, and indeed they were bound on the facts to find, that there had been a wilful obstruction of the free passage of the highway. There was no lawful authority or excuse, and it could not be said that the erection of the stall and the parking of the vehicle was in law a reasonable user of the highway, which is there for the free passage of persons and vehicles to and fro. As has been held many times, any erection of a structure which for a period and not merely temporarily prevents the free passage of the public or vehicles to every part of the road is an obstruction.'

I read LORD PARKER in that brief extract as saying that it was idle to argue that the local authority had by conduct licensed the accused to use the highway in the manner described because the local authority cannot licence people to obstruct the highway in that way. The highway is for the public and the public interest is not to be defeated

(1) 135 JP 156; [1971] 1 All ER 260.

because the local authority concerned expressly or by a failure to attend to its business allows obstructions to continue, albeit for a long time.

Counsel for the respondent has also given us some considerable assistance in regard to the meaning of lawful authority or excuse. He starts with *R v Harvey* (1). The facts of the case I think are not really important, and it is put before us for one interlocutory interjection by WILLES J in the argument where the learned judge, dealing with the matter we are concerned with, said: 'Excuse is either an authority or a reasonable belief in the authority.' I would readily adopt that phrase as being a very clear and simple way of describing 'excuse' in this context—a reasonable belief in authority, a reasonable belief that you have the right to do what you seek to do.

In a Scottish case to which counsel for the respondent also referred, the same approach is to be seen. This was *Roberts v Local Authority of the Burgh of Inverness and Macdonald* (2). The facts are simple and not without interest. There was at that time, 1889, a restriction on the movement of animals in Scotland with a view to preventing the spread of contagious disease, and anybody who wished to move a cow from one district to the next had to obtain a licence from the local authority. The owner of a cow who sought to move it knew the regulation perfectly well, and he consulted the inspector who was responsible for enforcing the regulation and asked him about a licence. The inspector told him quite wrongly, although no doubt honestly, that he did not need a licence because the district from which the cow was to be moved and the district into which the cow was to move had been turned into one district by amalgamation, so the owner of the cow, in the honest belief that no licence was required and with every reason for having that belief since he had it on the authority of the inspector, moved the cow. Nevertheless he was charged with an offence under the regulation.

The LORD JUSTICE-CLERK (LORD KINGSBURGH), having dealt with the brief history to which I have referred, said:

'It is therefore plain that the appellant was in good faith in what he did. In these circumstances one of the questions we have to consider is, whether the appellant is in the position of a person having a lawful excuse for doing what it must be admitted was a breach of the regulations. I think that is a question which this court may very properly decide, because I hold that it would be the grossest oppression to pronounce such a sentence as was here pronounced if it be the fact that there was 'lawful excuse' for the appellant in the intimation made by Mr. Thompson to him. I have no hesitation in holding that the intimation gave the appellant 'lawful excuse' for doing what he did, and that accordingly he did not infringe the Act of Parliament in doing what he did.'

I would respectfully agree entirely with what was said there, and I think that is a very good example of a situation in which the accused on reasonable grounds is honestly mistaken as to a fact, and the circumstances are such that, had the fact been as he believed it to be, the law would have been complied with. In that case he honestly believed that the districts had been amalgamated. If they had been, he would not have broken the law; he had reasonable grounds for the mistaken belief that he therefore had lawful excuse for what he had done.

Finally I get some help from *Dickins v Gill* (3), a case which was concerned with the possession without lawful excuse of materials for making a fictitious stamp, and in the judgment of GRANTHAM J I find this extract:

(1) (1871), 35 JP 245; LR 1 CCR 284.

(2) (1889), 27 Sc LR 198, 17 R 19.

(3) 60 JP 488; [1896] 2 QB 310.

'if a person ignorantly bought a fictitious stamp, it would be hard that he should be punished and made liable to a fine because his knowledge was not sufficient to enable him to know whether it was good or bad; and that, I think, would be a lawful excuse. Why? Not because the man believed that he had authority to have it, for he could not believe that he had authority to have a fictitious stamp in his possession simply because he had been taken in in the purchase of it; he might, however, say that he wished to excuse himself for having the stamp because he did not believe that it was fictitious, but believed it to be genuine: that seems to me to be an excuse in law, and, therefore, would be a "lawful excuse".'

So there again one finds that mistake as to a fact reasonably inspired where, had the facts been as the accused thought they were, he would have had a complete defence, is within the phrase and description of 'lawful excuse' for the present purpose, and I would so define it for the purposes of s 127 of the 1959 Act.

I think that in order for the respondent to have lawful excuse for what he did he must honestly believe on reasonable grounds that the facts are of a certain order and, if they were of that order, he would have an answer to the charge because his conduct would be lawful and not contrary to the law. I do not believe that in any case one can have a lawful excuse for conduct because one is mistaken as to the law—every one is supposed to know the law—but a mistake of fact of the kind which I have described seems to me to amount to lawful excuse.

What is the position here? I can well believe that the respondent thought that he had the right to pitch this stall on the island, and indeed the justices so held, but in law no authority had the right to licence him to act in this way. It certainly could not be done by the March District Council or the Ministry of Transport or the other authority to whom he went. Therefore I think that there is difficulty here in sustaining the defence of 'lawful excuse' because even if the facts were as the respondent thought them to be, he still would not be lawfully on the island because no one as a matter of law could have given him permission to be there.

I think that that situation is much more marked, and that the case against him is much stronger, when one passes on to consider what happened on the particular day charged, 23rd June. He may, of course, if he were a particularly single-minded man, have still honestly thought that he had some kind of licence from somebody which allowed him to be there notwithstanding the letter which he had received from the county council on the subject. I find it exceedingly difficult to say that he could then reasonably believe the facts to be such as to give him lawful authority to be present.

The justices, as I say, have found that he honestly believed that he had the right to be there, and they say that he did what seemed to them to be reasonable in order to ascertain his position. But in the end one comes back to the fact, as LORD PARKER CJ came back to the fact in *London Borough of Redbridge v Jaques* (1), that, however you imagine these facts, or whatever steps you take in favour of the respondent assuming the state of mind on his part, there just was not anybody in law who could grant him a licence to do what he did, and in the absence of some authority competent to do that there could be no lawful excuse, whatever the facts are assumed to be either in the mind of the respondent or elsewhere. I therefore feel compelled myself to say that, so far as the matters argued before us are concerned, the justices were not entitled to reach the conclusion that they did, and that if the matter rested there the case should go back to them with a direction to convict.

The matter, however, does not rest there, because after the argument in the court below was concluded the justices, as it appears in the Case, were rather worried

(1) 135 JP 156; [1971] 1 All ER 260.

about whether it had been established that the respondent was a hawker or other itinerant trader, which is an essential factor of the charge and one to which they had not previously referred in the Case. They explained to this court that they realised that they should have done so. For my part I think they should have done so if the matter was adequately brought before them, and I would think it right to give them the opportunity of disposing of the matter now.

I would deal with this case by sending the Case Stated back to the justices with a direction that if the only matter for conclusion were whether he had lawful excuse, their decision was wrong and that they ought to have convicted the respondent, but before doing that, they should consider the outstanding question whether he was a hawker or itinerant trader. If they are satisfied that he was, then it would follow that they should convict him of the offence. If they were not satisfied that he was, then they ought to acquit him notwithstanding the view which this court has taken on the other issue raised in the case.

**SHAW J:** I agree entirely with the judgment which has been given.

**WEIN J:** I agree that there was no lawful excuse for the respondent pitching his stall on the highway and with the course proposed by LORD WIDGERY.

*Case remitted to justices.*

Solicitors: Vincent & Vincent; Leonard Kasler & Co.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, JJ)

15th, 16th May 1972

#### MALTGLADE LTD AND OTHERS v ST ALBANS RURAL DISTRICT COUNCIL

*Town and Country Planning—Notice—Building preservation—Service—Validity—Service on company owner and occupier of untenanted building—Registered office in building—Notice addressed to company's registered office—Postman unable to find office—Demolition after attempted delivery—Interpretation Act, 1889 s. 26—Town and Country Planning Act, 1962, s. 214—Town and Country Planning Act, 1968, s. 48*

The appellant company was the owner of an empty property known as Town Farm W. In March, 1971, they notified the registrar of companies that they had changed their registered address from 35 to 35A Manchester Court, Luton. No sign was publicly displayed to show that any premises in Manchester Street was No. 35A. There was a street entrance in Manchester Street marked 35 with a letter box at the entrance. Inside were stairs leading to a first floor landing with four doors leading off it. One of the doors marked 'Private' led to a room which was in fact the company's office, but at no time was the company's name affixed outside the room as required by s 108 of the Companies Act 1948. On May 3, 1971, the planning authority resolved to serve a building preservation notice in respect of Town Farm, W. Copies of the notice were sent addressed to the company at 35 Manchester Street, Luton, by recorded delivery letter posted on May 4, 1971, and to the occupier at W. on the same day, as required by s 48 (3) of the Town and Country Planning Act, 1968. The postman with the recorded delivery letter was unable to find the company's office and he returned it to the post office marked 'gone away'. On May 7 the letter addressed to the occupier at W. was returned to the planning authority



marked 'deceased'. On May 11 the letter addressed to the company was also returned to the planning authority. Meanwhile, on May 8, Town Farm had been demolished by the company. An information was preferred against the company charging them with causing to be executed works for the demolition of a building with respect to which a building preservation notice was in force, being works which were not authorised under Part V of the Town and Country Planning Act, 1968, contrary to s 40 and s 48 of the Act. The justices convicted the appellant company.

**Held:** the appeal must be allowed and the conviction quashed as the notice served on them was not effective: although under s 26 of the Interpretation Act, 1889, service of a document was deemed to have been effected by properly addressing, preparing, and posting the letter containing the document, where the time of service was important in the sense that the document had to be received by a certain time, it was open to the addressee to prove that it had not been served within the requisite time or had not been served at all; in the present case, although the notice relating to the preservation order had not to be served by any particular date, its effectiveness depended on its being received before the actual work of demolition began; and accordingly it was open to the company to contend that the notice had never been served at all.

**CASE STATED** by St. Albans justices.

Informations were preferred by the respondents, St Albans Rural District Council, against the appellants, Maltglade Ltd, Richard Percival Walley, and Brian Colwell, charging that they on 8th May 1971 in the parish of Wheathampstead caused to be executed works for the demolition of a building, namely, Town Farm, Wheathampstead, with respect to which a building preservation notice was in force, contrary to ss 40 and 48 of the Town and Country Planning Act 1968.

The justices were of opinion that service of the notices had been effected under s 48 of the Town and Country Planning Act 1968, and s 214 of the Town and Country Planning Act 1962, and so found the cases proved. They imposed fines and made orders for costs against the appellants, who appealed.

*Iain Glidewell QC and M S Rich for the appellants.*

*K H T Schiemann for the respondents.*

**LORD WIDGERY CJ:** This is an appeal by Case Stated from a decision of justices for the county of Hertford acting in and for the petty sessional division of St Albans in respect of their adjudication as a magistrates' court sitting at St Albans on 1st October 1971. On that occasion they convicted each of the present three appellants on separate informations preferred by the respondents, the allegation in each case being that on 8th May 1971 in the parish of Wheathampstead the appellant had caused to be executed works for the demolition of a building, namely Town Farm, Wheathampstead, with respect to which a building preservation notice was in force, being works which were not authorised under Part V of the Town and Country Planning Act 1968.

The circumstances which the justices found as facts were these. Maltglade Ltd, the appellant company, was the owner at the material time of an empty property with no one residing in it which was colloquially known as the Town Farm in Wheathampstead. On 3rd May the respondents, St Albans Rural District Council, who were the planning authority acting under delegation from the Hertford County Council, resolved to serve a building preservation notice in respect of these premises.

I pause to remind myself of the meaning and effect of a building preservation notice. It is a notice which a planning authority may serve under s 48 of the Town and Country Planning Act 1968. Under sub-s (1) of that section:

*If it appears to the local planning authority, in the case of a building in their area which is not a listed building, that it is of special architectural or historic*

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<b>MOTOR CAR</b> - Driving. See <b>ROAD TRAFFIC</b> .		
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2). <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	<b>QBD</b>	<b>149</b>
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42. <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	<b>QBD</b>	<b>149</b>
<b>OBSCENITY</b> . See <b>CRIMINAL LAW; CUSTOMS AND EXCISE</b> .		
<b>OBTAINING PROPERTY OR PECUNIARY ADVANTAGE BY DECEPTION</b> . See <b>CRIMINAL LAW</b> .		
<b>PILOT</b> . See <b>SHIPPING</b> .		
<b>POLICE</b> - Obstructing constable in execution of duty. See <b>CRIMINAL LAW</b> .		

interest and is in danger of demolition or of alteration in such a way as to affect its character as such, they may . . . serve on the owner and occupier of the building a notice (referred to in this section as a "building preservation notice")

By s 48 (3):

'A building preservation notice shall come into force as soon as it has been served on both the owner and occupier of the building to which it relates and shall remain in force for six months from the date when it is served . . .'

By sub-s (4):

'While a building preservation notice is in force with respect to a building, the provisions of this Part of this Act shall have effect in relation to it as if the building were a listed building . . .'

This was aptly described in the course of argument as a kind of temporary or interim procedure whereby a planning authority can protect a building which is not yet a listed building but which has architectural or historic interest, and which is in danger of demolition. It is to be observed that the machinery thereby provided involves the service of the notice on the owner and occupier and the notice comes into force as soon as it is served.

I go back to the facts. Having resolved on 3rd May to serve a building preservation notice in regard to Town Farm, Wheathampstead, the planning authority by recorded delivery posted a copy of the notice to the appellant company, Maltglade Ltd, who were the owners of the farm, at 35 Manchester Street, Luton. They sent a further copy of the notice addressed to the occupier at 1 The Hill, Wheathampstead, on the same day. The reason why that notice was sent to 1 The Hill was because apparently the post office recognised that as the proper postal address of the premises which are sometimes referred to as Town Farm.

Both these letters were sent by recorded delivery and the choice of 35 Manchester Street as the address to which the company's copy was to be sent was based on the fact that that address had been given to the planning authority in connection with other planning matters affecting this land on another occasion.

35 Manchester Street, Luton, the justices find, is a building with a front door, disclosing at the front door no address or identification of Maltglade Ltd. There is a letterbox at the downstairs street entrance. If one penetrates beyond the downstairs street entrance, one finds a landing with four doors, two doors marked respectively 'Marriage Guidance Bureau', one marked 'Office Overload' and the fourth one simply marked 'Private'. The companies register at this time showed the address of Maltglade Ltd as being 35A Manchester Street, Luton, but no part of the building to which I have referred and none of the four rooms to which I have referred was visibly marked as being 35A or any other number.

The postman with a recorded delivery letter addressed to the company at 35 Manchester Street went there. He searched in vain for any indication of what postbox would be the appropriate one in which to deliver this letter, and indeed since it was recorded delivery, there was presumably some obligation on him to try and find someone to take it in. Being quite unable to identify the address on the envelope with the addressee, Maltglade Ltd, he, as was no doubt his duty, sent the letter back to the post office marked 'Gone away', and accordingly no actual attempt to deliver it to an individual on behalf of the company took place that day.

In so far as the notice addressed to the occupier at 1 The Hill, Wheathampstead, was concerned, that was returned by the post office marked 'Deceased', no doubt because the last occupier had died in the meantime. The notice addressed to the occupier

came back on 7th May, and the notice addressed to the company came back on 11th May.

Meanwhile events had been on the march, and on 8th May a company who had entered into a contract with the owners for the demolition of these premises appeared on the scene and began to demolish them. Protests were made on the spot. The chairman of the respondent council went down there to try and persuade the demolition company not to go on because there was a building preservation notice in force; the deputy clerk of the council was also in attendance and showed to one of those representing the demolition company a copy of the notice. But to cut a long story short, in the course of 8th May 1971 the premises were demolished, and it is as a result of those actions that this present case comes before us. The justices, as I have said, convicted each of these three appellants of the offence charged, and everything turns on whether the building preservation notice had come into force, to use the statutory words, by 8th May when the demolition actually took place.

The statutory provision for service of notices under the town and country planning legislation is still to be found in s 214 of the Town and Country Planning Act 1962 which, under the sidenote 'Service of notices', provides:

'(1) Subject to the provisions of this section, any notice or other document required or authorised to be served or given under this Act may be served or given either . . . (c) by sending it in a prepaid registered letter or by the recorded delivery service addressed to that person at his usual or last known place of abode, or, in a case where an address for service has been given by that person, at that address, or (d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office . . .'

Those, one may observe, are fairly common form provisions of a section of this kind. Section 214 (2) goes on to deal with other methods of service, but that is not relied on in this case, principally, I think, because on a proper construction of s 214 (2) it seems that its provisions are to be applied only when the name of the person to be served cannot be ascertained by reasonable enquiry and that clearly was not the present case. The name of the appellant company, Maltglade Ltd, was well known at all times.

Those provisions in the 1962 Act have to be read in conjunction with s 26 of the Interpretation Act 1889. That provides:

'Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve", or the expression "give" or "send", or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

The basic argument for the respondent planning authority, both below and in this court, is that that which was done on 4th May when those two letters were sent out was that which was required by s 26. In other words, the document in question had been properly addressed prepaid and posted, and accordingly it was argued that service must therefore be deemed to have taken place even though in fact, as I have already described, neither copy of the notice ever got beyond the hands of the post office officials.

The difficulty in the path of the respondent planning authority as I see it is that, although a literal reading of s 26 might result in that conclusion, there is authority in

a different sense. I think this court is bound by and should follow in this case the decision of the Court of Appeal in *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi* (1), a case concerned with the service of a notice under s 3 (1) of the Summary Jurisdiction (Appeals) Act 1933. That section provided:

'In the case of an appeal to which this Act applies, it shall not be necessary for the appellant to enter the appeal with the clerk of the peace, but so soon as an appellant has complied with the provisions of paragraph (iii) of subsection (1) of section thirty-one of the Summary Jurisdiction Act, 1879, with respect to entering into a recognisance or giving other security, it shall be the duty of the clerk to the court of summary jurisdiction against whose decision the appeal is brought to transmit to the clerk of the peace the notice of appeal and the recognisance, if any, and a statement as to any other security given by the appellant, and thereupon the clerk of the peace shall enter the appeal, and shall in due course give notice to the appellant, to the other party to the appeal, and to the clerk to the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal. A notice required by this subsection to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode.'

What happened in that case was that the clerk of the peace, being required to give a party to the proceedings notice of a proposed date for hearing, duly sent it by post in a registered letter addressed to him at his last or usual place of abode, but the letter never reached him, and when the case was called on it was disposed of in his absence. It was argued that, by virtue of s 26 of the Interpretation Act 1889, notice was deemed to have been served even though it never was received, and that accordingly he could not complain about lack of notice being given to him of the hearing in the court.

The Court of Appeal in *Rossi's* case (1) drew a distinction between the first and second half of s 26. It recognised that a document duly posted in accordance with statutory provisions may well be deemed to be served for the purposes of s 26 even though it never arrives. It went on to point out that where the time of service is important, the second half of s 26 allows the contrary to be proved, that is to say, allows proof of the fact that the service did not occur within the appropriate time, and having opened the door, as it were, to prove that the notice had not been served within the appropriate time, it went on to decide that it was open to the alleged recipient of the notice to say that he had never been served at all.

I find the principle most conveniently expressed in the judgment of PARKER LJ where, dealing with this point, he said:

'The first part [of s 26] provides that the dispatch of a notice or other document in the manner laid down, shall be deemed to be service thereof. The second part provides that, unless the contrary is proved, that service is effected on the day when in the ordinary course of post the document would be delivered. This second part, therefore, dealing as it does with delivery, comes into play, and only comes into play, in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case "the contrary is proved", i.e., that the document was not received by that time or at all, then the position appears to be that, though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time.'

(1) 120 JP 239; [1956] 1 All ER 670; [1956] 1 QB 682.



In my judgment, this is a case in which one should regard the notice in question as being one which had to be received by a certain time. True it did not have to be received by a particular date on the calendar, but its effectiveness depended on its being received before the bulldozers came in and the actual demolition began. It seems to me, although I confess I find the authorities somewhat unsatisfactory, and the conclusion is not wholly logical, that we should follow *Rossi* in this case, and say that it was open to the alleged recipients of this notice to say that they had not been served in time, and once that door is opened, as I said before, it is permissible for them to say that in truth the notices were never served at all. In those circumstances I have reluctantly come to the conclusion that the justices were wrong in this case and I think the appeal should be allowed and the conviction quashed.

**SHAW J:** I agree. I would only add that the respondent local authority followed the proper procedure laid down by the Act to effect service, and that service was frustrated only by the default of the appellants under s 108 of the Companies Act 1948 which requires them to display prominently their name at their registered office. This they unfortunately failed to do, and that was the origin of all the difficulties which have ensued.

**WIEN J:** I agree. The justices were influenced by *Moody v Godstone Rural District Council* (1), but that was a case which was very different from the present case, and indeed it was so pointed out in *Hewitt v Leicester City Council* (2). In *Moody v Godstone Rural District Council* there was no question of the documents ever having been returned at all, and I think the present case is quite different. As LORD WIDGERY CJ points out the building preservation notice never came into force unless it could be proved that at a certain time it had been served. That was not done and for the reasons he gave I would allow this appeal.

*Appeal allowed.*

Solicitors: Oswald Hickson, Collier & Co. for Miller & Co. Watford; Sharpe, Pritchard & Co.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) 130 JP 332; [1966] 2 All ER 696.

(2) 133 JP 452; [1969] 2 All ER 802.

## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, J)

17th May 1972

R v IMMIGRATION APPEAL TRIBUNAL. Ex parte JOYLES

*Commonwealth Immigrant—Admission—Conditions—Breach—Order to leave United Kingdom—Appeal to have conditions revoked allowed by adjudicator—Appeal by Home Secretary to Immigration Appeal Tribunal—Decision of tribunal allowing appeal in accordance with 'immigration rules applicable to the case'—Validity of rules—'Laid before Parliament'—Presentment to both Houses—Immigration Appeals Act, 1969, s 8 (1) (a).*

The applicant, a West Indian from Barbados, came to England in October, 1967, with an entry certificate granted in Barbados, to enable him to marry his fiancée who was resident in the United Kingdom. His admission permit was for three months and contained a condition that he should not engage in employment. The proposed marriage fell through, in breach of his conditions of entry he took up employment, and in March, 1969, he married another woman. In February, 1970, the Home Office requested him to leave England as being in breach of his conditions of entry. The applicant appealed to an adjudicator under s 8 (1) of the Immigration Appeals Act, 1969, to have his conditions of entry revoked. The adjudicator allowed the appeal, with the result that the applicant's continued presence in England became lawful with no prohibition against his working here. The Home Secretary appealed, under s 7 (1) of the Act of 1969, to the Immigration Appeal Tribunal against the adjudicator's decision. On October 28th, 1971, the tribunal allowed the Home Secretary's Appeal, holding that the refusal of the Home Secretary to revoke the applicant's conditions of admission was in accordance with the law and the immigration rules applicable to the case and that the applicant had not established the degree of hardship contemplated in para 24 of the rules. The applicant moved for an order of certiorari to quash the tribunal's decision. It was established that the Command Paper setting out the 1970 rules had been presented and laid before both Houses of Parliament in February, 1970, in accordance with procedure laid down in standing orders.

HELD: (i) the 1970 rules were presented to and laid before Parliament, and were accordingly valid rules; and (ii) as they were in existence when the appeal came before the Immigration Appeal Tribunal, under para 24 of the rules that tribunal was bound to consider the question of hardship and did so correctly, without attempting to do anything retrospectively; (iii) since the applicant was in England illegally and in breach of his conditions of entry, he was here in a 'temporary capacity' within the meaning of the rules; and so the application for certiorari must be refused.

MOTION by Enos Fitzgerald Joyles for an order of certiorari to remove into the High Court and quash a determination of the Immigration Appeal Tribunal allowing the appeal of the Home Secretary against the determination of an adjudicator that the Secretary of State ought to have revoked the applicant's conditions of admission to the United Kingdom so as to permit him permanently to reside in this country.

Stephen Sedley for the applicant.

Gordon Slynn for the respondent tribunal.

**WIEN, J:** The applicant is a native of Barbados. He arrived in this country on 22nd October 1967 in possession of an entry certificate granted in Barbados to enable him to come here to marry his fiancée who was resident in the United Kingdom. He was admitted here for a period of three months on condition that he did not engage in employment or in any business, profession or occupation for reward. When he arrived he fully intended to marry his fiancée, but he soon discovered that

she was expecting a child by another man. Not unnaturally the proposed marriage fell through and did not take place.

In breach of one of the conditions on which entry had been permitted he took employment, and, in the following year, 1968, he met another woman whom he eventually married on 29th March 1969. There are two young children in the family. The applicant has been illegally in this country and in breach of the conditions of his admission since 22nd January 1968.

As a matter of simple history, and nothing more, his marriage took place two months after it was announced in the House of Commons on 30th January 1969 by the then Secretary of State that

'In future the admission of husbands and fiancés from the Commonwealth for settlement will be restricted to cases presenting special features, and it will be a requirement that an entry certificate must have been obtained. Consistently with this, men who have been admitted as visitors, students or for other temporary purposes, will not be permitted to settle here following marriage, save in exceptional circumstances. Account will be taken in individual cases of any special circumstances, whether of a family nature or otherwise, which make exclusion from the United Kingdom undesirable . . . I have accordingly issued revised instructions to immigration officers which come into effect immediately.

If the Secretary of State did issue instructions immediately, we have not seen them, and I do not think that they would concern this court because under s 16 (3) of the Commonwealth Immigrants Act 1962 it would have been the duty of immigration officers to act in accordance with such instructions as may be given to them by the Secretary of State.

When the matter came before the adjudicator in July 1971, he bore in mind the provisions of s 8 of the Immigration Appeals Act 1969. Section 8 (1) provides:

'Subject to sections 2 (2) and 5 (2) of this Act, an adjudicator who hears an appeal under this Part of this Act—(a) shall allow the appeal if he considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case; or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently; and (b) in any other case, shall dismiss the appeal.'

I read sub-s (2) of that section in view of the argument which has been advanced by counsel for the applicant regarding the meaning of 'immigration rules':

'For the purposes of paragraph (a) of the foregoing subsection the adjudicator may review any determination of a question of fact on which the decision or action was based; and for the purposes of paragraph (a) (ii) of that subsection no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so.'

The adjudicator took the view that in all the circumstances of the case the discretion of the Secretary of State should have been exercised differently from the way in which it had been exercised and he therefore allowed the applicant's appeal to have his conditions of admission revoked. The effect of the adjudicator's determination was to render the applicant's continued presence in this country legal, with no prohibition against working here.

The Secretary of State appealed to the Immigration Appeal Tribunal pursuant to s 7 (1) of the 1969 Act which permits any party to an appeal to an adjudicator to appeal to the tribunal if he is dissatisfied with the adjudicator's determination. On an appeal to the tribunal, that tribunal has the powers set out in s 8 (4) of the 1969 Act. Those powers are as follows:

'On an appeal under this Part of this Act to the Tribunal from the determination of an adjudicator, the Tribunal may affirm the determination or make any other determination which could have been made by the adjudicator.'

The tribunal heard evidence and allowed the Secretary of State's appeal on the grounds that (i) the refusal of the Secretary of State to revoke the applicant's conditions of admission was in accordance with the law and the immigration rules applicable to the case, and (ii) the applicant had not established that degree of hardship contemplated in para 24 of the Command Paper 4295.

Since this particular document was the subject of much argument before this court and by counsel for the applicant it is pertinent to read its full title: 'Commonwealth Citizens: Control after Entry—Immigration Rules'. I pause there to say that until this document was published, all prior documents were instructions to immigration officers. Then it goes on 'Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty', the date given being February 1970. Paragraph 24 of the Immigration Rules (1970) reads as follows:

'If a man who was admitted as a visitor or student, or in some other temporary capacity, marries a woman who is resident in the United Kingdom, he is not on that account to be granted an extension of stay or any other variation of conditions to enable him to settle here unless refusal would be undesirable because of the degree of hardship which, in the particular circumstances of the case, would be caused if the woman had to live outside the United Kingdom in order to be with her husband after marriage. But a woman admitted in a temporary capacity who marries a resident should have her conditions of admission revoked on application.'

So far as hardship is concerned, the tribunal took into account that both the applicant and his wife would be returning to the country of which they were natives and where they were born and brought up.

Counsel for the applicant argues that the tribunal was in error in applying the Immigration Rules of 1970. He says that the words 'immigration rules' are expressly defined by s 24 of the 1969 Act, as indeed they are. By s 24 (2) of the Act

"immigration rules" means rules made by the Secretary of State for the administration of—(a) the control of entry into the United Kingdom of persons to whom the Act of 1962 applies; and (b) the control of such persons after entry, being rules which have been published and laid before Parliament . . .

I emphasise those last words. Counsel for the applicant's submission is that the rules were presented to Parliament and have no doubt been published, but they have not been laid before Parliament, and therefore, he says, they are not rules within the meaning of the 1969 Act. If counsel for the applicant is right, then many hardship cases decided since 1970 would have been quite erroneously decided, for hardship could not be taken into account at all.

Counsel for the respondent was informed only last Friday of the point that was going to be taken and was taken on Monday, and counsel came here armed with an affidavit that was not very satisfactory. The matter was adjourned and today has been dealt with in a way that in my judgment is conclusive.

Counsel for the applicant argued that when one looked at Erskine May's Parliamentary Practice one could conclude that there was a difference between the presentation of papers to Parliament and the laying of papers before Parliament. Erskine May says, 18th edn, p 251:

'The presentation of papers to the House of Lords is effected by their delivery to the office of the Clerk of the Parliaments and to the House of Commons by their delivery to the Votes and Proceedings Office.'

There is a footnote (t) which reads:

'Strictly speaking papers are *presented* to each House by Command, and *laid* before each House by Act. This distinction is observed in the Minutes of Proceedings of the House of Lords but not in the Votes and Proceedings of the House of Commons and for convenience has been disregarded in this account.'

So that at an early stage during the course of counsel for the applicant's argument one began to doubt very much whether there is any difference at all between presenting papers to Parliament, in particular presenting a Command Paper, and laying before Parliament.

Today counsel for the respondent submitted to the court certain documents, without any objection—indeed, by consent—the effect of which to my mind disposed of the matter beyond all doubt. I take the House of Commons first. There is a letter from Mr Hawtrey, Clerk of the Journals, which says that he encloses a copy of certain papers that were presented by the Home Secretary and ordered to lie on the table. Those papers include—I would still use for the moment the phrase 'so-called'—rules governing the control of Commonwealth citizens, i.e., the Command Paper 4925. The letter states:

'These papers were, in fact, delivered to the Votes and Proceedings Office in accordance with Standing Order No. 119 (Presentation of Command Papers) whose text is as follows:—"If, during the existence of a Parliament, papers are commanded by Her Majesty to be presented to this House at any time, the delivery of such papers to the Votes and Proceedings Office shall be deemed to be for all purposes the presentation of them to this House". When papers are presented in accordance with the Standing Order mentioned above, the practice of the House is to order them to lie upon the Table, and the entry on page 317 of the Votes and Proceedings proves that the House so ordered in the case of the two Command Papers mentioned. The terms "presented to the House" and "laid before the House" are synonymous in Parliamentary practice.'

The final sentence is extremely important. There is also a letter from the Clerk of the Journals to the House of Lords who in that document states that two Command Papers, including the so-called rules,

'were presented and laid before the House in accordance with the provisions of Standing Order 65 on 24th February, 1970.'

In my judgment, it is perfectly clear on what we have now been told that the Immigration Rules, 1970, were presented to Parliament and laid before Parliament on 24th February 1970 and that they are valid rules. I think that effectively disposes of the main submission of counsel for the applicant.

He then went on to submit that if the Immigration Rules, 1970, are valid, then they were not retrospective in effect. What he meant by that I think, so far as I could understand his argument, was that they came into existence on 24th February 1970



and could not therefore affect a marriage which had been contracted in 1969. A somewhat similar argument had been advanced before the tribunal, but it then met with little favour. As part of the written decision by the tribunal it is stated: 'At the date of his [the applicant's] admission to the United Kingdom Command Paper 3064 was in force'. Then there is set out the provisions of para 32 of that Paper, and the decision goes on:

'The paragraph clearly refers to marriage to a particular person already in the United Kingdom, and we do not agree with the view of the adjudicator that, because the proposed marriage to Miss Clarke did not take place, the more appropriate course was to consider the marriage which the respondent actually contracted in March 1969 on the basis of the rules of admission applicable in 1967 rather than on the rules in operation at the time of the marriage.'

In my judgment, these rules were in existence in 1971 when the matter came before the Immigration Appeal Tribunal. The tribunal was not only entitled but was obliged to consider para 24 and was obliged to consider the question of hardship. It did so, and in my judgment it did so correctly, without attempting to do anything retrospectively.

There was a final string to counsel for the applicant's bow and it was this. He said that if the Command Paper, i.e., the 1970 rules, applies, then the applicant was not a person who had come here 'in some other temporary capacity', words which he submits ought to be construed ejusdem generis with the words 'visitor or student' because he had an intention to settle here permanently. It may be that the applicant did have that intention at some time or another, but it matters not. Counsel for the applicant's argument is that a person who comes here in some other temporary capacity must be a person such as a trainee or a seasonal worker. I disagree. I think that the applicant who was here illegally and in breach of his conditions was a person who was here in a temporary capacity. He fits four-square into the words 'some other temporary capacity'. He was a person who in that capacity married a woman who was resident in the United Kingdom. For the reasons I have given, I think there is in the result nothing to show that the decision of the Immigration Appeal Tribunal was wrong in any respect. I would refuse the order asked for.

**SHAW J:** I agree.

**LORD WIDGERY CJ:** I agree also.

*Application refused.*

Solicitors: *Lawrence A Grant; Treasury Solicitor.*

Reported by *T R Fitzwalter Butler, Esq., Barrister.*

QUEEN'S BENCH DIVISION

(MELFORD STEVENSON, BRIDGE AND ACKNER, JJ)

9th June 1972

NICHOLSON v TAPP

*Road Traffic—Notice of intended prosecution—Service within fourteen days—Notice sent by recorded delivery service—Notice not capable of being delivered in ordinary course of post within fourteen days period—Road Traffic Act, 1960, s 241 (2), as amended by the Road Traffic Act, 1962, sch 4.*

A notice of intended prosecution for a traffic offence which is sent by recorded delivery service must, in order to comply with the provisions of s 241 (2) of the Road Traffic Act, 1960, as amended by sch 4 to the Road Traffic Act, 1962, be despatched in time to reach the defendant in the ordinary course of post within the statutory time limit of fourteen days prescribed by that section. It is not sufficient to prove that it was posted before the end of the fourteen days period, if it could not, within the ordinary course of post, have been delivered within that period.

CASE STATED by Northampton justices.

On 28th January 1972 an information was laid by the appellant, Thom Fisher MacMillan Nicholson, against the respondent, Barry Trevor Tapp, that he on 15th November 1971 drove a motor car on Wellingborough Road at the junction with Bouverie Street, Northampton, in a manner which was dangerous to the public, having regard to all the circumstances of the case, contrary to s 2 of the Road Traffic Act 1960.

On the hearing of the information at Northampton Magistrates' Court on March 13th, 1972, the following facts were found. The respondent was the driver of a motor car which it was alleged had been driven in a manner dangerous, as stated in the information, on 15th November 1971. The police constable who interviewed the respondent at the scene of the alleged offence did not give a verbal notice of intended prosecution. A summons was not served on the respondent in the 14 days immediately following the commission of the alleged offence. A written notice of intended prosecution was sent by recorded delivery post on 29th November 1971, being the 14th day after the alleged offence.

At the conclusion of the evidence for the appellant and respondent it was submitted by the solicitor for the respondent that the appellant had failed to comply with the provisions of s 241 (2) of the Road Traffic Act 1960, as amended. The solicitor for the respondent referred to the justices to a footnote in Stone's Justices Manual (1971 edn., p 3093), wherein was cited the case of *Groome v Driscoll* (1) in support of his submission.

The justices upheld the submission of the respondent's solicitor and dismissed the information. The appellant appealed.

*David Barker* for the appellant.

The respondent did not appear.

**ACKNER J:** This is a Case Stated by justices for the county borough of Northampton in relation to a decision which they reached on 13th March 1972 relative to an information laid against the respondent that he on 15th November 1971 drove a motor car in Wellingborough Road, Northampton, in a manner which was dangerous to the public. It was established that he was the driver of the motor car which it was alleged had been driven in a manner dangerous; that the police

(1) 134 JP 83; [1969] 3 All ER 1638.

constable who interviewed him did not give a verbal notice of intended prosecution; that a summons was not served on the respondent within 14 days immediately following the commission of the alleged offence; and that a written notice of intended prosecution was sent by recorded delivery post on 29th November 1971, that being, and I stress, the 14th day after the alleged offence.

At the conclusion of the evidence it was submitted by the solicitor for the respondent that the appellant had failed to comply with the provisions of s 241 (2) of the Road Traffic Act 1960, as amended by Sch 4 to the Road Traffic Act, 1962, which submission was accepted by the justices. That subsection is conveniently set out in its amended form in a case on which the appellant relies in this court, *Groome v Driscoll* (1). Section 241 (2) as amended provides:

'Subject to the following provisions of this section, where a person is prosecuted for an offence to which this section applies he shall not be convicted unless ... (b) within 14 days of the commission of the offence a summons ... for the offence was served on him; or (c) within the said 14 days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was ... (ii) ... served on him, or on the person, if any, registered as the owner of the vehicle at the time of the commission of the offence ...'

That section was further amended by sch 4 to the Road Traffic Act 1962, the following concluding words being added:

'and the notice shall be deemed for the purposes of paragraph (c) of this subsection to have been served on any person if it was sent by registered post or recorded delivery service addressed to him at his last known address, notwithstanding that the notice was returned as undelivered or was for any other reason not received by him.'

It is clear that without the addition of those words any notice which had been sent by registered post would, by reason of s 26 of the Interpretation Act 1889, be deemed to have been effected at the time when the letter would be delivered in the ordinary course of post unless the contrary was proved.

The case of *R v London Quarter Sessions, ex parte Rossi* (2) indicates how proof that in fact the document did not arrive in the ordinary course of post nullifies the presumption which would otherwise exist. I take the view that this amendment was designed to ensure that the presumption that a document which if delivered in the ordinary course of post would arrive within 14 days was not to be gainsaid by the de facto proof that it had not in fact arrived within that period. Hence the words 'notwithstanding that the notice was returned as undelivered or was for any other reason not received by him'.

Counsel for the appellant's argument is and must be that that amendment enables the prosecution, when serving by post, to have another day or perhaps even another two days longer than if they had effected personal service, because on his submissions it would be open to the prosecution to post a letter one minute before midnight on the 14th day. This clearly would mean that, in the ordinary course of post, the addressee would not receive it until the 15th or even the 16th day.

If that amendment had been intended to extend the period of time where the procedure of using the post office facilities were adopted, it would have said so in very clear language. In my judgment, all the amendment created by sch 4 did was to prevent an accused establishing that, although a document had been despatched in time

(1) 134 JP 83; [1969] 3 All ER 1638.

(2) 120 JP 239; [1956] 1 All ER 670; [1956] 1 QB 682.

enough to reach him in the ordinary course of post within the statutory 14 days, de facto it had not done so. Accordingly, in my judgment, the justices were right in their decision and accordingly this appeal by way of Case Stated should be dismissed.

**MELFORD STEVENSON J:** I agree.

**BRIDGE J:** I also agree.

*Appeal dismissed.*

Solicitors: Sharpe, Pritchard & Co, for R C Beadon, Northampton.

Reported by T R Fitzwalter Butler, Esq, Barrister.

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**QUEEN'S BENCH DIVISION**

(LORD WIDGERY, CJ, WILLIS AND BRIDGE, JJ)

20th, 22nd June 1972

**BURDLE AND ANOTHER v SECRETARY OF STATE FOR THE ENVIRONMENT  
AND ANOTHER**

*Town and Country Planning—Enforcement—Notice—Material change of use—Planning unit—Determination—Factors to be considered—Whole unit of occupation generally to be taken as planning unit—Exception where smaller unit recognisable as site of activities so as to amount to separate use physically and functionally.*

The appellants occupied a site on which stood a dwelling-house to which a lean-to annexe was attached and certain other buildings. Their predecessor in title had conducted on the site within the open curtilage the business of a scrap yard and car breakers' yard. As an incident of that business he effected from time to time retail sales of car parts, nearly always arising from the cars broken up on the site. In 1965 the appellants purchased the site and substantially re-constructed and altered the lean-to annexe, inter alia, providing it with external display windows. They then started using that building, on a substantial scale, for retail sales of new vehicle spare parts which they acquired from manufacturers and sales of other goods. They included in the advertisements of their business the phrase 'new accessories and spares shop now open.' In February, 1971, the local planning authority served on the appellants an enforcement notice, stating that it appeared 'that a breach of planning control has taken place, namely, the use of premises . . . as a shop for the purpose of the sale inter alia of motor car accessories and spare parts without the grant of planning permission . . .'. The appellants appealed to the Secretary of State against the notice. Both parties presented their cases to the inspector appointed by him on the footing that the whole site was the planning unit with which the inquiry was concerned. The appellants' contention was that as a matter of fact and degree, looking at the site as a whole, the intensification and retail sales had not been sufficient to amount to a material change of use. The inspector held that, whether or not the notice was properly directed to the whole property or to the annexe only, the appeal should fail. In his decision letter, however, the Secretary of State did not simply endorse the inspector's conclusion. He stated that the appellants' argument that the whole site was used for sales and should be regarded as a long established shop could not be accepted in the light of the clear definition of 'shop' in the Town and Country Planning Acts, and that the enforcement notice as worded could relate only to the lean-to annexe. He, therefore, considered the appeal and dismissed it on that limited basis. On appeal by the appellants,

**HELD:** (i) the reasons as expressed by the Secretary of State in his decision letter concluding that the lean-to annexe was the appropriate planning unit could not be accepted; although, whether regard were had to the definition of 'shop' in the Acts and orders made under them or to the ordinary dictionary meaning of the word 'shop', it was absurd to describe the whole site as a shop, the accident of language which the planning authority had chosen to use in framing their planning notice could not determine conclusively what was the appropriate planning unit to which attention should be directed. (ii) in determining what was the appropriate planning unit to be considered, a useful working rule was to assume that it was the unit of occupation unless and until some smaller unit could be recognised as the site of activities which amounted in substance to a separate use both physically and functionally; (iii) on the factual and evidential material in the present case it was not possible for the court to say that the conclusion of the Secretary of State that the lean-to annexe was the appropriate planning unit was an inevitable conclusion at which he was bound to arrive, and, accordingly, the appeal must be allowed and the case sent back to him for reconsideration in the light of the judgment of the court.

**APPEAL** under s 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment upholding, subject to variation, an enforcement notice served on the appellants by the New Forest Rural District Council as delegate of the local planning authority.

*R J Roddis for the appellants.*

*Gordon Slynne for the Secretary of State.*

*Alan Fletcher for the authority.*

**BRIDGE J:** The appellants occupy a site at Ringwood Road, Netley Marsh, in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and on it there stands a dwelling-house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the appellants' predecessor in title, a Mr Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breakers' yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited number of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breakers' yard business.

The lean-to annexe adjoining the dwelling-house was used by Mr Andrews as an office in connection with the scrap yard business. In 1965 the present appellants purchased the property. Whereas Mr Andrews had carried on business under the modest title of 'New Forest Scrap Metals', the present appellants promptly changed the title to the more grandiose 'New Forest Autos'. They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia they provided it with two external display windows. They started to use that building for retail sales on a substantial scale of vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the appellants had themselves been appointed stockists by the manufacturers. They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows, if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase 'New accessories and spares shop now open'.



Those activities prompted the local planning authority to serve on 3rd February 1971 the enforcement notice which is the subject of the appeal to this court. That notice recites:

'that it appears to the council: That a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor-car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act, 1962.

The steps required to be taken by the notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, employs the perhaps ambiguous expression 'premises' to indicate the unit of land to which it was intended to apply. We were told in the course of argument by counsel for the authority that the authority's intention was to direct this notice at the whole of the appellants' site and it alleged a material change of use of the whole site. It seems to have been so understood by the appellants, and when the matter came before an inspector of the Department of the Environment following the appeal to the Secretary of State by the appellants against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, counsel for the authority has submitted before us that that is still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so counsel said, the notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the appellants their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The appellants' case at the inquiry was in essence that, as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

'The legal implications of the above facts are matters for the consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrapyards, grew out of the then proprietor's specialisation in the Austin "Seven", an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survive, the combination of advertising with improved facilities for display, and the emphasis on new items in that display, all now support the appellants' claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than 1 January 1964. Whether or not [the use notice] is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d).'

**POLLUTION.** See RIVER.

**POST.** Sending obscene article through. See CRIMINAL LAW.

**PUBLIC ORDER** – Insulting behaviour conducive to breach of peace – ‘Insulting’ – Conduct displeasing and annoying to other people – Public tennis match – Disruption of match by appellant jumping over barrier and running on court – Public Order Act, 1936, s 5, as replaced by Race Relations Act, 1965, s 7.  
**Brutus v Cozens** .. .. . QBD 390; HL 636

**PUBLIC ORDER** – Public place – Open space to which public have access – Tennis court – Grounds consisting of courts, administrative buildings, and partly covered stands around one court – Match disrupted on that court – Public Order Act, 1936, s 9.  
**Cozens v Brutus** .. .. . QBD 390

**QUARTER SESSIONS** – Civil proceedings – Costs – General rule – Highway – non-repair – Proceedings by householder against highway authority – Proprietary right of complaint directly affected by outcome of proceedings – Complainants’ right to costs.  
**Riggall v Hereford County Council** .. . QBD 172

**RACE RELATIONS** – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declaration by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (2) (10).  
**London Borough of Ealing v Race Relations Board** .. . HL 112

**RACE RELATIONS** – Provision of facilities – Discrimination – Members’ club – Refusal to admit coloured man as member – Members of club ‘section of public’ – Impersonal quality distinguishing them from public at large – Clubs where admission by invitation – Race Relations Act, 1968, s 2 (1).  
**Race Relations Board v Charter** .. . CA 249

**RATING** – Rateable occupation – Unoccupied premises – House held for eleven months by church available for occupation by minister – General Rate Act, 1967, sched 1, para 2 (f).  
**Bexley Congregational Church Treasurer v London Borough of Bexley** .. . CA 532

**RENT CONTROL** – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Capricious, frivolous, or vexatious action – Rent Act, 1968, s 72 (1).  
**R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd** .. . CA 367

**RENT CONTROL** – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Need of tenants’ consent to reference – Reference of number of contracts together – Rent Act, 1968, s 72 (1).  
**R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd** .. . QBD 11

**RIGHT OF WAY** – Land sold by Secretary for Air – Conveyance of land ‘freed from rights’ – Application to rights of way – Defence Act, 1942, s 14.  
**Attorney-General v Shonleigh Nominees Ltd** .. . CA 407

**RIVER** – Pollution – ‘Causes’ – Common sense meaning – Liability in absence of negligence or knowledge – Novus actus interveniens – Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a).  
**Alphacell Ltd v Woodward** .. . HL 505

**ROAD TRAFFIC** – Causing death by dangerous driving – Evidence – Previous drinking – Admissibility – Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit – Evidence of substantial excess rightly admitted on major charge – Road Traffic Act, 1960, s 1.  
**R v Thorpe** .. . CA 301

**ROAD TRAFFIC** – Disqualification – Mitigating circumstances – Circumstances which may be considered – Gravity or triviality of previous convictions – Road Traffic Act, 1962, s 5 (3).  
**Lambie v Woodage** .. . HL 554

**ROAD TRAFFIC** – Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit – Breath test – Requirement to provide specimen – ‘Person driving or attempting to drive’ – Pursuit by constable after suspicion – Requirement when person no longer driving or attempting to drive – Road Safety Act, 1967, s 2 (1).  
**Sakhuja v. Allen** .. . HL 414

**ROAD TRAFFIC** – Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit – Specimen of blood for laboratory test – Analyst’s certificate of proportion of alcohol – Admissibility in evidence – Failure to serve copy on defendant – Waiver – No objection to evidence before close of case for prosecution – Road Traffic Act, 1962, s 2 (2).  
**R v Banks** .. . CA 306

**ROAD TRAFFIC** – Driving with blood-alcohol proportion above prescribed limit – ‘Accident’ – Broken down car pushed by other car – Interlocking of bumpers – Breath test – Damage to both cars – Road Safety Act, 1967, s 2 (2).  
**R v Morris** .. . CA 194

<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Breath specimen - Requirement to provide - Defendant in hospital - Words spoken by constable in honest and reasonable belief that they would be understood - Failure by defendant to hear or comprehend request - Validity of requirement - Road Safety Act, 1967, s 3 (2) (b). <i>R v Nicholls</i> .. .. .	CA	481
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Disqualification - Special reasons - Vehicle parked on highway - Driving of vehicle few yards from highway to private parking place - Road Traffic Act, 1962, s 5 (1). <i>James v Hall</i> .. .. .	QBD	385
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Disqualification - Special reasons - Vehicle parked on highway - Vehicle driven from one parking place to another - Route covering 200 yards along busy street - Potential source of danger to other road users - Road Traffic Act, 1962, s 5 (1). <i>Coombs v Kehoe</i> .. .. .	QBD	387
<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Laboratory test - Requirement to provide specimen - 'Person driving or attempting to drive' - Requirement made after driving ceased - Need only for requirement to be closely related to episode of driving - Road Safety Act, 1967, s 3 (3) (4). <i>Brooks v Ellis</i> .. .. .	QBD	627
<b>ROAD TRAFFIC</b> - Insurance - Third-party insurance - Policy - Charges of using car and permitting use without insurance - Onus of proof of existence of valid cover on defendant - Road Traffic Act, 1960, s 201 (1). <i>Leathley v Drummond. Leathley v Irving</i> .. .. .	QBD	548
<b>ROAD TRAFFIC</b> - Motorway - Hard shoulder - Part of verge - Marginal strip - Part of carriageway - Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f). <i>Wallwork v Rowland</i> .. .. .	QBD	137
<b>ROAD TRAFFIC</b> - Motorway - Prohibition against stopping on verge - Stopping permitted 'by reason of any accident, illness or other emergency' - 'Emergency' - Need for element of suddenness - Danger alleged to constitute emergency not apparent before driver got on motorway - Drowsiness - Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9. <i>Higgins v Bernard</i> .. .. .	QBD	314
<b>ROAD TRAFFIC</b> - Notice of intended prosecution - Service within fourteen days - Notice sent by recorded delivery service - Notice not capable of being delivered in ordinary course of post within fourteen days period - Road Traffic Act, 1960 s 241 (2), as amended by Road Traffic Act 1962, sch 4. <i>Nicholson v Tapp</i> .. .. .	QBD	718
<b>ROAD TRAFFIC</b> - Regulations relating to construction, etc., of vehicles - Using vehicle on road in contravention of regulations - 'Using' - Vehicle driven by person other than owner's servant at owner's request - Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64. <i>Crawford v Haughton</i> .. .. .	QBD	234
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Pilotage by unlicensed pilot after offer - Ship moving from one mooring to another - Pilotage district byelaws - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws Part IX, byelaw 2. <i>McMillan v Crouch</i> .. .. .	QBD 179; HL 643	
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Ship moving from mooring to discharge berth - Pilotage by unlicensed pilot after offer - General offer insufficient - Need of specific offer communicated in relation to particular movement of ship - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws, Part IX, byelaw 2. <i>Montague v Babbs</i> .. .. .	QBD	441
<b>SHOP</b> - Sunday trading - Offence - 'Place where any retail trade or business is carried on' - Premises other than shop - Market stalls - Whether sufficient degree of permanency - Question of fact and degree - Stalls erected on Saturday and taken down after trading on Sunday - No defined space for stall marked out on market site - Possibility of components of stalls varying from week to week - Shops Act, 1950, ss 47, 58. <i>Maby v Warwick Borough Council</i> .. .. .	QBD	631
<b>SUNDAY TRADING.</b> See SHOP.		
<b>TAPE RECORDING</b> - As evidence. See CRIMINAL LAW.		
<b>TOWN AND COUNTRY PLANNING</b> - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a). <i>McDonald v Howard Cook Advertising Ltd</i> .. .. .	QBD	79

<b>TOWN AND COUNTRY PLANNING</b> – Appropriation of land – Power to override easements and other rights – Conveyance by local authority of land to company – Re-development of area – Appropriation of conveyed land to housing purposes – Town and Country Planning Act, 1971, s 127 (1) (2). <b>Dowty Boulton Paul Ltd v Wolverhampton Corporation</b> .. .. .	ChD	677
<b>TOWN AND COUNTRY PLANNING</b> – Building preservation – Notice – Service – Validity – Service on company owner and occupier of untenanted building – Registered office in building – Notice addressed to company's registered office – Postman unable to find office – Demolition after attempted delivery; – Interpretation Act, 1889, s 26 – Town and Country Planning Act, 1962, s 214 – Town and Country Planning Act, 1968, s 48. <b>Maltglade Ltd v St Albans Rural District Council</b> .. .. .	QBD	707
<b>TOWN AND COUNTRY PLANNING</b> – Compulsory purchase – Compensation – Assessment – Land in area zoned for residential building – No prospect of permission being given for that use – Land Compensation Act, 1961, s 16 (2). <b>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</b> .. .. .	CA	93
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Material change of use – Planning unit – Determination – Factors to be considered – Whole unit of occupation generally to be taken as planning unit – Exception where smaller unit recognisable as site of activities so as to amount to separate use physically and functionally. <b>Burdle v Secretary of State for the Environment</b> .. .. .	QBD	720
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Mining operations – Notice specifying substantial area – Actual working only in two smaller areas within specified area – Some operations more than four years before service of notice – Town and Country Planning Act, 1962, s 45 (1) (2). <b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</b> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Notice to be served within four years from carrying out of development – Mining operations – Initial working of area more than four years prior to notice – Subsequent working of area within four-year period – Whether new development or continuation of original development – Validity of notice – Town and Country Planning Act, 1962, s 12 (1), s 45 (2). <b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</b> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> – Enforcement – Notice – Service on occupier of land affected – 'Occupier' – Licensee of caravan site – Right to be served with notice – Control over site – Duration of enjoyment – Town and Country Planning Act, 1962, s 45 (3). <b>Stevens v London Borough of Bromley</b> .. .. .	CA	261
<b>TRADE DESCRIPTIONS</b> – False description – Motor car – False mileage recorded on odometer – Sale by motor dealer – Defence of reasonable precautions and due diligence – Dealer ignorant of alteration of odometer – Condition of car consistent with mileage recorded on odometer – Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <b>Naish v Gore</b> .. .. .	QBD	1
<b>TRADE DESCRIPTIONS</b> – False description – Price – Misleading – 4d refund label on bottle – Refusal of refund – Trade descriptions Act, 1968, s 11 (2). <b>Doble v David Greig Ltd</b> .. .. .	QBD	469
<b>WARRANT</b> – Committal. See <b>MAGISTRATES</b> .		
<b>WITNESS</b> – Intimidation. See <b>CONTEMPT OF COURT</b> .		
<b>YOUTHFUL OFFENDER</b> , See <b>CRIMINAL LAW</b> ; <b>MAGISTRATES</b> .		

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I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site, on the one hand, or, on the other hand, the lean-to annexe, but he took the view that, whichever unit one considered, there had been a material change of use, and accordingly he thought the notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion. What he said in the decision letter was this:

'Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B [relating to the building operations] relates to the building called variously the annexe or lean-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc. The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis.'

The Secretary of State then went on to ask himself the question: Has there been a material change of use of the lean-to annexe? and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the argument of counsel for the appellants, I cannot accept that the Minister in any way exceeded his jurisdiction in ordering that the scope of the notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the notice in favour of the appellants.

But the real complaint and grievance of the appellants is that the Secretary of State has for insufficient or incorrect reasons directed his mind to the wrong planning unit and thereby deprived them of a decision by the Secretary of State, as opposed to the inspector, of the real question which the appellants say should have been considered, namely: Has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of 'shop' in the Town and Country Planning (Use Classes) Order 1963 or the ordinary dictionary meaning of the word 'shop', it is really an absurdity to describe the whole of this site as a shop, but what I cannot accept is that the accident of language which the planning authority chose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council* (1), where DIPLOCK LJ said:

'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that, if the Secretary of State had applied those criteria to the question: What was the proper planning unit which fell for consideration in the instant case?, he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable conclusion at which the Secretary of State was bound to arrive, and, that being so, I do not think it would be appropriate for us to usurp his function of deciding the question: What is the appropriate planning unit here? to be considered as a matter of fact and degree. Accordingly I reach the conclusion that this appeal should be

allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

**WILLIS J:** I agree.

**LORD WIDGERY CJ:** I entirely agree for the reasons so fully and clearly given by **BRIDGE J.**

*Appeal allowed.*

Solicitors: *Heppenstall, Rustom & Rowbotham, Lymington; The Solicitor, Department of the Environment: Sharpe, Pritchard & Co.*

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(Lord Widgery, CJ, Melford Stevenson and Milmo, JJ.)

24th July 1972

EVANS v HUGHES

*Criminal Law—Carrying offensive weapon—Reasonable excuse—Anticipation of attack—Self-defence—Prevention of Crime Act 1953, s 1 (1).*

It may be a reasonable excuse within s 1 (1) of the Prevention of Crime Act, 1953, for the carrying of an offensive weapon that the carrier is in anticipation of imminent attack and is carrying it for his personal defence, but there is no reasonable excuse in the case of the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat or danger to the carrier. Persons under a continuing threat must protect themselves by other means, notably by enlisting the protection of the police. What length of time can pass before the anticipated attack can be said not to be 'imminent' is a question of fact for the justices or jury.

CASE STATED by Ealing justices.

Before a magistrates' court the respondent, Geoffrey Michael Hughes, was charged with having with him, on 24th February 1972, without authority or reasonable excuse in a public place, an offensive weapon, namely, a metal bar, contrary to s 1 (1) of the Prevention of Crime Act, 1953. The magistrates acquitted the respondent of the charge, and the prosecutor appealed.

*Michael Worsley* for the appellant.

*Ronald Walker* for the respondent.

**LORD WIDGERY CJ:** Section 1 (1) of the Prevention of Crime Act, 1953, provides:

'Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence.'

In s 1 (4) an offensive weapon is defined as meaning

'any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him.'

The facts found were that in the afternoon of the 24th February the respondent

was in a public place, a public highway in Uxbridge Road, Ealing, and that he had in his possession a metal bar about six inches long. It was made of quite light metal. Two police officers saw him with this bar and asked him what he had with him. He replied it was an iron bar. Asked where he had got it from and why he said: 'I have just collected it from a friend of mine who took it from my house.' That proved to be an incorrect statement because he went back on it later on and said that the truth of why he had the bar was that a week before he was on his way home and 'got done by three blokes, so I've been carrying the iron bar about with me for self protection. I wouldn't carry a knife because that would be silly. If the blokes had attacked me again I would have used the iron bar on them'. He elaborated the earlier incident when he had been attacked by the three men, and his case was that it was true that he carried the bar and carried it as a weapon, but his sole purpose was to use it in self-defence if he was subjected to the kind of experience which he had had the previous week, namely, when he was attacked by three men.

The first task of the justices was to decide whether this bar was an offensive weapon because the question whether or not it was carried with lawful authority or reasonable excuse does not arise unless and until it is shown to be an offensive weapon. It was obviously, and I turn to the definition, an 'article made or adapted for use for causing injury to the person'. On the respondent's own admission it was intended by him to be used for self-defence if he was attacked, and, therefore, in my view it was intended by him for use for causing injury to the person and the justices when they concluded that this was not an offensive weapon were wrong. The fact that the carrier of the weapon only intended to use it defensively does not prevent it from being an offensive weapon within the meaning of the definition, and I have no hesitation in saying that the justices made a mistake in their first conclusion—that this was not an offensive weapon at all.

However, they did not leave the matter there because they also said that even if the bar was an 'offensive weapon' within the Act, of 1953 the respondent had a reasonable excuse for having it with him. They found that he had reasonable cause for fear, and did fear, that he would be violently attacked, and that he carried the bar with the intention of using it for the purpose of self-defence only and not for any aggressive purpose. The argument in this court has turned on whether it was open to the justices to say that in the circumstances the respondent had a reasonable excuse for having this offensive weapon with him.

The first relevant case is *Evans v Wright* (1). That was a case in which a man had been stopped when driving a car, and he was found to have with him in the car a knuckle duster and a truncheon. He was charged with an offence under this Act, and his defence was that he used the car to collect large sums of money for wages for employees and he carried the weapons in the car so as to guard against possible attempts to rob him of the wages. He was not collecting wages on the occasion of the arrest, and the last time he had done so was a few days before. He said that the weapons, particularly the truncheon, were left in the car for the next time. The justices convicted him, he appealed, the appeal was dismissed, and this court said that 'reasonable excuse' in the present context was intended to cover the particular moment at which the weapon was carried. If, the moment the defendant had returned from the bank, the weapons had been found in his possession, his excuse might have been reasonable, but it was necessary to look at the actual time when he was carrying the weapons.

That principle, that one must consider reasonableness in relation to the immediately prevailing circumstances, is borne out in a decision in Scotland of *Grieve v MacLeod* (2).

(1) 1964, Crim Law Review 466.

(2) 1967, S.C. (J) 32.

There an Edinburgh taxi car driver carried a two-foot loaded rubber cosh in his cab. He was charged with carrying an offensive weapon in a public place, and he argued that taxicab drivers were sometimes assaulted at night, perhaps severely, and said that he carried the cosh for self-defence. The High Court of Justiciary held that, while each case must depend on its own facts, the appellant had not established the defence of reasonable excuse.

The outcome of those authorities and my own reading of the Act is that it may be a reasonable excuse for the carrying of an offensive weapon that the carrier is in anticipation of imminent attack and is carrying it for his own personal defence, but what is abundantly clear to my mind is that this Act never intended to sanction the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat of danger to the carrier. People who are under that kind of continuing threat must protect themselves by other means, notably by enlisting the protection of the police. That it may be a reasonable excuse to say: 'I carried this for my own defence', the threat for which the defence is required must be an imminent particular threat affecting the particular circumstances in which the weapon is carried.

That being so, a nice point arises whether the respondent could possibly have pleaded reasonable excuse for carrying this weapon seven days after the attack which he says had been made upon him. The story was that he remained in fear, and, if he had carried the weapon for a day or two perhaps he could have successfully claimed that he did so with reasonable excuse. When one gets to eight days one gets very close to the borderline, and at the borderline it is the good sense of the justices which must ultimately determine whether or not there was reasonable excuse. I am not at all sure that I should have reached the same conclusion had I been sitting among the justices, but I think we must leave the decision to them. I would accordingly dismiss the appeal.

**MELFORD STEVENSON J:** I agree.

**MILMO J:** I agree.

*Appeal dismissed.*

Solicitors: *Solicitor for Metropolitan Police; Somers & Laity.*

Reported by T. R. Fitzwalter Butler, Esq, Barrister.



HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD DIPLOCK, LORD SIMON OF GLAISDALE  
AND LORD KILBRANDON)

7th, 8th, 9th, 10th, 13th, 14th, 15th March, 14th June 1972

KNULLER (PUBLISHING, PRINTING AND PROMOTIONS) LTD AND OTHERS  
v DIRECTOR OF PUBLIC PROSECUTIONS

*Criminal Law—Conspiracy to corrupt public morals—Conspiracy to outrage public decency—Advertisements in magazine—Homosexualists seeking contact with other homosexualists—Advertisements on inside pages of magazine.*

Conspiracy to corrupt public morals is a crime known to the law of England (see *Shaw v Director of Public Prosecutions* (125 JP 437)), as also is conspiracy to outrage public decency (LORD REID and LORD DIPLOCK dissenting).

An agreement by three persons to insert advertisements in a magazine, whereby adult male advertisers sought replies from other adult males who were prepared to commit homosexual acts with them in private, was held to be capable of amounting to the offence of conspiracy to corrupt public morals; and an agreement to insert such advertisements in a magazine with a wide circulation, albeit on inside pages, the magazine being on sale in public places, and read individually at any one time by a number of people in different places, was held to be capable of amounting to the offence of conspiracy to outrage public decency.

*Criminal Law—Corruption of public morals—Conduct previously criminal—Exempted from criminal penalties by statute—Homosexual acts by adults in private.*

PER CURIAM: Conduct previously constituting a criminal offence but now sanctioned by Parliament (e.g., the provision in s 1 (1) of the Sexual Offences Act, 1967, that a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years) can still be considered as susceptible of corrupting public morals. There is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense.

APPEALS by Knuller (Publishing, Printing and Promotions) Ltd, Graham Keen Peter Stansil and David Hall against a decision of the Court of Appeal, reported 135 JP 569, dismissing the appeals of the appellants against their convictions at the Central Criminal Court of conspiracy to corrupt public morals and outrage public decency.

J B R Hagan QC and L Brittan for the appellants.

J H Buzzard and Richard Du Cann for the Crown.

Their Lordships took time for consideration.

14th June. The following opinions were read.

**LORD REID:** The accused took part in publishing a magazine which contained a wide variety of material thought to be of interest to those holding 'progressive' views. Much of this material is unobjectionable. Some would be distasteful to many people, some is more objectionable. In this case we are only concerned with some columns of advertisements appearing on inner pages of the magazine. These columns are headed 'Males'. In most cases these advertisements were inserted by homosexuals and their express purpose was to attract answers from persons who would indulge in homosexual practices with the advertisers. Sometimes persons answering the advertisements were to communicate directly with the advertisers. Sometimes they were to send their answers to the magazine and the answers were then forwarded to the advertisers. The appellants stated that they established this

service to avoid the need for resorting to other methods of solicitation, and there is no reason to doubt that.

The appellants were charged and convicted on two counts. The contention of the appellants in this appeal is that neither count discloses any offence known to the law. The second count raises quite different legal issues from those involved in the first and I must deal with them separately.

The first count charges a conspiracy to corrupt public morals. The particulars given are that between January and May 1969 the appellants conspired together and with persons inserting the advertisements by means of the advertisements

'to induce readers thereof to meet those persons inserting such advertisements for the purpose of sexual practices taking place between male persons and to encourage readers thereof to indulge in such practices, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen.'

It was decided by this House in *Shaw v Director of Public Prosecutions* (1) that conspiracy to corrupt public morals is a crime known to the law of England. So if the appellants are to succeed on this count, either the House must reverse that decision or there must be sufficient grounds for distinguishing this case. The appellants' main argument is that we should reconsider that decision; alternatively, they submit that it can and should be distinguished.

I dissented in *Shaw's* case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. [His LORDSHIP referred to the power of the House of Lords to reverse a previous decision of the House\*]: Although I would not support reconsidering *Shaw's* case I think that we ought to clarify one or two matters. In the first place conspiracy to corrupt public morals is something of a misnomer. It really means to corrupt the morals of such members of the public as may be influenced by the matter published by the accused.

Next I think that the meaning of the word 'corrupt' requires some clarification. One of my objections to the *Shaw* decision is that it leaves too much to the jury. I recognise that in the end it must be for the jury to say whether the matter published is likely to lead to corruption. But juries, unlike judges, are not expected to be experts in the use of the English language and I think that they ought to be given some assistance. In *Shaw's* case a direction was upheld in which the trial judge said:

'And, really, the meaning of debauched and corrupt is again, just as the meaning of the word induce is, essentially a matter for you. After all the arguments, I wonder really whether it means in this case and in this context much more than lead astray morally.'

(1) 125 JP 437; [1961] 2 All ER 446; [1962] AC 220.

\*July 26, 1966. LORD GARDINER, LC., made the following statement on behalf of himself and the Lords of Appeal: Their Lordships regard the use of precedent as an indispensable foundation on which to decide what is the law and its application to individual cases. It provides at least some degree of certainty on which individuals can rely in the conduct of their affairs, as well as a basis for the orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice, and, while treating former decisions of the House of Lords as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property, and fiscal arrangements, have been entered into, and also the special need for certainty as to the criminal law.

I cannot agree that that is right. 'Corrupt' is a strong word and the jury ought to be reminded of that, as they were in the present case. The Obscene Publications Act 1959 appears to use the words 'deprave' and 'corrupt' as synonymous, as I think they are. We may regret that we live in a permissive society but I doubt whether even the most staunch defender of a better age would maintain that all or even most of those who have at one time or in one way or another been led astray morally have thereby become depraved or corrupt. I think that the jury should be told in one way or another that, although in the end the question whether matter is corrupting is for them, they should keep in mind the current standards of ordinary decent people.

I can now turn to the appellants' second argument. They say that homosexual acts between adult males in private are now lawful so it is unreasonable and cannot be the law that other persons are guilty of an offence if they merely put in touch with one another two males who wish to indulge in such acts. But there is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense. Prostitution and gaming afford examples of this difference. So we must examine the provisions of the Sexual Offences Act 1967 to see just how far it altered the old law. It enacts subject to limitation that a homosexual act in private shall not be an offence but it goes no farther than that. Section 4 shows that procuring is still a serious offence and it would seem that some of the facts in this case might have supported a charge under that section.

I find nothing in the Act to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way, that is their affair and the law will not interfere. But no licence is given to others to encourage the practice. So if one accepts *Shaw's* case as rightly decided it must be left to each jury to decide in the circumstances of each case whether people were likely to be corrupted. In this case the jury were properly directed and it is impossible to say that they reached a wrong conclusion. It is not for us to say whether or not we agree with it. So I would dismiss the appeal as regards the first count.

The second count is conspiracy to outrage public decency, the particulars, based on the same facts, being that the appellants conspired with persons inserting lewd, disgusting and offensive advertisements in the magazine 'by means of the publication of the said magazine containing the said advertisements to outrage public decency'.

The crucial question here is whether in this generalised form this is an offence known to the law. There are a number of particular offences well known to the law which involve indecency in various ways but none of them covers the facts of this case. We were informed that a charge of this character has never been brought with regard to printed matter on sale to the public. The recognised offences with regard to such matter are based on its being obscene, i.e., likely to corrupt or deprave. The basis of the new offence, if it is one, is quite different. It is that ordinary decent-minded people who are not likely to become corrupted or depraved will be outraged or utterly disgusted by what they read. To my mind questions of public policy of the utmost importance are at stake here.

I think that the objections to the creation of this generalised offence are similar in character to but even greater than the objections to the generalised offence of conspiracy to corrupt public morals. In upholding the decision in *Shaw's* case we are, in my view, in no way affirming or lending any support to the doctrine that the courts still have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment. Apart from some statutory offences of limited application, there appears to be neither precedent nor authority of any kind for punishing the publication of written or printed matter on the ground that it is indecent as distinct from being

obscene. To say that published matter offends against public decency adds nothing to saying that it is indecent. To say, as is said in this charge, that it outrages public decency adds no new factor; it seems to me to mean no more than that the degree of indecency is such that decent members of the public who read the material will not merely feel shocked or disgusted but will feel outraged. If this charge is an attempt to introduce something new into the criminal law it cannot be saved because it is limited to what a jury might think to be a high degree of indecency.

There are at present three well-known offences of general application which involve indecency—indecent exposure of the person, keeping a disorderly house, and exposure or exhibition in public of indecent things or acts. The first two are far removed from sale of indecent literature and I can see no real analogy with the third.

Indecent exhibitions in public have been widely interpreted. Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting. And 'in public' also has a wide meaning. It appears to cover exhibitions in all places to which the public have access either as of right or gratis or on payment. There is authority to the effect that two or more members of the public must be able to see the exhibition at the same time, but I doubt whether that applies in all cases. We were not referred to any case where the exhibition consisted of written or printed matter, but it may well be that public exhibition of an indecent notice or advertisement would be punishable.

But to say that an inside page of a book or magazine exposed for sale is exhibited in public seems to me to be going far beyond both the general purpose and intentment of this offence and any decision or even dictum in any case. I need not go farther because this offence is not charged and it was not argued that it could have been charged in this case.

I must now consider what the effect would be if this new generalised crime were held to exist. If there were in any book, new or old, a few pages or even a few sentences which any jury could find to be outrageously indecent, those who took part in its publication and sale would risk conviction. I can see no way of denying to juries the free hand which *Shaw's* case gives them in cases of conspiracy to corrupt public morals. There would be no defence based on literary, artistic or scientific merit. The undertaking given in Parliament with regard to obscene publications would not apply to this quite different crime. Notoriously many old works, commonly regarded as classics of the highest merit, contain passages which many a jurymen might regard as outrageously indecent. It has been generally supposed that the days for Bowdlerising the classics were long past, but the introduction of this new crime might make publishers of such works think twice. It may be said that no prosecution would ever be brought except in a very bad case. But I have expressed on previous occasions my opinion that a bad law is not defensible on the ground that it will be judiciously administered. To recognise this new crime would go contrary to the whole trend of public policy followed by Parliament in recent times. I have no hesitation in saying that in my opinion the conviction of the appellants on the second count must be quashed.

**LORD MORRIS OF BORTH-Y-GEST:** In the case of *Shaw v Director of Public Prosecutions* (1) it was clearly recognised and affirmed that a conspiracy to corrupt public morals is a common law misdemeanour which is indictable at common law. That was so held by the judge at the trial after full legal argument. His ruling was upheld in December 1960 by the Court of Criminal Appeal (LORD PARKER CJ, STREATFIELD and ASHWORTH JJ) after further full legal argument. On appeal to your Lordships' House, after further full legal argument lasting some seven days, and

(1) 125 JP 437; [1961] 2 All ER 446; [1962] AC 220.

after an examination of a large number of authorities, it was, in May 1961, again held that the ruling had been correct. It cannot validly be asserted that what the House did was to create a new offence. What was held was that authority showed that the offence existed and was known to the common law. VISCOUNT SIMONDS said:

'My Lords, as I have already said, the first count in the indictment is "Conspiracy to corrupt public morals", and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law and that it was open to the jury to find on the facts of this case that the appellant was guilty of such an offence.'

LORD TUCKER, with whose speech LORD SIMONDS, LORD HODSON and I agreed, based himself on what he regarded as clear and compelling authority upholding their existence of the crime of conspiracy to corrupt morals.

It was contended on behalf of the appellants that, in view of the provisions of s 1 (1) of the Sexual Offences Act 1967, no offence had in the present case been committed. By that subsection it is provided as follows:

'Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.'

It was submitted that where Parliament has altered the law so that certain sexual conduct which was formerly illegal becomes under certain circumstances no longer an offence there can be no commission of the offence of conspiring to corrupt public morals by the insertion of advertisements which only have in view such sexual conduct under the specified circumstances. At the trial it was said that the circulation of the paper, *International Times*, in which the advertisements were inserted was about 38,000 although some 54,000 copies of the last edition were printed. One of the appellants thought that the readers could include up to 10,000 schoolboys and 20,000 to 30,000 students. In considering the submission which is made I propose to leave out of account any question whether some of the advertisements might be regarded as having been addressed to or might have been responded to by persons under the age of 21 years. The submission which is made is, I think, fallacious. What s 1 of the 1967 Act does is to provide that certain acts which previously were criminal offences should no longer be criminal offences. But that does not mean that it is not open to a jury to say that to assist or to encourage persons to take part in such acts may be to corrupt them. If by agreement it was arranged to insert advertisements by married people proclaiming themselves to be such and to be desirous of meeting someone of the opposite sex with a view to clandestine sexual association, would it be a justification to say that adultery is not of itself a criminal offence? A person who, as a result of perusing the *Ladies Directory*, decided to resort to a prostitute was committing no legal offence, but it was open to a jury to hold that those who conspired to insert the advertisements did so with the intention of corrupting the morals of those who read the advertisements. So in the present case it was open to the jury to hold that there was an intention to corrupt; it was for the jury to decide whether the advertisements would induce readers of them to meet those who inserted the advertisements and to meet them for the purpose of the contemplated sexual practices; it was for the jury to decide whether readers would be or might be encouraged to indulge in such practices; it was for the jury to decide whether those conspiring together to insert the advertisements had the intent to debauch and corrupt the morals of the readers. The word 'corrupt' is a strong word; it should not be weakened by too gentle a paraphrase or explanation.



The situation giving rise to the question now being considered was foreseen by and referred to by LORD SIMONDS and by LORD TUCKER in their speeches in *Shaw's* case. Thus LORD TUCKER said:

'Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury?'

It is suggested that what was said was obiter. In a limited sense it was—but in reality it was merely illustrative of an issue of fact which might arise for the consideration of a jury. The reasoning of the speeches in *Shaw's* case would have been just as fully applicable to the situation in the present case had LORD SIMONDS and LORD TUCKER not made the specific references which I have mentioned. It is to be observed that LORD TUCKER was only speaking of an issue which could be left to the consideration of a jury. Conviction could only follow if the jury were satisfied that the elements of the offence were all established.

A clear recognition and acceptance of the fact that there existed as an offence known to the law the offence of conspiracy to corrupt public morals did not involve that every variety and combination of circumstances by which the offence could be committed must in some past period have been devised or have been known or adopted or recorded. Precedent may be pointed to as showing that the law has known and recognised the offence. But it is idle to say that the offence is by-passed merely because someone thinks of a new way of committing it. I would respectfully reiterate what was said by LORD SIMONDS in *Shaw's* case:

'But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described . . . The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before.'

It was contended that the words 'or common law provision' in s 1 (1) of the 1967 Act were words which precluded the bringing of a charge at common law of conspiracy to corrupt morals if what was in contemplation was a homosexual act in private between consenting adults. The contention is, in my view, unsustainable. In their context the words are merely part of the provision by which the law was changed so that such a homosexual act would no longer be a criminal offence even though previously it had been an offence either by statute or at common law.

[His LORDSHIP considered the judge's summing-up in the present case and continued:] I pass, then, to consider the second main submission on behalf of the appellants. It was urged that *Shaw's* case should now be reconsidered. I reject this submission primarily because, in my view, *Shaw's* case was correctly decided. Even had I been of a different opinion I would nevertheless consider it wholly inappropriate now to review the decision. Such a course would not, in my view, be warranted or desirable within the ambit of the statement made in this House on 26th July 1966. That statement drew attention to the especial need for certainty as to the criminal law\*.

It was suggested and it has been suggested that there is an element of uncertainty which attaches to the offence of conspiracy to corrupt public morals. It is said that

\*See p 729 ante.

the rules of law ought to be precise so that a person will know the exact consequences of all his actions and so that he can regulate his conduct with complete assurance. This, however, is not possible under any system of law. If someone chooses to publish words in regard to another it may be possible to give advice whether the words are capable of bearing a defamatory meaning but there will be very many cases in which no certain advice could be given as to whether it will be held that the words were defamatory and as to whether he might be held liable to pay damages in a civil action. It may depend on the collective view of 12 people on a jury. If there is no jury it will depend on the view which may be formed by one particular judge, which might well differ from that which would be formed by a different judge. In many cases there can be no certainty what the decision will be. But none of this is a reflection on the law. Nor do I know of any procedure under which someone could be told with precision just how far he may go before he may incur some civil or some criminal liability. Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in. So when Parliament has made it an offence to publish an article which may tend to deprave and corrupt and has left it to a jury to decide whether an article may so tend it is no criticism of the law to say that a man will not be sure in advance whether he will be acquitted or convicted. *Shaw's* case is, therefore, not open to the criticism that it created or tolerated a state of uncertainty. It merely affirmed with certainty that an offence was known to the law. The view is advanced by some that the law should not be used as an instrument to enforce moral standards. Those who hold that view hold it sincerely. But whether that view should or should not prevail is not a matter for the courts to resolve. If there be some who think that in relation to the publication of articles or the performances of plays there should be no restraints at all or at least no restraints which involve or require the machinery of the law for their sanction it is for them to persuade Parliament to adopt their view. As recently as 1968 (by the Theatres Act) it was provided that a play should be deemed to be obscene if, taken as a whole, its effect is such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances to attend it. If a case is dealt with summarily it will be for magistrates to decide the issue whether or not the effect of the play was such as to tend to deprave and corrupt; if there is a trial on indictment it will be for the jury so to decide. As I have mentioned some criticism of *Shaw's* case is made on the basis that a man cannot know with certainty whether what he is doing will land him in trouble (because it could not be predicted what views a jury would form); the criticism is, in my view, invalid because it was not the decision in *Shaw's* case that produced the uncertainty. The invalidity of the criticism is highlighted when it is seen that Parliament not only enacted the Obscene Publications Act 1959 in terms to which I have referred but more recently, i.e., by the Theatres Act 1968, has enacted that it will be or may be for a jury to determine whether a performance is obscene because it tends to deprave and corrupt. Incidentally, it is to be observed that in creating (and requiring) concentration on the statutory offence of presenting or directing an obscene performance Parliament excluded proceedings for certain common law offences:

'and no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance.'

(see s 2 (4) of the Theatres Act 1968). It would be hard to find a clearer indication that Parliament had fully in mind the decision in *Shaw's* case acknowledging the existence of the common law offence of conspiring to corrupt public morals. So also was there

acknowledgment of the existence of the common law offence of conspiring to do an act contrary to public morals or decency.

It has sometimes been asserted that in his speech in *Shaw's* case LORD SIMONDS was proclaiming that the courts had power to extend the sphere of the law by devising new extensions of the operations of the criminal law; his use of the words 'residual power' is pointed to as a basis of what is asserted. In my view, the sustained reasoning of his speech refutes the assertion. In the first place, he expressly and firmly repudiated any notion that there is in the judges a right to create new criminal offences. He held, in agreement with LORD TUCKER that the offence of conspiracy to corrupt public morals was an offence known to the common law. He then proceeded to demonstrate that if offending acts do reveal a conspiracy to corrupt public morals it is not to be said that no offence has been committed merely because the particular acts are novel or unprepared for or are unprecedented. He pointed out that Parliament from time to time by legislative acts alters the common law but that yet there are 'unravished remnants' of it. The residual power to which he referred is the power 'where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare'. The reasoning is directed to the enforcement of the common law to the extent that its power may reach; the reasoning disclaims the existence of an arbitrary power to re-fashion the common law.

I must refer to a submission which was based on the statutory provision contained in s 2 (4) of the Obscene Publications Act 1959, which provides:

'A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.'

It was urged that this provision precludes the bringing of a charge of conspiring to corrupt public morals if what is alleged is that the conspiracy was one to bring about a publication which would tend to deprave or corrupt readers. This submission must be negatived because of what was decided (and I think rightly decided) in *Shaw's* case. In regard to the argument advanced in *Shaw's* case to the effect that count 1 in the case (which compares with count 1 in the present case) offended against the provisions of s 2 (4) of the 1959 Act, LORD TUCKER said:

'My Lords, I agree with the judgment of the Court of Criminal Appeal that the short answer to this argument is that the offence at common law alleged, namely, conspiracy to corrupt public morals, did not "consist of the publication" of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.'

It is relevant to have in mind that it is provided by s 4 of the 1959 Act that a person is not to be convicted of the offence (under s 2 of that Act) of publishing an obscene article if it is proved that publication of the article is justified as being for the public good 'on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'. It was not suggested that the advertisements in the present case (nor was it suggested that the directory in *Shaw's* case) could be regarded as publications which were justifiable as being for the public good. It may be that if a publication could be so justified, a conspiracy designed to effect, or which contemplated, such a publication would not be a criminal conspiracy. But whether this be so or not it would be quite inappropriate if there could be a charge of conspiracy to corrupt public morals which placed anyone at risk of conviction in circumstances which circumvented the statutory defence under s 4. In 1964 Parliament passed the Obscene Publications Act of that year and we were told that before it was passed the Law Officers of the Crown gave an assurance to the

House of Commons (in repetition of an earlier similar assurance) now a conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence in s 4. That should be known by all who are concerned with the operation of the criminal law. For present purposes the relevance of this lies in the circumstance that Parliament had the decision in *Shaw's* case fully in mind.

The result of this is that even had I not been of the view that the decision in *Shaw's* case was as a decision correct I would have thought it wholly inappropriate now to review it under the freedom expressed in the statement which was made in 1966\*. That would be for the following reasons: (i) The decision constituted a clear pronouncement of this House as to what the law was and had been; (ii) it was a decision in relation to the criminal law where certainty is so desirable; (iii) the decision has been acted on and many criminal prosecutions have been based on the authority of it; (iv) the decision was one which attracted public attention and which on different occasions has been brought particularly to the attention of Parliament; (v) Parliament has not altered the law; (vi) whether a change in the law could or could not have been effected as part of the provisions of the Obscene Publications Act 1964, or of the Sexual Offences Act 1967, or of the Theatres Act 1968 is immaterial. The provisions and contents of those Acts could well have stimulated an alteration of the law as laid down in *Shaw's* case had Parliament so desired.

I pass then to consider the second count. It charged the appellants with the offence of conspiracy to outrage public decency. The particulars alleged that between certain dates the appellants conspired together and with persons inserting lewd, disgusting, and offensive advertisements in issues of the magazine and with other persons unknown by means of the publication of the magazine to outrage public decency. In regard to this count a very limited contention was presented. It was accepted that there is an offence of conspiracy to outrage public decency but it was argued that there was nothing objectionable on the outside of the magazines and that as the advertisements complained of would only present themselves to those who looked at and read the inner pages of the magazines the offence of outraging public decency had not been committed. This contention finds its expression in the second point of law of general public importance which was certified by the Court of Appeal, namely, whether an agreement to insert advertisements (ie, those whereby adult male advertisers seek replies from other adult males who are prepared to consent to commit homosexual acts with them in private) on the inside pages of a magazine with a wide circulation, on sale in public places, and which was read individually at any one time by a number of people in different places, is capable of amounting to the offence of conspiracy to outrage public decency.

In recognising that there is a common law offence of conspiring to outrage public decency learned counsel for the appellants was amply supported by authority. I would respectfully adopt what my noble and learned friend, LORD REID, said in his speech in *Shaw's* case:

'I shall not examine the authorities, because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it. In my view, it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence. If the jury in this case had been properly directed, they might well have found the appellant guilty for this reason. And the offence would be the same whether the invitation was made by an individual or by several people acting in concert.'

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\*See p 729 ante.

The last two sentences related to the fact that some of the advertisements in the publication then in question extended beyond what was called 'ordinary prostitution'.

In *R v Mayling* (1) the charge in the indictment was that by reason of certain described behaviour the accused committed an act of a lewd, obscene, and disgusting nature which outraged public decency. No question of a conspiracy arose. ASHWORTH J in delivering the judgment of the Court of Criminal Appeal held that it was well established that there was an offence of committing an act outraging public decency (indeed the contrary had not been contended) and that the act complained of must be committed in public if it was to constitute the offence. Hence if what was alleged was some indecent act the prosecution had to prove that such act was committed in public in the sense that more than one person must have been able to see it.

The evidence in the present case established that the magazines were on sale in public places. There was evidence that 15,000 copies were taken by a distributor in East London and that those copies went to shops and newsagents; another distributor took some 6,000 or 8,000 copies which he supplied to shops and newsagents and college bookshops. Some 4,000 or 5,000 went to other smaller distributors. Some copies were sold by street sellers. In addition there was a subscription list.

What was said was that although the sales were in public so that any member of the public could buy, there was no outrage of public decency because members of the public would have to read the inside rather than the outside of what they bought before they were outraged, and further that members of the public would be outraged separately and not in collective groups. It was further said that the offence now being considered is only committed if there is some act (such as an act of indecent exposure) which is done in public. Furthermore, that there was no exact precedent which recorded particulars of the offence similar to those in the present case.

My Lords, I cannot accept these contentions. It seems to me to be wholly unrealistic to say that if a magazine which is sold in public has matter on its outside cover which outrages public decency (which means outrages the sense of decency of members of the public) an offence is then committed, whereas if the outside cover of the magazine is plain and innocuous but as soon as the magazine is opened the member of the public who buys it is outraged by all that he sees, then no offence is committed.

It may well be that in this present case it would have been sufficient to prefer only count 1. But the conceptions of the two counts are different. Count 1 alleges an intention to debauch and corrupt. Count 2 raises the issue not whether people might be corrupted but whether the sense of decency of members of the public would be outraged. It is to be observed that it is not suggested that publication of the advertisements in the magazines could be said to have been justified as being for the public good on the ground that the advertisements were in the interests of science or literature or art or learning or of other objects of general concern. Although the assurance given to the House of Commons in 1964 was in reference to a charge of conspiracy to corrupt public morals the spirit and intendment of the assurance would clearly apply in reference to a charge of conspiracy to outrage public decency.

The contention that no exact precedent has been produced showing that the offence (the existence of which as an offence is accepted) has not previously been alleged to have been committed in this precise manner is refuted by the statements in *Shaw's* case to which I have alluded. The books contain numerous examples of criminal conspiracies which have been held to be such because of the particular purposes which those agreeing desired to effect. Reference may be made to Kenny's *Outlines of Criminal Law* (18th edn p 412), to Russell on *Crime* (12th edn, p 1469), and to Archbold's *Pleading, Evidence and Practice in Criminal Cases* (37th edn, p 1343). It would be quite impracticable to seek to consider or to review all the many cases cited.

(1) 127 JP 269; [1963] 1 All ER 687; [1963] 2 QB 717.



They could neither be approved nor disapproved in bulk. I take merely one example. I do not suppose that it would be contested that a conspiracy is criminal if its purpose is to prevent or to obstruct or to pervert or to defeat the course of public justice. I cannot think that it would be an answer to a charge to assert that the particular means employed for perverting or obstructing the course of public justice had never before been thought of or used so that no previous indictment could be traced the particulars of which set out as the means employed those which only new ingenuity had devised.

In regard to count 2 the learned judge at the trial reminded the jury of all that he had said as to the nature of a conspiracy and told them that count 2 alleged an offence quite separate and distinct from that alleged in count 1. He told them that they had to be satisfied that the advertisements were lewd, disgusting and offensive and that the particular accused person was a party to an agreement to outrage public decency. He carefully reminded them that public feeling varies from one generation to another so that what would outrage public decency in one generation would pass unnoticed in the next, so the jury had to be satisfied that the advertisements did outrage public decency and that there was an agreement to outrage public decency. The matter was I think fairly and sufficiently submitted to the jury for their consideration and their decision.

In giving the judgment of the Court of Appeal FENTON ATKINSON LJ said that to establish guilt it was not necessary to have 'an actual act which has to be performed in public.' The court expressed the view that

'with a paper of this kind with a wide circulation being read at any one time by numerous people in different places, there is no difference in principle between that and, let us say, a blue film which is seen by only two or three people at one particular time.'

The magazines here in question were sold in public to any and every member of the public who cared to buy. The expectation of those who in agreement arranged such public dissemination must have been that members of the public who bought would open the magazines that they bought and would read and peruse the inside pages. If, in the opinion of a jury, what was inside could rationally be regarded as lewd, disgusting and offensive, and if, in the opinion of a jury, the sense of decency of members of the public would be outraged by seeing and reading what was presented to them to see and read, I can hardly think that a prosecution must fail if, but only if, and only because the outside page was by itself harmless.

I would dismiss the appeal.

**LORD DIPLOCK:** dissenting, expressed the opinion that the decision of the House of Lords in *Shaw's* case that an offence of conspiracy to corrupt public morals existed at common law was wrong and ought not to be followed. He was unable to draw the distinction which had commended itself to some of their Lordships between a 'conspiracy to corrupt public morals', the subject of the first count against the appellants, and a 'conspiracy to outrage public decency' the subject of the second count. The old judicial dicta which in *Shaw's* case were treated as the historical justification for holding that an agreement to do anything which tended to corrupt public morals amounted to a crime at common law, did not draw any distinction between conduct or conspiracies directed against public morals and conduct or conspiracies directed against public decency. As a matter of decision *Shaw's* case was limited to conspiracies to corrupt public morals; as a matter of judicial reasoning its scope could not logically be so confined. To bow to the decision yet to deny the legal reasoning on which it was based, was to draw the kind of distinction which reflected

discredit on the English legal system. To deliver the Law Lords from the temptation to do this was one of the objects of the change of policy announced in July 1966\*.

[His LORDSHIP traced the history of prosecution for conspiracy and offences against decency and public morals, and concluded]: Your Lordships need have no fear that to overrule *Shaw's* case would subject an unwilling public to forced participation in immoralities or exposure to indecencies which are indulged in by a minority in a permissive age. Most conduct which is offensive to public morals or public decency is prohibited by statute or falls within the ambit of some specific misdemeanour at common law which has long been recognised in decided cases. Having regard to the contents of some of the advertisements which were the subject-matter of the charges in the instant case and to the provision of facilities for forwarding to the advertisers answers to such advertisements, the defendants might well have been guilty of an offence under the Obscene Publications Acts 1959 and 1964 or of the common law misdemeanour of inciting or procuring the commission of the statutory offence of doing acts of gross indecency with male persons under the age of 21. But if they were to be found guilty of those offences they were entitled to be charged with them and to have the verdict of a jury properly instructed by a judge on the legal character of those particular offences. They were not so charged, the jury was not so instructed. The consideration that the defendants in the instant case may have been undeservedly lucky if *Shaw's* case were overruled ought not, in my view, to deter this House from correcting an unfortunate mistake as to the common law which for the reasons that I have given I believe it made ten years ago.

I, for my part, would have allowed these appeals on the first count as well as on the second.

**LORD SIMON OF GLAISDALE**, dealing with the count against the appellants of conspiracy to corrupt public morals, referred to the decision in *Shaw v Director of Public Prosecutions* (1) and the observations in that case of LORD SIMONDS, LORD TUCKER, LORD MORRIS OF BORTH-Y-GEST, and LORD HODSON, and continued: It was at one stage argued before your Lordships on behalf of the appellants that the Sexual Offences Act 1967 had as regards the instant case abrogated the decision in *Shaw's* case or had made the instant case distinguishable from it. Section 1 (1) of the Sexual Offences Act 1967 reads:

'Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.'

(The next following section provided that homosexual acts between members of the crews of United Kingdom merchant ships should continue to be offences.) The argument for the appellants based on the Sexual Offences Act 1967 was twofold: first, that the words 'Notwithstanding any . . . common law provision' were inserted in order to refer to the common law offence of conspiracy to corrupt public morals by an agreement to encourage or facilitate private homosexual acts between male persons over 21—i.e., in order to overrule the decision in *Shaw's* case pro tanto; secondly, and alternatively, that, Parliament having sanctioned such conduct, it could not be a conspiracy to corrupt public morals to agree to encourage or facilitate it.

But the phrase 'Notwithstanding any . . . common law provision' was required because buggery was an offence at common law before it became a statutory offence

\* See p 729 ante.

(1) 125 JP 437; [1961] 2 All ER 446; [1962] AC 220.

by virtue of s 12 of the Sexual Offences Act 1956. The enactment of a statutory offence, even though coterminous with a previous common law offence, does not abrogate such common law offence (see Interpretation Act 1889, s 33); so that in turn the statutory abrogation of a statutory offence does not carry with it automatically the abrogation of the (even coterminous) common law offence. The opening phrase was thus required by the very purpose of s 1—otherwise Parliament would have been abolishing the statutory offence of buggery between consenting adults in private only to leave a coincident common law offence in being—and this requisite demonstrates the meaning of Parliament in enacting the opening phrase. But it is in any event inherently improbable that Parliament would have sought to abolish pro tanto the common law offence of conspiracy to corrupt public morals, so recently affirmed in your Lordships' House (accompanied by the dicta which I have cited on its application to the situation which would arise after the passing of such a measure as the Sexual Offences Act 1967), in such an oblique and obscure a way—especially as the decision of your Lordships' House had in the meantime been a subject of some controversy. On the contrary, the Parliamentary mode in such circumstances is to be seen in a statute passed in the following session, the Theatres Act 1968. Section 2 of that Act makes it generally a punishable offence to present obscene performances of plays ('obscene' being statutorily defined). Subsection (4) of s 2 precludes proceedings at common law in respect of such performances. The relevant words are as follows:

'(4) No person shall be proceeded against . . . (a) for an offence at common law where it is of the essence of the offence that the performance . . . was obscene, indecent, offensive, disgusting or injurious to morality . . . and no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play . . .'

I therefore reject the argument for the appellants that the opening words of s 1 (1) of the Sexual Offences Act 1967 pro tanto reversed the decision of your Lordships' House in *Shaw's* case and made inapplicable the offence of conspiracy to corrupt public morals pro tanto.

As for the second argument for the appellants founded on the Sexual Offences Act 1967 (namely, that conduct sanctioned by Parliament could no longer be considered as susceptible of corrupting public morals), although Parliament decided that homosexual acts in private between persons over the age of 21 should no longer be offences either at common law or by statute, it does not appear that Parliament was even neutral in its attitude towards such conduct. In the first place, there is the exception of homosexual acts in merchant ships to which I have already referred. In the second place, notwithstanding the recommendation of the Wolfenden Committee on which the statute was founded, the Act did not extend to Scotland. In the third place, by s 4 it continues to be an offence for A to procure a male B to commit buggery or an act of gross indecency with a male C, notwithstanding that both B and C are consenting adults over 21 years of age and that the act is in private. (Indeed, counsel for the Crown before your Lordships indicated that, if the offence of conspiracy to corrupt public morals had not been apparently available for indictment of the appellants, he would have included in the indictment a count of conspiracy to procure homosexual acts, although, since counsel for the appellants indicated that there would be an answer to such a charge, I must not be taken as expressing any opinion whether an indictment so framed would be likely to succeed.) It is, in my view, impossible to spell out of the Sexual Offences Act 1967 any indication that Parliament regarded the sort of conduct which was the subject-matter of the indictment in the instant case as no longer susceptible of corruption of public morals.

In the end counsel for the appellants abandoned any argument that the instant case was distinguishable from *Shaw's* case, either by reason of the Sexual Offences Act 1967 or otherwise, and rested his case on the contention that your Lordships should decline to follow *Shaw's* case. He did not traverse the field of the case law which was closely covered in the speeches in *Shaw's* case, but rather argued that it was objectionable that our law should recognise any such offence as conspiracy to corrupt public morals. I do not myself find it necessary for judgment in this appeal to express any opinion whether the decision in *Shaw's* case was (in an abstract juridical sense) 'correct in law' or as to its desirability. In my view, the appeal turns on how far your Lordships are justified in altering the law as previously established.

The sanction for your Lordships' departure from a rule of law laid down by a previous decision of your Lordships' House rests on an announcement made on 26th July 1966, by LORD GARDINER LC with the approval of all the Lords of Appeal in Ordinary at that time\*.

[His LORDSHIP read the announcement\*, drawing particular attention to the words 'the especial need for certainty as to the criminal law, and continued']: But in, any case, the type of 'uncertainty' invoked by the appellants is not that with which the declaration of 26th July 1966, was concerned. The context was the doctrine of precedent. The declaration was, in other words, concerned with that certainty which comes from following rules of law already judicially determined, not with any such certainty as may come from the abrogation of those judicially determined rules of law which involve issues of fact and degree. *Shaw's* case laid down with certainty that the offence of conspiracy to corrupt public morals was part of our criminal law. Parliament, in the Theatres Act 1968, recognised that this had been so established. A number of persons have been prosecuted and convicted on this basis. It was not contended that the rule had led to any injustice.

But over and above the limitations constitutionally imposed by the terms and context of the declaration of 26th July 1966, there are three additional features in the instant case which render it particularly undesirable, in my respectful submission, for your Lordships to depart from the decision in *Shaw's* case. In the first place, your Lordships are concerned with highly controversial issues, on which there is every sign that neither public nor Parliamentary opinion is settled. It is a matter of high debate how far the law should concern itself at all with 'morality'. The ambivalence in society's attitude towards homosexuality is sufficiently indicated by the provisions of the Sexual Offences Act 1967, to which I have already drawn attention. Nor has the decision itself in *Shaw's* case lacked critics and champions. Of course, courts of law do not shrink from decisions which are liable to be controversial when judicial duty demands such decisions. But your Lordships are here in a field where the decisions—at any rate, policy decisions—are better left to Parliament, if such is possible. Certainly, it is the sort of matter in which it is most undesirable that there should be in effect an appeal from one appellate committee of your Lordships' House to another. In default of any decision by Parliament to reverse the judgment in *Shaw's* case the determination in particular cases is in the hands of that microcosm of democratic society, the jury.

A second particular reason why this is, over and above constitutional convention, in my view, an unsuitable issue for the exercise of your Lordships' law-making powers is that there have been several occasions when Parliament itself had the opportunity, had it wished to avail itself of it, to abrogate the decision in *Shaw's* case—the Obscene Publications Act 1964 (when Parliament instead accepted the re-iteration of the limited undertaking on behalf of the Crown to which LORD REED

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\* See p 729 ante.

has referred), the Sexual Offences Act 1967, and the Criminal Law Act 1968. As my noble and learned friend, LORD REID, said in *Shaw's* case: 'Where Parliament fears to tread it is not for the courts to rush in.'

Thirdly, virtually all the objections which have been advanced against the offence of conspiracy to corrupt public morals are equally applicable to the offence of conspiracy to effect a public mischief. The two offences may, indeed, both be sub-classes of a more general class, or conspiracy to corrupt public morals may be a species of the genus conspiracy to effect a public mischief. (This appears to have been the view of LORD TUCKER in *Shaw's* case, with whose speech the rest of the majority agreed.) It would hardly be possible to consider *Shaw's* case without also reconsidering the offence of conspiracy to effect a public mischief.

A special aspect of the rule of precedent in your Lordships' House arises on the powerful argument on behalf of the appellants based on s 2 (4) of the Obscene Publications Act 1959. The construction and applicability of this subsection was a matter of direct decision in *Shaw's* case; and, since it was a matter of statutory interpretation the views of the majority in *Jones v Secretary of State for Social Services* (1) constitute a further reason for not departing from the decision in *Shaw's* case so far as this point is concerned.

It follows, in my view, that your Lordships should follow *Shaw's* case on the matter as to which it constituted a direct authority—namely, that the offence of conspiracy to corrupt public morals is part of the criminal law of England. But there are certain other matters which either appear in that case as obiter dicta or which have been ascribed to the decision (in my view unnecessarily and wrongly) to which I would wish to refer. First, there are some expressions in the majority speeches which indicate that not only was the offence of conspiracy to corrupt public morals established as a matter of continuous legal history in English law, but also that it was desirable that this should be so. I do not think that those expressions of view were necessary for the decision. Although courts of law are sometimes faced with making policy decisions (in the sense that there is sometimes a choice to be made between two tenable views of the law), I have already indicated that I think that in the instant field they should if possible be avoided and rather left to Parliament. Secondly, there are some suggestions in the speeches in *Shaw's* case that the courts have still some role to play in the way of general superintendence of morals. This was a phrase used in various 18th and 19th century cases, 'superintendence of' meaning 'jurisdiction over'. Whatever may have been the position in the 18th century—and there is more than one clear indication that the courts of common law then assumed that they were fitted for and bound to exercise such a role—I do not myself believe that such is any part of their present function. As will appear, I do not think that 'conspiracy to corrupt public morals' invites a general tangling with codes of morality. Thirdly, in this connection, it has been suggested that the speeches in *Shaw's* case indicated that the courts retain a residual power to create new offences. I do not think they did so. Certainly, it is my view that the courts have no more power to create new offences than they have to abolish those already established in the law; both tasks are for Parliament. What the courts can and should do (as was truly laid down in *Shaw's* case is to recognise the applicability of established offences to new circumstances to which they are relevant. Fourthly, I have already indicated my view that *Shaw's* case is not authority for the proposition that male homosexuality, or even its facilitation or encouragement, is itself as a matter of law corrupting of public morals. It is for the jury to decide as a matter of fact whether the conduct alleged to be the subject-matter of the conspiracy charged is in any particular case corrupting of public morals. Lastly, it was suggested in argument before your Lordships that, if *Shaw's*

(1) [1972] 1 All ER 145.



case were not overruled, it would be open to juries to convict if they thought that the conduct in question was liable to 'lead morally astray'. But all that was decided in *Shaw's* case was that, in the general context of the whole of the summing-up in that case, the use of the phrase 'leads morally astray' was not a misdirection. *Shaw's* case must not be taken as an authority that 'corrupt public morals' and 'lead morally astray' are interchangeable expressions. On the contrary, 'corrupt' is a strong word. The Book of Common Prayer, following the Gospel, has 'where rust and moth doth corrupt'. The words 'corrupt public morals' suggest conduct which a jury might find to be destructive of the very fabric of society.

Having scrutinised the summing-up in the instant case in the light of the foregoing reservations, in my view there was no misdirection. The conviction on count 1 must be upheld; and the appeal on this part of the case dismissed.

*Count 2: Conspiracy to outrage public decency*

This count, on which the appellants were also convicted, reads as follows in the indictment:

'Statement of offence: Conspiracy to outrage public decency. Particulars of offence: Kneller (Publishing, Printing and Promotions) Ltd., David Hall, Peter Stansill and Graham Keen between the 1st day of January and the 30th day of May 1969 within the jurisdiction of the Central Criminal Court conspired together and with persons inserting lewd, disgusting and offensive advertisements in issues of a magazine entitled "it" under the heading "MALES", and with other persons unknown, by means of the publication of the said magazine containing the said advertisements to outrage public decency.'

Until a very late stage of the argument before your Lordships counsel for the appellants accepted (consonantly with his grounds of appeal to the Court of Appeal) that conspiracy to outrage public decency was an offence at common law. He argued, however, that it was not applicable to the present case for three reasons: first, the offence had never yet been applied to a newspaper or book, and it was undesirable that it should be now; secondly, s 2 (4) of the Obscene Publications Act 1959 excludes it; and, thirdly, the necessary 'public' element in the offence is missing, since the advertisements complained of were tucked away from public view in the middle of the newspaper. But at a late stage in his reply counsel accepted the suggestion that there was no such offence known to the common law; there were merely certain specific offences violating public decency which were not applications of any more general class—namely, keeping a disorderly house, mounting an indecent exhibition, and indecent exposure. Apart from his arguments on law, counsel argued that the jury was insufficiently directed as to the necessary element of publicity, and that the Court of Appeal was wrong in holding that the facts proved established sufficient publicity to constitute the offence.

The following questions, therefore, arise on this part of the case: (i) Is there a general common law offence of outraging public decency, or only the particular offences which the cases establish?; (ii) Is there a common law offence of conspiring to outrage public decency?; (iii) If (i) or (ii) are answered in the affirmative, are they inapplicable to newspapers or books either (a) because they have never been so applied or (b) because of s 2 (4) of the Obscene Publications Act 1959? (iv) If (i) and (ii) are answered in the affirmative, what are the requirements of the law as to publicity in order for the offence(s) to be established? In particular, is there sufficient publicity if either (a) the object in question is not seen simultaneously by more than one person, but only by one at a time, or (b) it is on the inside of a newspaper or book?

(v) Do any other ingredients of the offence(s) (if they exist) need emphasis? (vi) Was the direction to the jury on this part of the case misleading or inadequate?

(i) It is, in general, the difference between mature and rudimentary legal systems that the latter deal specifically with a number of particular and unrelated instances, whereas the former embody the law in comprehensive, cohesive and rational general rules. The law is then easier to understand and commands a greater respect. Fragmentation, on the other hand, leads to anomalous (and therefore inequitable) distinctions and to hedging legal rules round with technicalities that are only within the understanding of an esoteric class. The general development of English law (like that of other mature systems) has been towards the co-ordination of particular instances into comprehensive and comprehensible general rules. The evolution of the compendious tort of negligence from a number of disparate forms of action is a well-known example from the common law: the Theft Act 1968 may be regarded as a statutory counterpart. (I must, however, add the rider that English law has never felt bound to carry every rule to its logical conclusion in the face of convenience.) But the common law proceeds generally by distilling from a particular case the legal principle on which it is decided, and that legal principle is then generally applied to the circumstances of other cases to which the principle is relevant as they arise before the courts. As PARKE J said, giving the advice of the judges to your Lordships' House in *Mirehouse v Rennell* (1) (cited with approval in *Shaw's* case by LORD TUCKER, VISCOUNT SIMONDS and LORD MORRIS OF BORTH-Y-GEST concurring, and by LORD HODSON):

'Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.'

Secondly, the decided cases look odd standing on their own. Indecent exposure (*R v Crunden* (2)), acts of sexual indecency in public (*R v Mayling* (3)), indecent words (*R v Saunders* (4)), disinterring a corpse (*R v Lynn* (5)), selling a wife (cited in *R v Delaval* (6)), exhibiting deformed children (*Herring v Walround* (7)), exhibiting a picture of sores (*R v Grey* (8)), procuring a girl apprentice to be taken out of the custody of her master for the purpose of prostitution (*R v Delaval* (3); see also count 4 in *R v Howell* (9)), conspiracy to procure a girl of 17 to become a common prostitute—all these have been held to be offences. They have a common element in that, in each, an offence against public decency was alleged to be an ingredient of the crime (except *R v Grey* (8), where it was said to be 'disgusting and offensive', 'so disgusting that it is calculated to turn the stomach'); but otherwise they are widely disparate. This suggests that they are particular applications of a general rule whereby conduct which outrages public decency is a common law offence. Even keeping a disorderly

(1) (1833), 1 Cl & Fin 527.

(2) (1809), 2 Camp 89.

(3) 127 JP 269; [1963] 1 All ER 687; [1963] 2 QB 717.

(4) (1875), 1 QBD 15; sub nom *R v Sargent*, 39 JP 760.

(5) (1788), 2 Term Rep 733; 1 Leach 497.

(6) (1763), 3 Burr 1434; 1 Wm Bl 439.

(7) (1682), 3 Cas in Ch 110.

(8) (1864), 4 F & F 73.

(9) (1864), 7 F & F 160.

house can be considered a manifestation of conduct which outrages public decency. (The alternative is to regard all as manifestations of public nuisance.)

Thirdly, in *R v Delaval* (1) (the case of the female apprentice) the court proceeded on the basis that *R v Sidley* (2) (where the accused stood naked on a balcony and urinated on the crowd below) and *R v Curl* (3) (obscene and indecent libel) were precedents (they had both 'been guilty of offences against good manners'): this strongly suggests a general class embracing all three decisions, rather than a number of isolated instances.

Fourthly, my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, in *Shaw's* case, where, though there was no count of conspiracy to outrage public decency, most of the cases were reviewed, said: 'The cases afford examples of the conduct of individuals which has been punished because it outraged public decency . . .' And my noble and learned friend, LORD REID, though dissenting on the main issue, said:

'I think that they [the authorities] establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it.'

Fifthly, in *R v Mayling* (4) the offence charged in the indictment was 'committing an act outraging public decency'. It was common ground there, and expressly held by the court, that this was an offence at common law.

I would add, lastly, that, subject to the riders to which I refer later, it does not seem to me to be exorbitant to demand of the law that reasonable people should be able to venture into public without their sense of decency being outraged. I think that the authorities establish a common law offence of conduct which outrages public decency.

(ii) If there is a common law offence of conduct which outrages public decency, a conspiracy to outrage public decency is also a common law offence, as an agreement to do an illegal act. In *Shaw's* case VISCOUNT SIMONDS seems to have considered that the conduct there in question was indictable also as a conspiracy 'to affront public decency'. In my view, counsel for the appellants was right to concede that there is a common law offence of conspiring to outrage public decency.

(iii) As to whether such an offence is applicable to books and newspapers, the argument based on s 2 (4) of the Obscene Publications Act 1959 is concluded against the appellants by the construction put on that subsection in *Shaw's* case. The passage I have cited from *Mirehouse v Rennell* (5) indicated that the fact that the authorities show no example of the application of the rule of law in circumstances such as the instant does not mean that it is not applicable, provided that there are circumstances, however novel, which fall fairly within the rule. Counsel for the appellants could not suggest any demarcation in principle. To attempt delimitation would produce absurd anomalies. The newspaper placard would presumably fall within the offence: it would be odd if similar material on the exposed front page of the newspaper did not do so. A picture fly-posted in a small village would fall within the offence; but, on the argument for the appellants, not the same picture contained in a newspaper or book of mass circulation. Safeguards are to be found in the requirement of publicity for the offence to be established, and in the Parliamentary undertaking to which LORD REID has referred—this must be taken to apply to conspiracy to outrage public decency as much as to conspiracy to corrupt public morals.

(iv) I turn, then, to the requirement of publicity. *R v Mayling* shows that the substantive offence (and therefore the conduct the subject of the conspiracy) must be

(1) (1763), 3 Burr 1434; 1 Wm Bl 439.

(2) (1663), 1 Sid 168.

(3) (1727), 17 State Tr 153.

(4) 127 JP 269; [1963] 1 All ER 687; [1963] 2 QB 717.

(5) (1833), 1 Cl & Fin 527.

committed in public, in the sense that the circumstances must be such that the alleged outrageously indecent matter could have been seen by more than one person, even though in fact no more than one did see it. If it is capable of being seen by one person only, no offence is committed.

It was at one time argued for the appellants that the matter must have been visible to two or more people simultaneously; and that an article in a newspaper did not fulfil this requirement. But this point was rightly abandoned, and I need not examine it further.

It was argued for the Crown that it was immaterial whether or not the alleged outrage to decency took place in public, provided that the sense of decency of the public or a substantial section of the public was outraged. But this seems to me to be contrary to many of the authorities which the Crown itself relied on to establish the generic offence. The authorities establish that the word 'public' has a different connotation in the respective offences of conspiracy to corrupt public morals and conduct calculated to, or conspiracy to, outrage public decency. In the first it refers to certain fundamental rules regarded as essential social control which yet lack the force of law, in other words when applicable to individuals 'public' refers to persons in society. In the latter offences, however, 'public' refers to places in which the offence is committed. This is borne out by the way the rule was framed by my noble and learned friend, LORD REID in *Shaw's* case in the passage which I have just cited. It is also borne out by what is presumably the purpose of the legal rule—namely, that reasonable people may venture out in public without the risk of outrage to certain minimum accepted standards of decency.

On the other hand, I do not think that it would necessarily negative the offence that the act or exhibit is superficially hid from view, if the public is expressly or impliedly invited to penetrate the cover. Thus, the public touting for an outrageously indecent exhibition in private would not escape: see *R v Saunders* (1). Another obvious example is an outrageously indecent exhibit with a cover entitled 'Lift in order to see . . .' This sort of instance could be applied to a book or newspaper; and I think that a jury should be invited to consider the matter in this way. The conduct must at least in some way be so projected as to have an impact in public: cf *Smith v Hughes* (2).

(v) There are other features of the offence which should, in my view, be brought to the notice of the jury. It should be emphasised that 'outrage', like 'corrupt', is a very strong word. 'Outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people. Moreover the offence is, in my view, concerned with recognised minimum standards of decency, which are likely to vary from time to time. Finally, notwithstanding that 'public' in the offence is used in a locative sense, public decency must be viewed as a whole; and I think the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of public decency.

(vi) The Court of Appeal said of the direction on count 2 that it might be that it was not wholly satisfactory. I would myself go further. I regard it as essential that the jury should be carefully directed, on the lines that I have ventured to suggest, on the proper approach to the meaning of 'decency' and 'outrage' and the element of publicity required to constitute the offence. The summing-up was generally a careful and fair one, but I think it was defective in these regards; and I therefore do not think it would be safe to allow the conviction on count 2 to stand.

(1) (1875), 1 QBD 15; sub nom *R v Sargent*, 39 JP 760.

(2) 124 JP 430; [1960] 2 All ER 859.

**LORD KILBRANDON:** I have had the advantage of reading in advance the speech prepared by my noble and learned friend, LORD SIMON OF GLAISDALE, and since I find myself in agreement with it I would avoid repeating in detail in my own words the conclusions at which he has arrived.

On the first charge it has been conceded that this case is indistinguishable from that of *Shaw v Director of Public Prosecutions* in this sense, that the appeal could not succeed unless the House were to hold both that that case was wrongly decided and also that it is proper for this House, under the direction of 1966\*, to overrule it. Since, in my opinion, the first of these propositions has not been made out, I do not need to deal with the second.

Shaw was convicted of conspiring, with persons who procured the insertion of advertisements in his paper 'The Ladies Directory', to corrupt public morals in the particulars set out in the charge. It was held inter alia by LORD PARKER CJ, STREATHFIELD J, ASHWORTH J, and by four of the five noble Lords who heard the appeal in this House that a conspiracy to corrupt public morals is a common law misdemeanour. It is this decision which, for the present appeal to succeed, must be set aside.

My Lords, it would in any event be a strong step indeed to hold that a pronouncement on principle in a criminal matter made so recently and so authoritatively was wrong, but for my part I would find such a course impossible to contemplate in view of an even more recent Act of the legislature. By the Theatres Act 1968, s 2 (4), it is provided:

'no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals . . . in respect of an agreement to present or give a performance of a play . . .'

I do not see how Parliament could have used this phrase except by way of recognition that conspiring to corrupt public morals was at that time a crime, and of provision that in certain circumstances charges of having committed that crime were not to be proceeded with. Nothing has happened since 1968 to alter the law in this respect; it is accordingly, in my opinion, impossible to say as a matter of law that the crime to which Parliament so recently referred is non-existent.

Most of the criticism, some of it severe, which has been levelled at *Shaw's* case has been occasioned by certain obiter dicta, in particular of VISCOUNT SIMONDS, from the purport of which my noble and learned friend, LORD REID, strongly dissented in his speech. LORD SIMONDS declared that

'there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State',

and again referred to a passage in which LORD MANSFIELD [in *R v Delaval* (1)] had described the Court of King's Bench as *custos morum* of the people, having the superintending of offences contra bonos mores, and asserted 'as I now assert, that there is in that court a residual power . . . to superintend those offences which are prejudicial to the public welfare'. In view of the emphatic disclaimer, made by VISCOUNT SIMONDS earlier in his speech, of any power in the judges to create new criminal offences, it seems at least probable that in these dicta the noble Lord was intending to give an account of how the crime of conspiracy to corrupt public morals first came to be recognised rather than to originate a crime in order that the appellant's clearly

\*See p 729 ante.

(1) (1763), 3 Burr 1434; 1 Wm Bl 439.



immoral conduct might be punished. Certainly, if a contemporary authority were claimed for the judges to superintend human conduct and to declare criminal such instances as they regarded as inimical to the moral welfare of the State, I would be among those who would deny it. But the present appeal is not affected by the repudiation of such erroneous doctrine.

I have dealt with this part of the case on a narrow front, not only because it has been more widely and carefully considered by the noble Lords who preceded me, but also because I think that as far as possible it is expedient so to do. I suppose that every citizen who takes an interest in the kind of society in which he lives is bound to form views about, for example, what should be the limits of the controls permitted to be put by the State on those things to which a man may lawfully expose his neighbours. But the authority to decide such questions, and the forum where they must be discussed, is emphatically not the courts of justice, but the legislature. Again I have profited by the advantage of seeing in print the speech of my noble and learned friend, LORD DIPLOCK. Much of what he has to say about the law of conspiracy is bound to be attractive to one who is not trained to a familiarity with the subject. But the situation as regards conspiracy is the same as that of corrupting public morals; both form part of the criminal law, and it would be as improper to attempt to change the one by a judicial decision as it would be the other. The very reproach which was, by some, levelled at the decision in *Shaw's* case would be heard again, though perhaps from different voices.

The only other matter to which I desire specially to refer is the concession, given by one of the law officers in the House of Commons, to the effect that a conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence of public good made available by s 4 of the Obscene Publications Act 1959 to a person charged with publishing an article which tends to deprave and corrupt persons who are likely to read, see, or hear it. I think that in this appeal we are in a region necessarily unaffected by the concession. We are not here concerned primarily with an obscene publication; the corrupting and depraving which are here alleged do not arise from the articles themselves. They arise from the whole apparatus of liaison organised by the appellants. The subject-matter of the conspiracy was not the production of a piece of pornography. It was the introduction of males to one another for sexual gratification. In a few instances this was to be in the confessed relationship of prostitute and client; in a very large number of cases indeed the emphasis is on the requirement by the advertiser of youth in his partner, and in many cases also of inexperience. When one of the accused admitted—or perhaps boasted—in the witness box that his publication was read by some 10,000 schoolboys, it could only be some person utterly ignorant of the world of adolescence who would fail to appreciate the inevitable consequences. These, not the publication of the article, constituted the corruption and the depravity.

As regards the second charge, the relevance of a charge of outraging public decency by a public invitation to indulge in sexual perversion appears to be supported by all the speeches in *Shaw's* case. But I agree with my noble and learned friend, LORD SIMON OF GLAISDALE, without elaborating his reasons, that the summing-up was on the whole defective in the respects which he has set out, and that it would be safer to set aside the conviction on the second charge.

I would dismiss the appeals as regards the first charge, allow it as regards the second.

Solicitors: Seifert, Sedley & Co; Director of Public Prosecutions.

Reported by G F L Bridgman, Esq, Barrister.

## COURT OF APPEAL (CRIMINAL DIVISION)

(ROSKILL, LJ, GEOFFREY LANE AND WATKINS, JJ)

17th December 1971

R v MARSHALL

*Criminal Law—Handling stolen goods—Indictment—Different methods of dishonest handling alleged—Desirability of separate counts—Theft Act, 1968, s 22 (1).*

On an indictment charging an accused with handling stolen goods contrary to s 22 (1) of the Theft Act, 1968, where different methods of dishonest handling are alleged there should be separate counts in respect of each method.

APPLICATION for leave to appeal against conviction.

On 9th August 1971, at Middlesex Quarter Sessions the applicant, Anthony Markham Marshall, was convicted on count 1 of an indictment containing three counts, each of them charging him with handling stolen goods, contrary to s 22 of the Theft Act 1968, on or before 26th August 1970, in Greater London. In count 1 the particulars were that on or before that date he dishonestly handled certain stolen goods, namely, 64 carcasses of lamb knowing or believing the same to be stolen goods. In count 2 it was alleged that he dishonestly handled 72 carcasses of lamb knowing or believing the same to be stolen; and in count 3 it was alleged that he dishonestly handled 136 carcasses of lamb knowing or believing the same to be stolen goods. The applicant pleaded not guilty to all three counts. The jury were discharged from giving a verdict on count 3, that count containing a consolidation of counts 1 and 2. They convicted the applicant on count 1 but found him not guilty on count 2 and the deputy chairman sentenced him to 18 months' imprisonment. He applied for leave to appeal against both conviction and sentence.

M R Wilkinson for the applicant.

P Temple Morris for the Crown.

**WATKINS J** delivered this judgment of the court: This application has been referred to the full court by the single judge. On 11th August 1971, at Middlesex Quarter Sessions the applicant was convicted on one of three counts of an indictment which alleged that he had handled stolen goods. On count 3, the particulars of which contained a consolidation of the allegations contained in counts 1 and 2, the deputy chairman discharged the jury, properly in our opinion, from returning a verdict. On the second count, in which it was alleged in the particulars that, on or before 26th August 1970 in Greater London the applicant dishonestly handled 72 carcasses of lamb knowing or believing them to be stolen goods, he was acquitted. With the exception that 64 carcasses of lamb were stated to be involved, the first count contained precisely similar particulars to those of the second count. Following a finding of guilt upon the first count the applicant was sent to prison for 18 months. He now applies for leave to appeal against conviction and sentence.

The applicant is a butcher who carries on a retail business from two shops one of which is at Osterley and the other at Greenford. In the afternoon of 26th August 1970, he was driving his van, which contained the 64 carcasses of lamb referred to in the first count, in the direction of Willesden where he was intending to deliver his entire load at the premises of another butcher. Whilst driving through Acton he lost his way. He stopped and asked for directions from two police officers. They asked him questions about his load. Being dissatisfied with the answers he gave to them, the officers invited him to accompany them to the local police station and

thence, after further questioning, to the applicant's shop at Osterley. At the shop the applicant produced receipts as evidence of the obtaining by him of lamb carcasses from his regular suppliers during a period covering the previous two or three months. After making a telephone call to his wife, and, accompanied by a police officer, paying a visit to his home, he produced further receipts. On three of these receipts alterations to figures had been made so as to inflate to a substantial extent the number of lamb carcasses actually delivered to the applicant's premises from his regular suppliers. The applicant suggested that the alterations had been made accidentally when customers' orders had been written out while the receipts lay beneath the order forms which contained carbon paper. It was a suggestion which involved a series of remarkable coincidences which the police officers did not accept and which the jury rejected. In the evening of the same day the police officers invited the applicant to keep the 64 carcasses of lamb in his refrigerator at the shop in Osterley while their inquiries were being pursued. He agreed to do so. When the refrigerator was opened it was observed that it already contained 72 carcasses of lamb, the subject of the second count. The carcasses from the van were put into the refrigerator. This meant that it contained, when the police officers left the premises that evening, 136 carcasses altogether.

When the officers returned on the following day the refrigerator contained only four carcasses. The remainder had been disposed of by the applicant because, he said, he was fed up at being questioned by the police and he needed the money. This conduct, allied to a complete absence of details of the sales he had made, was bound inevitably to arouse suspicion and it seems to have persuaded the officers finally to charge the applicant with the offence of handling stolen goods.

With regard to his conviction of this offence we think it was a misfortune, in the circumstances of the case, that the allegations arising out of the carriage of the 64 carcasses of lamb in the van were confined to one count, and that the particulars in that count were of such a general nature. In the judgment of this court given by ROSKILL LJ in *R v Sloggett* (1), clear guidance was given to practitioners on the advisability of using separate counts to describe different methods of dishonestly handling stolen goods. Attention was also drawn, inferentially, to the distinction which needs to be drawn between the two main parts of s 22 (1) of the Theft Act, 1968. In this subsection it is provided:

'A person handles stolen goods if (otherwise than in the course of stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.'

Failure to follow the guidance given in *R v Sloggett* by not providing, as should have been done, particulars of handling stolen goods in separate counts was, in our opinion, the root cause of much that is open to criticism in the present case. If charges founded on each of the two main parts as they appear in the subsection had been set out in separate counts, we think it is more than likely that the summing-up of the deputy chairman would not have been open to such serious criticism as it is and that the jury's task would have been simplified.

The deputy chairman in his summing-up read out the provisions of s 22 (1). He then very briefly explained those provisions. The effects of the explanation were, first, to blur the distinction between the two main parts of the subsection; secondly, to give no direction whatsoever on the second part; and, thirdly, to leave the jury with a definition of handling stolen goods which was more appropriate to the old law of receiving stolen goods than to the first part of s 22 (1). The direction was, in any event,

(1) (1971), 135 JP 539.

defective in that it contained no reference to the time when guilty knowledge needs to have been possessed and no mention was made of the important word 'dishonestly'. In our opinion the overall effect of this combination of misdirection and non-direction must have been such as to leave the jury in a state of confusion about the law which had to be applied. Having regard to the facts of the case which probably fell more appropriately to be considered under the second part of the subsection and to the manner in which the first count was framed, a comprehensive and careful direction to the jury on the law was vital.

A number of other grounds of appeal have been advanced for the applicant. These include other criticisms of the summing-up, an alleged inconsistency between the verdicts on counts 1 and 2, the finding of fact by the jury that the lamb carcasses were stolen and the admission of a piece of evidence for the first time after the conclusion of the summing-up. Having regard to the very clear conclusion that this court has felt obliged to reach in respect of the form of the indictment the court has come to the conclusion that it would be wholly unsafe to allow the verdicts of the jury to stand having regard to the form of the indictment and the directions in law given on the first count. Accordingly, this application will be treated as the hearing of the appeal. The appeal is allowed.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

Reported by N P Metcalfe Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND STEPHENSON, LJ AND SHAW, J)

23rd March, 1972

R v ALT

*Criminal Law—Handling stolen goods—Indictment—Desirability of clearly indicating type of handling alleged—Theft Act 1968, s 22 (1).*

Where an accused person is charged with handling stolen goods contrary to s 22 (1) of the Theft Act 1968 it is desirable to indicate with clarity in the indictment what type of handling is being charged against the accused person. Where, therefore, it was intended to charge the appellant with receiving stolen goods, knowing or believing at the time that they were received that they were stolen, not only should that have been alleged in the indictment, but the jury should have been directed that that was an essential ingredient of the charge which the Crown had to establish.

APPEAL by Victor Robert Alt against his conviction at Inner London Quarter Sessions of handling stolen goods contrary to s 22 of the Theft Act 1968, and against the sentence then imposed of 18 months' imprisonment.

T M E Nash for the appellant.

D B Watling for the Crown.

EDMUND DAVIES LJ delivered the following judgment of the court: On 1st September 1971 at the Inner London Quarter Sessions, the appellant, Victor Robert Alt, was convicted of handling a stolen brief case and he was sentenced to 18 months' imprisonment. After refusal by the single judge he applied to this court

for leave to appeal against both conviction and sentence. We granted the application for leave to appeal against conviction, and, having heard counsel for the Crown, we have come to the conclusion that the appeal must be allowed for reasons which I will shortly relate.

In April 1970, the flat of a Mr Elrick was broken into and some £3,000 worth of goods was stolen. They included a brief case of a most unusual design. That brief case was later found in the possession of the appellant, and when it was found is an important question in this case. It was found in his possession on 28th June 1971, and in due course he was charged under s 22 of the Theft Act 1968 with handling stolen goods. The particulars of the count were that he on that date, 28th June 1971, dishonestly handled stolen goods, namely, one brief case belonging to George Elrick knowing or believing the same to be stolen goods. The police officer who saw him asked the appellant about the brief case, and according to him and another officer who was present he said: 'I bought it off a bloke'. A little later he said: 'Look, mate, it's like this. A mate gave it to me. I needed a case to carry my papers. I might have known it was nicked, because nothing he's got is straight'. When he was asked to identify his mate, the officers testified that he said: 'I couldn't do that to him when he was doing me a favour'. The appellant gave evidence at his trial and said that his mate was known to him as Jimmy. Jimmy stayed with him for about a week at his flat and had allowed him to borrow the brief case. Jimmy left his flat at the end of the week, he had not seen him since, and the brief case had remained in his possession for about three months before the police picked him up. He denied that he told the police anything about buying the brief case off a bloke, and said that he was almost sure he told the police he had borrowed it.

The reasons why we allow this appeal are twofold. First, this trial had an unfortunate initiation, the indictment being defective in form. We see that it bears the date 17th August 1971, and its form we have already related. On 25th February 1970 *Griffiths v Freeman* (1) was decided, and that case dealt with the proper form of charge in a magistrates' court when an offence contrary to s 22 of the Theft Act 1968 was being preferred. The point was made that it is desirable to indicate with clarity what type of handling it is that the accused person is charged with. LORD PARKER CJ added:

'I would only mention that for my part I would like to confine this judgment to proceedings in magistrates' courts. It may be, whatever be the true position in law, that when one comes to deal with indictments, the better practice may be as envisaged in the latest appendix to Archbold, Criminal Pleading, Evidence and Practice, 37th edn (1969), 2nd supplement, para 1560, of having separate counts describing the different methods of handling.'

Archbold did then, as it does now, have precedents which indicate in the particulars the type of handling that is being charged against the accused person. We cannot abstain from expressing regret that by August 1971 this matter had not become known to those responsible for the settling of the indictment. Counsel for the Crown has conceded that in this case where the charge sought to be made against the appellant was one of receiving stolen goods in the old sense of that word, that is to say, receiving knowing at the time of receipt that the goods were stolen, or, as the statute now says, knowing or believing that they were stolen, the particulars of the offence should have alleged that the appellant had dishonestly received stolen goods, namely, a brief case the property of George Elrick, at the time of receipt knowing or believing the same to have been stolen.

(1) 134 JP 394; [1970] 1 All ER 1117.



The departure from what is the established practice in this case led to the mischief which has arisen. The observations of LORD PARKER in *Griffiths v Freeman* were echoed by this court in *R v Sloggett* (1) and *R v Marshall* (2), but they were not followed. It has already been observed that the date assigned in the particulars of the charge is 28th June 1971. Nobody suggests that that date is right. There is nothing to countervail the appellant's assertion that he had been in possession of the brief case for a period of months. If counsel for the Crown is right in his assertion that it was intended to charge the appellant with receiving stolen goods knowing or believing at the time that they were received that they were stolen goods, then not only should that have been alleged in the indictment, but the jury should have been directed that that was an essential ingredient of the charge which the Crown had to establish.

But what happened in this case was something quite different. The deputy chairman told the jury that there were three matters about which the Crown had to satisfy them, first, that the goods were stolen, and, secondly, that the appellant handled the goods. He said:

'There is no issue about that. The [appellant] admits that he had the brief case in his possession, had it in his possession for three months, and so there is no question about him handling it.'

We now move to the second branch of s 22 of the Theft Act 1968. The deputy chairman proceeded to deal with the third ingredient of the offence of receiving stolen goods:

'The third matter which the prosecution must prove is that, at the time when the defendant handled the goods, he did so dishonestly, knowing or believing that the goods were stolen. That is to say, the prosecution must prove that, when this defendant was handling this brief case, he knew or believed it to be stolen, and thus he was handling it dishonestly.'

It is one thing to prove that at the time a man received stolen goods he knew or believed them to be stolen; it is another thing to say of a man who has been handling goods for a period of three months that at the time when he handled the goods he did so dishonestly knowing or believing that the goods were stolen. This is not a case where the Crown intended to show that, even though he received the goods honestly in the first place, he later on acquired guilty knowledge. The case for the Crown was that he knew they were stolen when he got them, and for some reason which has escaped me, they chose to say that he received the property on the very day that the police approached him, namely, 28th June. So the jury were never really asked to direct their minds to the question: Have the prosecution proved that this man knew or believed on the day when, according to him, Jimmy let him have the brief case either on a lending basis or as a gift or by way of sale, that it was stolen property. The direction was lacking both in clarity and in accuracy, and in those circumstances this conviction cannot stand. The result is that the appeal will be allowed.

*Conviction quashed.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

Reported by N P Metcalfe, Esq, Barrister.

(1) (1971) 135 JP 539.

(2) Ante p 749.

## QUEEN'S BENCH DIVISION

(BRISTOW, J)

23rd, 24th, 29th March 1972

## HOWARD v SECRETARY OF STATE FOR THE ENVIRONMENT

*Town and Country Planning—Enforcement—Notice—Appeal—Jurisdiction of Minister to hear—Mandatory time limit—Letter sent to Minister as notice of appeal within time limit—Not valid notice as failing to comply with statutory requirements—Subsequent letter complying with statutory requirements but out of time—Town and Country Planning Act, 1968, s 16 (1), (2).*

On 7th October 1970, the local planning authority served on the plaintiff an enforcement notice requiring him to discontinue the use of his land as a transport contractor's depot. The notice informed the plaintiff that notice of appeal against it must be sent to the Secretary of State by 18th November. On 6th November the plaintiff's solicitors wrote to the Ministry informing them that they were instructed on the plaintiff's behalf and asking them to accept the letter as a formal notice of appeal. The Ministry replied that they could not accept the letter as a valid notice of appeal as it did not state, as was required by s 16 (1) and (2) of the Town and Country Planning Act, 1968, either the grounds of appeal or the facts on which the plaintiff relied. On 16th November the plaintiff's solicitors wrote a further letter to the Ministry giving notice of appeal including the grounds of appeal and facts. Through a mistake in the office the letter was not posted until 20th November which was out of time. The Ministry replied that no action could be taken by the Secretary of State as the notice of appeal was out of time and he had no power to extend the time. The plaintiff sought a declaration that the letter of 6th November, or, alternatively, that the letter together with the letter of 16th November, constituted a valid notice of appeal, and contended that in any event the provisions of ss 15 and 16 with regard to time limits were only directory and not mandatory, and that they did not affect the jurisdiction of the Secretary of State to hear the appeal.

**Held:** the letter of 6th November, which failed to comply with the statutory requirements, was not a valid notice of appeal and what had been added out of time could not turn an invalid notice into a valid notice; the time limits imposed by ss 15 and 16 of the Act were mandatory, and accordingly the Minister had no power to entertain an appeal out of time; and, therefore, the declaration would not be granted.

**ORIGINATING SUMMONS** by the plaintiff, Harry Howard, seeking a declaration that a letter sent by his solicitors to the Ministry of Housing and Local Government [now the Secretary of State for the Environment] on 6th November 1970 constituted a valid notice of appeal under s 16 of the Town and Country Planning Act 1968, against an enforcement notice served on him by Havering London Borough Council, alternatively, that the letter of 6th November in conjunction with a letter written by the solicitors to the Ministry on 16th November 1970 constituted a valid notice of appeal.

*Peter Pain QC and A D Dinkin for the plaintiff.*

*Gordon Slynne for the Secretary of State.*

Cur adv vult

29th March. **BRISTOW J** read the following judgment: In 1957 Mr Harry Howard, the plaintiff, bought 6 Birkbeck Road, Romford. Adjacent to the house, and part of what he bought, was a plot of land which he understood to have been used for some 30 years as a transport contractor's depot, for parking, storing and maintaining vehicles. The plaintiff continued to use it for this purpose. In May 1970 he had a call from a representative of the local planning authority, the Havering Borough Council. Following this call he consulted his solicitors. On 21st May 1970

they wrote to the council saying that the plaintiff had used the land for that purpose since 1957 and that he understood it had been so used for over 30 years before. So I can assume the subject of the call was: When did the plaintiff start using the plot as a transport contractor's depot?

On 7th October 1970 the council served on the plaintiff an enforcement notice reciting that his use of the plot required planning permission under the Town and Country Planning Acts 1962 to 1968, and that the development had started after the end of 1963 and was still going on. The notice required him within one calendar month to discontinue using the land as a transport contractor's depot and remove apparatus and equipment including vehicles and a diesel oil storage tank. So this was a very serious matter affecting the plaintiff's business, and he put it in his solicitors' hands.

The notice explained how the plaintiff could appeal against it. 18th November 1970 was the date by which notice of appeal had to be given to the Secretary of State in order that the enforcement notice should not take effect before an appeal was disposed of or withdrawn. It also explained the penal and other consequences of failure to comply with its requirements once it had taken effect. These are severe.

On 6th November 1970 the plaintiff's solicitors wrote to the Ministry that they were instructed by the plaintiff, and would the Ministry kindly accept the letter as formal notice of appeal. On 10th November the Ministry answered that the solicitors had neither stated the grounds nor the facts on which the plaintiff relied, as required by s 16 (1) and (2) of the Town and Country Planning Act 1968. They added:

'Unless this information is provided the Minister will be unable to entertain your appeal. The grounds of appeal and statement of facts must be sent to the Minister before the date on which the enforcement notice is to take effect.'

On 16th November, within time, the solicitors wrote to the Ministry giving notice of appeal including grounds and facts. Unhappily by reason of a mistake in the office the letter was not posted until 20th November, out of time as both parties agree, and was received on 24th November. On 30th November Mr Reed, on behalf of the Minister, wrote pointing out that the notice of appeal was out of time and that since the Minister had no power to extend the time for making an appeal against an enforcement notice, there did not seem to be any action he could take. On 2nd December the solicitors telephoned and then confirmed in writing that they had given formal notice by their 6th November letter, and would the Department of the Environment, reconsider the matter. On 18th December Mr Reed replied that the Secretary of State had no power to do anything because the 6th November letter was not a valid appeal and the 16th November letter was posted too late.

On 18th May 1971 the plaintiff initiated proceedings in the High Court against the Secretary of State by originating summons, seeking a declaration that the 6th November letter constituted valid notice of appeal, or, alternatively, that the 6th November letter plus the 16th November letter constituted a valid notice of appeal. By order dated 22nd October 1971 Master Jacob ordered the action to be tried in the Special Paper list.

The case depends on the true construction of ss 15 (1) and 16 (1) and (2) of the Town and Country Planning Act 1968. Section 16, which deals with appeals against enforcement notices, is in these terms:

'(1) A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal to the Minister against the notice on any of the following grounds ...

'(2) An appeal under this section shall be made by notice in writing to the Minister, which shall indicate the grounds of the appeal and state the facts on which it is based; and on any such appeal the Minister shall, if either the appellant or the local planning authority so desire, afford to each of them an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose . . .'

Section 15 (1) is in these terms:

'Where it appears to the local planning authority that there has been a breach of planning control after the end of 1963, then, subject to any directions given by the Minister and to the following provisions of this section, the authority, if they consider it expedient to do so having regard to the provisions of the development plan and to any other material considerations, may serve a notice under this section (in this Act and the principal Act referred to as an "enforcement notice") requiring the breach to be remedied.'

Then, by s 15 (7):

'Subject to section 16 below, an enforcement notice shall take effect at the end of such period, not less than twenty-eight days after the service of the notice, as may be specified in the notice.'

Counsel on behalf of the plaintiff submits first that the provision for the time limit within which an appeal can be brought as stated in these statutory provisions is directory and not mandatory in the sense that if they are not complied with the Secretary of State still has jurisdiction to entertain the appeal, although if the local planning authority takes the limitation point the appeal will be defeated. The effect of the standpoint that the Secretary of State has taken is to deprive the local planning authority of the opportunity of saying: 'We will not take advantage of an obvious mistake by which no-one has been damnified. We prefer that the planning appeal shall be decided by the Secretary of State on its merits'.

Counsel further submits, that whether or not s 16 (1) is directory in this sense, s 16 (2) certainly is when it requires grounds and facts to be stated. Whatever was formally wrong with the 6th November notice has been put right in time for it to be a substantial compliance with the section, since the second letter gave the local planning authority everything required by s 16 (2) in ample time for it to prepare its case. Counsel says that *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* (1) shows the approach of the court to similar statutory provisions limiting time under the Landlord and Tenant Act 1954. There the House of Lords held that time provisions in that Act were procedural only and did not go to jurisdiction. Counsel further says that the decision in *Chelmsford Rural District Council v Powell* (2) shows that the Minister is not restricted to a consideration of the grounds set out, in a notice given within time under the 1962 Act, which required only grounds to be set out, and that this shows that the requirements of s 16 (2) as to grounds and facts are not mandatory.

Counsel on behalf of the Secretary of State submits first that the time provision goes to jurisdiction, and the view the Ministry have taken for the last 12 years is the correct one. In the case of time provisions in statutes creating special jurisdiction this has been clear law ever since *Howard v Bodington* (3)—a case which dealt with ecclesiastical disciplinary jurisdiction. Where the public interest is involved time provisions go

(1) [1970] 2 All ER 871; [1971] AC 850.

(2) 127 JP 157; [1963] 1 All ER 150.

(3) (1877), 42 JP 6; 2 PD 203.

to jurisdiction, as for example in *R v Pontypool Gaming Licensing Committee, ex parte Risca Cinemas Ltd* (1), a case of an application for a bingo licence, and as in *Nair v Teik* (2), a decision of the Privy Council on the Election Offences Ordinance of Malaysia. He submits that the reason that the Limitation Acts, couched as they have been ever since 1623 in terms *prima facie* going to jurisdiction, have always been treated as something the opposite party must raise is that they are something which normally only bars the remedy. There is machinery by which if the party does raise the time question then this can be decided as a preliminary point. In any case public interest is only indirectly involved in those circumstances.

Counsel for the Secretary of State further submits that the notice of 6th November is a nullity since it does not comply with the requirements of s 16 (2). If it had contained only one ground and one fact, it would have been an effective notice and the Secretary of State would have been able to consider any further facts or grounds added out of time, following the decision of this court in *Chelmsford Rural District Council v Powell* (3). On this second point, in my judgment, counsel for the Secretary of State clearly is right. The letter of 6th November simply failed to comply with the requirements of s 16 (2), and nothing that was added out of time can turn what was a non-notice into a valid notice. It was simply a nullity.

The question then is: On the true construction of ss 15 and 16 (1) in their context—namely the enforcement procedure designed to ensure that planning decisions restrict the right of the subject to use his own land—do the time limits go to jurisdiction, as in the *Howard v Bodington* (4) line of authority, or are they something to be raised by one of the parties and not by the Secretary of State in his quasi-judicial capacity, as were the time limits in the *Kammins Ballrooms* case (5) and as are time limits in the Limitation Acts?

Here we have to deal with a special jurisdiction created by the legislature and vested in the Secretary of State which is essentially designed for the protection of the public interest in what it is fashionable to call the environment. In this part of the Act the pattern is that once the enforcement notice bites, consequences of public importance—some of them penal—immediately follow. Until the enforcement notice bites it can be said that the scheme of the Act at least allows, if it does not encourage, agreement between the land occupier and the local planning authority, but once the notice takes effect the consequences automatically follow. In my judgment, these are considerations which point strongly to the conclusion that Parliament intended that the Secretary of State's quasi-judicial appellate functions should come into play if, but only if, the conditions for their exercise, including the time limit, were strictly fulfilled. In my judgment, the principle in *Howard v Bodington* (4) applies, and the time limits here go to jurisdiction.

In the *Kammins* case (5), in contrast, the special jurisdiction created by the legislature by the Landlord and Tenant Act 1954 and vested in the county court, although it could equally well have been vested in, for example, a rent tribunal, was essentially designed for the protection of the tenant against the landlord and the resolution of their private differences, and the public interest although present is as little immediate as the public interest which is the basis of the Limitation Acts. It is stressed in the majority opinions in the House of Lords that the scheme of that Act is to promote agreement between landlord and tenant. So Parliament cannot be taken to have intended that a failure by one party to observe a time limit strictly would deprive

(1) 134 JP 648; [1970] 3 All ER 241.

(2) [1967] 2 All ER 34; [1967] 2 AC 31.

(3) 127 JP 157; [1963] 1 All ER 150.

(4) (1877), 42 JP 6; 2 PD 203.

(5) [1970] 2 All ER 871; [1971] AC 850.



the court of jurisdiction and result in the frustration of the whole statutory machinery designed to protect the tenant and secure a resolution of differences about the terms of a new tenancy.

Accordingly this action fails, and there must be judgment for the Secretary of State.

*Judgment for the Secretary of State.*

Solicitors: *Hunt & Hunt*, Romford; *Solicitor for the Department of the Environment*.

Reported by T R Fitzwalter Butler, Esq, Barrister.

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### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, SHAW AND WIEN, JJ)

11th May 1972

E PEARSON & SON (TEESSIDE) LTD v RICHARDSON

*Road Traffic—Trade licence—'Recovery vehicle'—Vehicle equipped for raising disabled vehicle from ground, but not equipped for drawing disabled vehicle—Vehicles (Excise) Act, 1971, s 16 (8)—Road Vehicles (Registration and Licensing) Regulations, 1971, reg 35 (3).*

By reg 35 (3) of the Road Vehicles (Registration and Licensing) Regulations, 1971: '... no person, being a motor trader and the holder of a trade licence, shall use any mechanically propelled vehicle on a public road by virtue of that licence unless it is ... a recovery vehicle kept by him for the purpose of dealing with disabled vehicles in the course of that business'.

By s 16 (8) of the Vehicles (Excise) Act, 1971, a 'recovery vehicle' is defined as 'a vehicle on which there is mounted, or which is drawing, or which is carrying as part of its equipment, apparatus designed for raising a disabled vehicle wholly or partly from the ground or for drawing a disabled vehicle when so raised, and which is not used for the conveyance of goods other than a disabled vehicle wholly raised by the apparatus, and which carries no other load than articles required for the operation of, or in connection with, that apparatus or otherwise for dealing with disabled vehicles.'

A vehicle on which there is mounted, or which is carrying as part of its equipment, apparatus designed for raising a disabled vehicle wholly or partly from the ground is a 'recovery vehicle' within the meaning of this subsection, and it is not necessary that the vehicle should also be equipped with a crane or other apparatus for drawing a disabled vehicle when wholly or partly raised from the ground. Accordingly, a motor trader who used on a public road under a trade licence a vehicle equipped for raising, but not for drawing or towing, a disabled vehicle was held to be not guilty of an offence under reg 35 (3).

#### CASE STATED by Workstop justices.

The respondent, Richard James Richardson, a superintendent of police, preferred at Workstop Magistrates' Court an information against the appellants, E Pearson & Son (Teesside) Ltd, charging that on 28th June 1971 at Workstop, being motor traders and the holders of a trade licence, the appellants unlawfully used a mechanically propelled vehicle on a public road under the licence, the vehicle not being either a vehicle temporarily in their possession in the course of their business as a motor trader or a recovery vehicle kept for the purpose of dealing with disabled vehicles in course of

such business, contrary to reg 35 (3) and (4) of the Road Vehicle (Registrations and Licensing) Regulations 1971. The justices convicted the appellants and ordered them to pay a fine of £5.

*J Trench for the appellants.*

*J A Bush for the respondent.*

**SHAW J:** This is an appeal by Case Stated from a decision of Nottingham justices acting in and for the petty sessional division of Worksop who on 8th December 1971 heard an information which charged that the appellant company on 28th June 1971 at Worksop, being a motor trader and the holder of a trade licence, unlawfully used a certain mechanically propelled vehicle on a public road there by virtue of that licence, the vehicle not being either a vehicle temporarily in their possession in the course of their business as a motor trader or a recovery vehicle kept for the purpose of dealing with disabled vehicles in course of such business, contrary to reg 35 (3) and (4) of the Road Vehicles (Registration and Licensing) Regulations 1971. If one omits what is immaterial for the purpose of this case reg 35 (3) provides:

'no person, being a motor trader and the holder of a trade licence, shall use any mechanically propelled vehicle on a public road by virtue of that licence unless it is . . . a recovery vehicle kept by him for the purpose of dealing with disabled vehicles in the course of that business.'

A 'recovery vehicle' is defined by s 16 (8) of the Vehicles (Excise) Act 1971 as

'a vehicle on which there is mounted, or which is drawing, or which is carrying as part of its equipment, apparatus designed for raising a disabled vehicle wholly or partly from the ground or for drawing a disabled vehicle when so raised, and which is not used for the conveyance of goods other than a disabled vehicle wholly raised by that apparatus, and which carries no other load than articles required for the operation of, or in connection with, that apparatus or otherwise for dealing with disabled vehicles.'

The facts as found by the justices were these. The vehicle was a Dodge articulated towing unit, which carried trade plates there being no other tax displayed on the vehicle which was used solely for breakdown purposes and was specially equipped for such purposes having extended brake air line hoses, a towing eye and rigid bar, and two heavy duty lifting jacks. It was not equipped with a crane or winch and it was not capable of suspended towing. When stopped the vehicle was proceeding to attend to a breakdown.

The facts were not in dispute, the sole issue being: Was this vehicle a 'recovery vehicle' as defined in s 16 (8)? The justices came to the conclusion that for the purposes of that section it was essential for a recovery vehicle to be equipped with a crane or winch or other apparatus designed for drawing a vehicle when wholly or partly raised from the ground. Their line of reasoning apparently was that fundamentally a recovery vehicle means one which serves the function of rescuing a disabled vehicle, and that involves the idea of the recovery vehicle being one which is so equipped that it can draw the disabled vehicle if need be by suspended tow. However, if one looks at s 16 (8) it recites a number of ways in which a vehicle may be within the class or category of recovery vehicles. It may be a vehicle on which there is mounted or which is drawing or which is carrying as part of its equipment apparatus designed for raising a disabled vehicle wholly or partly from the ground. If that is analysed, one at least of the alternatives which would bring a vehicle within the definition is that it is a vehicle on which there is mounted, or which is carrying as part of its equipment,

apparatus designed for raising a disabled vehicle wholly or partly from the ground. The definition goes on after the disjunctive 'or' with the words 'for drawing a disabled vehicle when so raised'. Thus the definition would appear to include two sub-categories of recovery vehicles, the first comprising those which are equipped to draw and the second those which are equipped to raise a disabled vehicle. It may be that a single vehicle is equipped to serve both functions but either would bring it within the definition. There does not appear to be any circumstance which would make it necessary to apply a different construction of that part of the section so as to make those elements conjunctive instead of disjunctive. Recovery vehicles may well include not merely the vehicle which actually does the drawing or towing, but any vehicle which serves a necessary function in that operation.

There are in these days on the roads many vehicles of such dimensions that it might be impossible if one of them broke down to accomplish the recovery of that vehicle in the full sense, that is to say the transfer of it from the road to a place where it can be repaired, by the use of a single rescue vehicle. It may be necessary for more than one to be used in combination. If therefore a vehicle is one on which there is mounted or which is carrying as part of its equipment, apparatus designed for raising a disabled vehicle from the ground, and that is a necessary part of the operation of recovering that vehicle, it does not strain language to include in the expression 'recovery vehicle' a vehicle thus equipped. It seems to me that it would be artificial to distinguish or discriminate between a vehicle serving one necessary function or the other no less necessary function. What is required by s 16 (8) is that the vehicle must be equipped in one or other of the ways set out as alternatives. Section 16 (8) gives an extended meaning to what would otherwise be the narrow if natural concept of a recovery vehicle. The vehicle in the present case falls within the statutory definition and accordingly the justices were wrong in holding that the offence charged had been committed. I would allow the appeal.

**WIEN J:** With some diffidence I too have reached the conclusion that the justices were wrong in holding that because the vehicle concerned in this case was not equipped with a crane or capable of suspended towing, therefore it was not a recovery vehicle within the meaning of s 16 (8) of the Vehicles (Excise) Act 1971. It seems to me that the definition of 'recovery vehicle' for the purposes of this case can be read in the following way: recovery vehicle means a vehicle which is carrying as part of its equipment apparatus designed for raising a disabled vehicle wholly or partly from the ground and is not used for the conveyance of goods other than a disabled vehicle wholly raised by that apparatus. In other words, as Shaw J has indicated, there can be more than one vehicle involved in a recovery. If the object of one vehicle is merely to raise from the ground a disabled vehicle, there can be another vehicle at hand to tow the vehicle away once it has been raised. Accordingly I think from a strict construction of this subsection the vehicle concerned in this case was indeed a recovery vehicle. I too would allow this appeal.

**LORD WIDGERY CJ:** I agree. I have no hesitation in saying that if one reads the definition of 'recovery vehicle', giving the words their ordinary and straightforward meaning, the result is that a vehicle comes within that category although it is not equipped for towing on a suspended tow or carrying a vehicle off the ground, but is merely equipped with apparatus for raising a disabled vehicle wholly or partly from the ground.

What caused me to hesitate for a very long time before coming to the view which I now take was that it seemed to me at one time that such a construction of the

definition would produce absurdity. That matter being defined is a recovery vehicle and, as everybody knows, 'recovery' in this context means going out and bringing back a disabled vehicle as opposed to going out and repairing it on the spot. It seemed to me at one time that to accept within the category of 'recovery vehicle' a vehicle which merely carried lifting jacks for the purpose of raising the vehicle in its position on the road, was one which ought not to come within the definition and one which if included within the definition would produce absurdities. However, I am satisfied for the reasons given by SHAW and WIEN JJ that the draftsman may well have contemplated that a recovery operation was one of such magnitude that in addition to a vehicle equipped for towing the damaged vehicle, there may as well have to be a subsidiary vehicle travelling with it, carrying the heavy equipment necessary for the purpose of getting the disabled vehicle into a condition in which it could be towed.

Therefore it seems to me that giving the words their ordinary meaning does not produce absurdity, and it being a penal statute I am happy to give the words their ordinary meaning in favour of the subject. I therefore also agree that this appeal should be allowed.

*Conviction quashed.*

Solicitors: Doyle, Devonshire, Box & Co, for T H Campbell Wardlaw, Newcastle-upon-Tyne; D W Ritchie, Nottingham.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(CAIRNS LJ, NIELD AND CROOM-JOHNSON, JJ)

12th, 19th May 1972

R v BENTHAM AND OTHERS

*Firearms—Offence—Possession with intent to endanger life—No limit to intention immediately and unconditionally to endanger life—Firearms Act, 1968, s 16.*

By s 16 of the Firearms Act, 1968: 'It is an offence for a person to have in his possession any firearm or ammunition with intent by means thereof to endanger life... or to enable another person by means thereof to endanger life... whether any injury to person or property has been caused or not.'

The intention which falls within the section is not confined to an intention immediately and unconditionally to endanger life. The intention with which a man wounds another or detonates an explosive is an intention which accompanies the act, but possession is not an act done at a particular moment, it is a continuing state of things, and the intention to endanger life is something which may last as long as the possession lasts. It cannot, therefore, be limited to an intention to endanger life immediately, nor is there any reason why it should be limited to an unconditional intention. In most cases it would be impossible to establish an unconditional intention to endanger life until the moment before a firearm was fired. The mischief at which the section is aimed must be that of a person possessing a firearm ready for use, if and when occasion arises, in a manner which endangers life.

*Criminal Law—Evidence—Consideration of evidence on one count of indictment—Relevance of earlier findings by jury on other counts.*

The rule that evidence on each count of an indictment has to be considered separately does not mean that when the jury have found certain facts in relation to one count they have to put such findings out of their minds in considering later counts.

APPEALS by John Preston Bentham and Keith Noel Adrian Baillie against their convictions before FISHER J at Winchester Assizes of possessing firearms and ammunition with intent to endanger life, contrary to s 16 of the Firearms Act 1968.

*Patrick Back* QC and *Rosina Hare* for the appellant Bentham.

The appellant Baillie appeared in person.

*D O Thomas* QC for the appellant Simpson.

*Sir Joseph Molony* QC and *Martin Tucker* for the Crown.

*Cur adv vult*

19th May. **CAIRNS LJ** read the following judgment of the court: On 12th May the court heard appeals against conviction by the appellants Bentham and Baillie on one count of an indictment, and appeals by these two and the appellant Simpson against sentences generally on that indictment. The appeals against conviction were dismissed, so was Simpson's appeal against sentence, but in respect of Bentham's and Baillie's appeals, some reduction of sentence was ordered. The court now gives reasons for those decisions.

On 8th December 1969 at Hampshire Assizes, the appellant Simpson pleaded guilty to robbery (count 1 of the indictment); having firearms with intent to commit robbery (count 2); using firearms with intent to resist arrest (count 4); and taking a motor car without consent (count 7). On 23rd December, after a trial, the appellants Bentham and Baillie were convicted on counts 1, 2 and 4, Baillie in respect of count 4 of counselling and procuring the offence, and on count 9 the two of them were convicted of possessing firearms and ammunition with intent to endanger life. Further the appellant Bentham was convicted of driving a vehicle he had taken without consent (count 8); Baillie was convicted on two similar counts (counts 5 and 6); and Baillie was also convicted on two counts of handling stolen goods (counts 10 and 11). They were sentenced by FISHER J as follows: Bentham to 11 years on the robbery count (count 1); seven years on count 2; eight years on count 4, these sentences to run concurrently, and also on count 8 one year's sentence concurrently, consecutive thereto four years on count 9, the count of possessing firearms. The appellant Baillie to 12 years on count 1, seven on count 2, eight on count 4, one year on counts 5 and 6, all those concurrent, and consecutive thereto these concurrent sentences: five years on count 9, three years on count 10 and three years on count 11. The appellant Simpson was sentenced to eight years on the robbery and concurrent terms of five, eight and one year respectively on the other counts to which he pleaded guilty. That made a total of 15 years for the appellant Bentham, 17 years for the appellant Baillie and eight years for the appellant Simpson. Because a suspended sentence on Bentham was ordered to take effect consecutively, that brought his total period of imprisonment up to 15½ years. Baillie had been placed on probation, and for breach of probation he was given 12 months which was made to run concurrently, and so his total period of imprisonment remained at 17 years. So the total periods of imprisonment were 15½ years for the appellant Bentham, 17 years for the appellant Baillie and eight years for the appellant Simpson. Now by leave of the full court, the appellants Baillie and Bentham appeal against conviction on count 9, and all three men appeal against their sentences.

The facts on which this indictment was founded were briefly as follows. During the night of 4th April 1969 a blue MGB sports car belonging to a Mr Edwards was taken from outside his house. That was the car in respect of which the appellant Baillie was convicted on count 5. During the night of 7th April a blue Austin Mini belonging to a Miss Rogers was taken from outside her house. That was the subject of count 6.



At about 3.30 p.m. on the afternoon of 25th April, the appellants Simpson and Baillie called at 24a Hyde Street, Winchester, which is a hostel for ex-prisoners, and asked to speak to Mrs Traynor, the housekeeper at the hostel. The men were admitted by a Mr Watt and were taken to Mrs Traynor's flat. The appellant Baillie said that he wanted to speak to her in private. There was another person, a Mr Razey, in the flat at the time. She took the visitors down to the kitchen, and Mr Watt went to buy cigarettes. After a brief conversation about a man who had once lived at the hostel, the appellant Baillie produced a revolver with which he threatened the housekeeper, saying: 'Do as you're asked, turn your back, don't look at us. If you do as you're asked you won't get hurt'. Mrs Traynor was tied up and questioned about the whereabouts of the safe. She replied that there was no safe. Then the third man, the appellant Bentham, appeared on the scene and went upstairs to get Mr Razey. He also was tied up and made to lie on the floor. At one point Mr Razey remonstrated with the men, and the appellant Baillie said: 'If he speaks again shoot him in the legs, and if he makes a nuisance of himself let him have it'.

Mrs Traynor was then untied and taken upstairs, and again asked about the safe. She replied that there was no safe, and indicated a suitcase saying she was packed ready to leave, and would let them have all she had. She opened the case, and the appellant Simpson took out from it a quantity of jewellery and other things. He also took a ring from her finger. She was questioned again about the safe and about a large diamond which the men apparently believed she possessed. She denied any knowledge thereof. The appellant Bentham said 'She's lying, I'll make her talk.' She was forced to lie on the bed, she was struck on the stomach and on the back of the head and tied up again and the men then left. In the meantime Mr Watt, who had returned to the house, had also been attacked and tied up by the appellant Simpson, who was also carrying a revolver at the time. After the men left, Mr Watt and Mr Razey freed themselves and freed Mrs Traynor. These events were the subject of counts 1 and 2 of the indictment.

After the appellants Bentham and Simpson left the scene of this crime in the blue MGB which had been taken from outside Mr Edwards's house earlier in the month, they were pursued by a police car which forced them into the side of the road. When the officers got out of the car, the appellant Bentham using a .32 revolver and Simpson using a Webley .38 revolver fired some five or six shots altogether at the police car puncturing the two nearside tyres. The police driver of the car was out on the road, and was terrified at what was going on. Later that evening the appellant Simpson succeeded in making his escape in a Morris Mini, also a car which had been taken; that was the subject of count 6.

Between 23rd and 26th May a Lotus Elan belonging to a Mr Gridley was taken from outside his house, and shortly afterwards the appellant Bentham was seen driving it; that was the subject of count 8.

Then we come to count 9, which is the only one which is the subject of the appeals against conviction. At 8.00 a.m. on 8th June 1969, police had been keeping observation on a cottage at a place called Braughing in Hertfordshire, which was rented by the appellant Baillie from 2nd April. The police got in and found the appellant Baillie in one bedroom with a girl. Afterwards they found the appellants Bentham and Simpson in the loft, Simpson being almost completely immersed in water in the cistern. In the other bedrooms there were two more girls found, and the cottage was then searched and produced quite an armoury: a .32 'Young America' revolver, loaded; a 9 mm 'Astra' automatic pistol, loaded—both found in the water tank; a 7.65 mm Bayard automatic pistol, loaded, found wrapped in a duster on a window sill; a .38 Mark IV Webley revolver, loaded, with 109 rounds of ammunition and also shotgun cartridges found in the kitchen cupboard; a 12-bore double-barrelled

sawn-off shotgun found behind the kitchen sink; six rounds of .38 ammunition in a jacket pocket and further rounds of ammunition in some shoes. That was count 9.

Counts 10 and 11 related to the handling by the appellant Baillie of some silver hair brush backs and other articles which had been stolen in 1968 from a house in Colchester.

With regard to the firearms, they were shown to the appellant Baillie, and he was asked how they came to be on the premises. He had at that stage no comment to make. The appellant Bentham was interviewed, and according to the police he was asked if he had handled the firearms, and he said: 'Yes, just to look at but never to fire'. Later he said he had first seen the guns when he first arrived at the house. When asked if he had taken them there, he replied: 'No, and I don't know who did, they were there when I first went'.

On 26th June the appellant Baillie was again questioned about the guns and he denied any knowledge of them. Later the appellant Bentham was interviewed, and when the police told him what the appellant Baillie had said, that the guns were 'down to' the appellant Simpson, he admitted that he had seen the weapons in the house and had known that the shotgun had been hidden under the sink unit. During the evidence at the trial the appellant Baillie maintained that he was innocent on all counts of the indictment; the appellant Bentham also gave evidence denying that he had anything to do with these guns and ammunition.

On the appeal in respect of count 9, one complaint which was made by counsel who appeared for the appellant Bentham and whose arguments on count 9 applied equally to the appellant Baillie, was a complaint of the summing-up to the effect that the judge told the jury that in considering count 9 they could take into account their conclusion on count 1; and in another part of the summing-up he said that they could take into account their conclusions on counts 1 to 4. The first of these passages was in a part of the summing-up where the judge was dealing with identification and in the second one he was discussing the evidence of intention for the purposes of count 9.

It is quite clear that what the judge meant and what the jury would understand him to mean was simply that, according to whether or not they found that the appellants Bentham and Baillie were the two men who had accompanied the appellant Simpson on the robbery and had used (or counselled the use of) the firearms in connection with that crime and subsequent resistance to arrest, those findings might assist them in considering whether or not they were in possession of the weapons at the cottage later on, and if so with what intention. In our view these directions were proper ones. The rule that evidence on each count has to be considered separately does not mean that when the jury have found certain facts in relation to one count they have to put such findings out of their minds in considering later counts.

Count 9 as originally drawn related only to 8th June 1969. At the end of the case for the prosecution it was amended to cover the period between 25th April and 8th June. Counsel for the Crown contended on the appeal that this meant that the conviction could be supported even if the only day on which evidence showed the appellants to have been in possession of the firearms with intent to endanger life was 25th April. We do not accept that contention; the count, after amendment, still specified Braughing as the place where the offence was committed and, while this alone would not be fatal to counsel's contention, the summing-up was directed solely to whether or not the men were in possession of the weapon at the cottage and the intention which they had there. The events of 25th April were referred to only (as indicated earlier) as being matters which the jury could take into account and not as forming the materials on which alone it would be open to them to convict on count 9.

We are satisfied that the matter was left to the jury on the basis that they had to decide whether the men were in possession of the firearms at the cottage during the period leading up to the police raid, and if so with what intention.

It was not contended on appeal that it was not open to the jury to find that the appellants Bentham and Baillie were in possession of the weapons. What was argued was that they were not shown to be in possession with the intention of endangering life. It was submitted that to fall within the section such an intention must be a present and unconditional one. Further it was said that none of the conduct of the two appellants at any time had shown any intention to endanger life and that the way they dealt with the weapons on 8th June was a positive indication that they had no such intention.

There is a singular lack of authority as to the construction of the section in question, s 16 of the Firearms Act 1968, which has now been amended by the Criminal Damage Act 1971. We were referred to only one case under it (or rather under its predecessor s 22 of the Firearms Act 1937) and one under a different section where endangering life was material. In *R v Edgecombe* (1), where a man had fired some shots at a window of the house of a girl who had jilted him and had afterwards picked up a spare magazine for his pistol and said: 'I need that still. I will go back up to town. I haven't finished my job yet', the Court of Criminal Appeal held that there was ample evidence from which the jury could infer that he was in possession of the firearm with the intent to endanger life.

In *R v McGrath and McKevitt* (2), on an indictment under s 9 of the Malicious Damage Act 1861, for maliciously damaging a building by the explosion of dynamite whereby the lives of certain persons were endangered, LOPES J ruled that if any person inside the building was put in danger it was within the terms of the Act of Parliament. Neither of these authorities is of any real assistance in the present case.

We cannot accept that the only intention which falls within the section is an intention immediately and unconditionally to endanger life. The intention with which a man wounds another or detonates an explosive is an intention which accompanies the act, but possession is not an act done at a particular moment, it is a continuing state of things, and in our view the intention to endanger life is something which may last as long as the possession lasts. It cannot therefore be limited to an intention to endanger life immediately. Nor do we see any reason why it should be limited to an unconditional intention. It would indeed in most cases be impossible to establish an unconditional intention to endanger life until the moment before a firearm was fired. The mischief at which the section is aimed must be that of a person possessing a firearm ready for use, if and when occasion arises, in a manner which endangers life.

Now in the present case the jury could have no doubt that the appellants were in possession of the firearms for the purpose of assisting in violent crime or of resisting arrest. The number and character of the weapons and the way they had been used on 25th April was ample evidence of that. The firing of the guns at the tyres of a car when a policeman was close at hand (although not in the line of fire) showed a willingness to endanger life on that day. The fact that some of the guns were kept loaded at the cottage was, in our view, quite sufficient to establish that these men were prepared to use these weapons again in order to further criminal ends or to escape from justice. It is true that they made no attempt to use them on 8th June and indeed made two of them unusable by putting them in the cistern, but the jury (who were properly directed to take these matters into account) no doubt thought that this was due to discretion rather than a desire to save the police from harm.

We consider that on the true construction of the section, there was ample evidence

(1) [1963] Crim LR 574.

(2) (1881), 14 Cox CC 598.

here of the guilt of both appellants and that there was no fault in the summing-up. Accordingly the appeals against conviction were dismissed.

Dealing with the sentences, HIS LORDSHIP said that the appellants were all about the same age, 26 or 27, and all had substantial criminal records. The appellant Simpson's record was perhaps the worst of the three and he took a very active part in the events of 25th April. There was no ground on which the concurrent sentences imposed on him could be interfered with. The trial judge was right to impose on the appellants Bentham and Baillie sentences on count 9 which were consecutive to those on count 1, but the court reached the conclusion that the addition of five years to 12 years in Baillie's case and of four to 11 years in Bentham's resulted in a total period of imprisonment which in all the circumstances was excessive. Accordingly the appeal against sentence on count 9 was in each case allowed and Bentham's sentence on that count was reduced from four years to two years and Baillie's from five years to three years.

*Orders accordingly.*

Solicitors: *Beach & Beach; White, Brooks & Gilman, Winchester; Director of Public Prosecutions.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

### COURT OF APPEAL (CRIMINAL DIVISION)

(ROSKILL, LJ, MILMO AND GRIFFITHS, JJ)

22nd June 1972

R v AKAN

*Alien—Conviction—Wrongfully at large—Conditional discharge—Power to make recommendation for deportation—Criminal Justice Act, 1948, s 12 (2)—Aliens Order, 1953, art. 20 (2).*

Where an alien has been convicted of an offence and the court has made an order of conditional discharge, the court is empowered also to make a recommendation for deportation, since such recommendation is not to be regarded as either a disqualification or a disability imposed on a person or as something which authorises or requires the imposition of any such disqualification or disability within the meaning of s 12 (2) of the Criminal Justice Act, 1948.

*Alien—Deportation—Alien unlawfully at large—Obligation of court to make recommendation.*

Where an alien is unlawfully at large, the court before which he is convicted is under no obligation to make a recommendation for deportation under art 20 (2) (a) of the Aliens Order 1953. The question whether or not to make a recommendation is one for the discretion of the court.

APPEAL by Muzeyen Akan against a recommendation for deportation made in respect of her at Inner London Quarter Sessions when she had pleaded guilty to, being an alien, having failed to comply with a condition subject to which leave to land in the United Kingdom had been granted previously.

*Barbara Mills for the appellant.  
L Gerber for the Crown.*

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**ROSKILL LJ** delivered this judgment of the court: The appellant, Muzeyen Akan, pleaded guilty on 27th October 1971 at Inner London Quarter Sessions before Judge Hines sitting as chairman of that court, to an offence of, being an alien, failing to comply with a landing condition. On 29th November quarter sessions granted her a conditional discharge for 12 months and recommended her for deportation. The court released her on bail pending the decision of the Secretary of State whether or not he would act on that recommendation. She applied for leave to appeal against the sentence—really against the sentence of deportation—and to that end obtained the permission of the single judge so to do. The single judge also granted an extension of time within which to appeal, for she had allowed her application to lapse.

The facts of this case are curious, unusual and somewhat tragic. The appellant is Turkish. She originally came to this country in 1967 to join her husband who came here in 1966. There are three children of the marriage of whom the youngest was born in England in 1969 and is thus a British subject.

There are certain dates which are of importance. On 5th October 1970 both the appellant and her husband returned to this country from Turkey. They landed here and were granted a stay for two months, so that that stay expired on 4th December 1970. On 5th December, that is the day after the permit had expired, Mr Akan died. Very promptly the appellant went to the authorities, related what had happened, and on 8th December was given an extension of her existing stay, which had already run out, that extension to run until 31st December 1971. Three days later, on 11th December 1970, the appellant took her husband's body back to Turkey for burial in her native country. That was done and on 6th January 1971, a month later, she returned to this country and landed at Dover.

It so happened that, under the immigration laws of this country, the fact that she left on 11th December 1970 caused the stay which she had obtained, running until 31st December 1971, to lapse, although of course this lady, who hardly speaks a word of English, could not and did not realise that at the time. When she landed on 6th January at Dover, she was given a fresh stay for one month. On 3rd February, she was granted a further month's extension up to 3rd March. However, she did not then leave the country—it must be doubtful how much of the complications she understood—and she remained in this country technically unlawfully at large until 7th July, when she was arrested. She was then, as I have said, brought to trial at the Inner London Quarter Sessions on 27th October, and ultimately received the sentence which I have already related.

Two points are taken on this appeal. The first is one of law and the second relates to the merits or otherwise of the recommendation which quarter sessions made. The point of law is this. It is said that since a conditional discharge was ordered, quarter sessions had no power to make the recommendation for deportation. This rather curious position is said to arise by reason of the interaction—or perhaps one should say lack of interaction—between certain provisions in the Criminal Justice Act 1948 and the Aliens Order 1953. In order to consider the merits of this argument, it is necessary to read the relevant sections of these two statutes. I take s 12 of the Criminal Justice Act 1948 first. Subsection (1) of that section provides:

'Subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act . . .'

I need not read the proviso. Subsection (2) provides:

'Without prejudice to the foregoing provisions of this section, the conviction

of an offender who is placed on probation or discharged absolutely or conditionally as aforesaid shall in any event be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability.'

I turn to the relevant provisions of the Aliens Order 1953. Article 20 thereof provides:

'(1) The Secretary of State may, if he thinks fit, in any such case as is mentioned in paragraph (2) of this article make an order (in this order referred to as a "deportation order") requiring an alien to leave and to remain thereafter out of the United Kingdom.

'(2) A deportation order may be made in the case of an alien in the following circumstances, that is to say—(a) if any court certifies to the Secretary of State that the alien has been convicted either by that court, or by any inferior court from which the case of the alien has been referred for sentence or brought by way of appeal, of any of the offences specified in the fourth schedule to this order and that the court recommends that a deportation order be made in his case; or (b) if the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien . . .'

Paragraph 4 of art 21 provides:

'An alien in whose case a deportation order has been made may be detained, under the authority of the Secretary of State, until he is dealt with under para (1) of this article; and an alien in whose case a recommendation for deportation is in force under art 20 of the order shall (unless the court, in a case where the alien is not sentenced to imprisonment, otherwise directs) be detained until the Secretary of State makes a deportation order in his case or directs him to be released.'

What happened is this. In the first instance the learned judge, anxious if he could to help the appellant in spite of the recommendation, decided to pass a nominal sentence of imprisonment and suspend it. But it was then pointed out to him, rightly, as this court thinks, that, if he did that, he would lose his ability under sub-para (4) of art 21 to free the appellant on bail pending the decision of the Secretary of State. Accordingly, after consideration, he changed his mind, as he was entitled to do. Instead of passing a nominal sentence of imprisonment and suspending it, he granted a conditional discharge, but left the recommendation outstanding. Now it is said that he was not empowered to do this because of the provisions of s 12 (1) of the Criminal Justice Act 1948. If this is right, it produces the result that in a case where a court does not want, when making a recommendation for deportation, to pass a sentence of imprisonment, whether suspended or not suspended, it cannot at the same time as making the recommendation make a probation order or grant an absolute or conditional discharge.

If this be the law, it would seem to be a very curious result which the combined operation of these sections produces. This court has therefore looked very carefully at the argument to see whether or not this is a necessary consequence of these statutory provisions. The argument which has been advanced by counsel for the appellant really comes to this, that a recommendation for deportation has to be treated as if it were something done under an enactment imposing a disqualification or a disability on a convicted person or which authorises or requires an imposition of any such disqualification or disability. The submission is that since under the Aliens Order 1953 the Secretary of State can, so far as para 20 (2) (a) is concerned, only

deport after a recommendation is made by the court, the court must regard the recommendation as a disqualification or disability or, if not that, as something which authorises or requires the imposition of such a disqualification or disability.

The contrary argument is that no alien has any right to be present in this country. The permission to land, pursuant to the Aliens Order 1953, is not a right; it is a privilege, and it is a privilege which is susceptible of being withdrawn. Accordingly a recommendation for the removal of the privilege is not an imposition of a disqualification or disability within the meaning of s 12 (2) of the 1948 Act, nor is it something which authorises or requires the imposition of any such disqualification or disability.

This court has carefully considered these arguments. It has reached the conclusion that a recommendation for deportation by a court is not to be regarded as either a disqualification or a disability imposed on a person nor as something which authorises or requires the imposition of any such disqualification or disability. Accordingly the point of law which has been raised fails.

But that is not the only ground of appeal. I have already mentioned this lady's history in this country, the fact that she has got three children here, that there is nothing against her of any kind and that her youngest child was born in this country and is a British subject. One looks to see why it was in those circumstances that the learned chairman made this recommendation. When one looks at the transcript, it seems that the learned judge felt obliged to make this recommendation because this lady was unlawfully at large. In effect he felt obliged to hand over the discretion which the Aliens Order 1953 gives to the court to the Secretary of State so that the matter could be dealt with by the Secretary of State. With respect, this seems to this court to be wrong. The court's discretion was in no way fettered by anything that had happened. The court was entirely free to make a recommendation or withhold a recommendation as it thought fit, and if it withheld a recommendation, it would still be open to the Secretary of State, under art 20 (2) (b) of the order, if he thought it conducive to the public good so to do, to make a deportation order without any recommendation.

In all the circumstances of this case and in view of the fact that this lady, so far as anyone knows, has behaved admirably since she has been in this country, this court takes the view, that although quarter sessions was empowered to make a recommendation, this was a case in which the recommendation ought not to have been made. Accordingly it will allow the appeal and set aside the recommendation.

That does not conclude the matter, because as I have just pointed out, it remains open to the Secretary of State, if he deems it conducive to the public good, to make a deportation order against this lady. That is a matter for him and not a matter for this court. So far as this court is concerned, the case is one in which the recommendation for deportation ought not to have been made. The appeal to that extent is allowed.

*Order accordingly.*

*Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.*

*Reported by T R Fitzwalter Butler, Esq, Barrister.*

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, WILLIS AND BRIDGE, JJ)

23rd June 1972

R v IMMIGRATION APPEALS ADJUDICATOR. EX PARTE PERWEEN KHAN

*Commonwealth Immigrant—Admission—Admission for course of study—Need for primary purpose of immigrant to be attendance on course—Relevance of intention regarding conduct after expiration of course—Commonwealth Immigrants Act, 1962, s 2 (3) (b).*

The applicant, who was a Commonwealth citizen, obtained in Guyana an entry certificate authorising her entry into the United Kingdom for the purpose of taking a course of study in hairdressing. On her arrival at Gatwick Airport the chief immigration officer, following para 19 of the Home Office Instruction to Immigration Officers, took the view that the applicant did not have the intention of returning to Guyana after the completion of the course which was not her primary purpose in coming to the United Kingdom. He accordingly decided that she was not entitled to admission by virtue of s 2 (3) (b) of the Commonwealth Immigrants Act, 1962. His decision was upheld by an adjudicator and the Immigration Appeal tribunal. The applicant applied for orders of certiorari to quash the decisions of the three authorities and for an order of mandamus directing the chief immigration officer and the Home Secretary to reverse, modify, or otherwise cancel those decisions and to admit the applicant to the United Kingdom.

**HELD** (BRIDGE, J., dubitante), for an immigrant to qualify for admission under s 2 (3) (b) of the Act of 1962 his primary purpose in entering the United Kingdom had to be attendance on a course of study; what was in the immigrants' mind in regard to his conduct after the expiration of the course must be a factor in determining the purpose or purposes with which he entered the United Kingdom and consideration of that aspect of the matter ought not to be wholly eliminated; the chief immigration officer in the present case was entitled to come to the conclusion of fact that the applicant's primary purpose of entry was not attendance on a course of hairdressing, but settlement in the United Kingdom; and accordingly the applications for certiorari and mandamus must be refused.

**PER CURIAM:** The fact that the immigrant has in mind the possibility of being allowed legally to stay in the United Kingdom should not affect the right of entry, provided that the course of instruction is the primary purpose of entry.

**APPLICATION** by Perween Khan for orders of certiorari to bring up and quash decisions of the chief immigration officer at Gatwick Airport, an immigration appeals adjudicator, and the Immigration Appeal Tribunal, and for an order of mandamus directing the immigration officer and the respondent, the Secretary of State for the Home Department, to reverse, modify or otherwise cancel the decisions and to admit the applicant to the United Kingdom unconditionally or subject to conditions.

*E Cotran* for the applicant.

*Gordon Slyn* for the respondent.

The immigration officer, the appeals adjudicator and the appeal tribunal did not appear.

**LORD WIDGERY CJ:** In these proceedings counsel for the applicant, Perween Khan, moves for an order of certiorari to bring up and quash three decisions made under the commonwealth immigration legislation: first, a decision of the chief immigration officer at Gatwick on 8th March 1972 refusing the applicant admission to the country; secondly, the decision of an immigration appeals adjudicator on 10th March, he having had the matter referred to him by way of appeal; and, thirdly, the decision of the Immigration Appeal Tribunal made on 4th May, that

being the ultimate tribunal in the chain of appeals set up under the commonwealth immigration legislation. Counsel for the applicant first asks for an order of mandamus to those bodies to hear and determine afresh.

Briefly what happened was this. On 8th March 1972 the applicant arrived at Gatwick. She had come from Guyana, and she was in possession of an entry certificate issued in Guyana which authorised her entry for the purpose of attending a course of instruction in London at the London School of Beauty Culture. The subject of the course was ladies' hairdressing. The entry certificate had been obtained by the applicant in Guyana, and the evidence as to precisely what passed between her, her mother, and the responsible officer in Guyana is not altogether clear, but it must be accepted for present purposes that among other things she stated as a fact that she intended, when she had completed the course of hairdressing, to go back to Guyana and there carry on the trade which she had learned.

The entry certificate officer in his evidence says that he had some doubts whether this intention was genuine, but nevertheless was unable to take a different view against the protestations of the applicant and her mother, so she got the certificate and she duly arrived at Gatwick.

The matter was re-examined at Gatwick by the chief immigration officer. He took the view that the applicant did not have the intention of returning to Guyana after the completion of her course, and from that he progressed to the conclusion that she obtained the entry certificate by virtue of a false representation. He therefore refused her entry, and from that refusal she appealed.

It is not necessary to dwell at all on the proceedings before the adjudicator. When the matter came to the appeal tribunal, the appeal tribunal upheld the decision of the chief immigration officer, and the adjudicator, on this point, and accordingly the entry certificate was declared to be ineffectual, and counsel for the applicant does not seek to pursue in this court any considerations arising out of that part of the case. We are concerned only with a secondary argument which was put before the appeal tribunal, and which I think is clearly open before us. The secondary argument goes in this way. It is submitted that, even if the entry certificate was invalid, and even if in consequence the applicant had no right to enter by virtue of that certificate, yet it is said that she had a right to enter, a right which could not be gainsaid by the immigration officer, under s 2 (3) (b) of the Commonwealth Immigrants Act 1962. Section 2 of the 1962 Act, which was amended by s 2 of the Commonwealth Immigrants Act 1968, sets out a new code regulating the circumstances in which permission shall or shall not be granted to a commonwealth immigrant, and, having provided earlier in the section that such permission may be granted subject to conditions or refused, it goes on to specify in sub-s (3) certain situations in which permission may not be refused. Omitting the irrelevant words, sub-s (3) provides as follows:

'... the power to refuse admission under this section shall not be exercised, ... in the case of a commonwealth citizen who satisfies an immigration officer. ... (b) that he wishes to enter the United Kingdom for the purpose of attending a course of study at any university, college, school or other institution in the United Kingdom, being a course which will occupy the whole or a substantial part of his time ...'

The argument for the applicant in this court is that those words, given their ordinary meaning, fit her situation. It was never doubted that she genuinely intended to take this course. It is said that it was a course of study within the meaning of sub-s (3) (b), and would occupy the whole or a substantial part of her time. Hence it was argued that within the four walls of that subsection there was a right in the applicant to enter, a right which could not be denied by the immigration officer.



The tribunal, in dealing with this argument, followed as a guide to construction of this section para 19 of the Home Office Instructions to Immigration Officers. This paragraph, which is both a construction of the section and guidance for the immigration officers, reads in this way:

'A commonwealth citizen seeking admission as a student should normally be expected to produce evidence of acceptance for a course of study, beginning shortly, that meets the requirements of the Act (a correspondence course does not meet those requirements) and of ability to meet the cost of the course and of his own maintenance. Due weight will be given to any evidence that a student produces of qualifications he has already obtained, or of sponsorship by his home government or an educational authority. If there are grounds for doubting that his intentions are genuine and realistic—for example where there is an obvious lack of correspondence between the student's previous attainments and the nature of the course he proposes to follow—admission should be refused. In particular, the immigration officer should be on his guard against attempts to use enrolment for a course of study as a means of obtaining admission without a voucher. Attendance at the course must be the student's primary purpose in coming to the United Kingdom and he will be expected to leave when his studies are completed; if his primary intention is to work and settle, he must qualify for admission on other grounds.'

The last part of the paragraph is the important part.

Counsel in his submission for the applicant today complains that that interpretation of the Act in para 19 of the instructions to immigration officers is incorrect; alternatively, that it has been wrongly applied in the circumstances of the particular case. He contends quite boldly that if the intended immigrant satisfies the immigration officer that she wishes to attend a course of the kind described in s 2 (3) (b), it is wholly irrelevant what her intentions may be in regard to her movements when the course is concluded. He says that, if it is once shown that a genuine intention to undergo one of the authorised courses of instruction is shown, that is an end of the matter, and anything which may be in the immigrant's mind in regard to her conduct at the end of the course is completely irrelevant.

For my part, I am quite unable to accept that approach to the construction of the section. In my judgment, that which is in the immigrant's mind in regard to conduct after the expiration of the course must be a factor in the determination of the purpose or purposes with which she enters the country, and accordingly an argument which completely eliminates any consideration of that aspect of the matter seems to me to be wrong. I am confident that it was not the intention of Parliament that this should be the interpretation of the subsection, because, if it were, the way would at once be open for enthusiastic teachers of the English language or some other elementary subject to set up short courses of instruction, full-time courses during their duration, for immigrants who chose to take them, and one would find, I suspect, in a very short time a large number of these short although perfectly bona fide courses of instruction being used as no more than a key to obtain entry to the country without other authority. For those reasons I would reject the submission made by counsel for the applicant in the form in which I have described it.

On the other hand, counsel for the respondent adopts as correct the interpretation of the Act given in para 19. He says that it shows the broad intention of Parliament in the section, that it is a good working rule for immigration officers, and that the tribunal in following it did not in any way misdirect themselves. In my judgment, para 19 is what counsel for the respondent claims for it. It is not an exhaustive and authoritative statement of the meaning of the subsection, but it is a very good working rule, and I think that its language produces as nearly as a simple statement of the

kind can, the intention which Parliament must have had in enacting this particular piece of legislation.

I think that the only risk disclosed in argument of too close an adherence to para 19 is the risk that immigration officers may be tempted to feel that no intending student can come in under s 2 (3) (b) unless he positively avers that he is going to go home at the end of the relevant course. LORD PARKER CJ in *R v Chief Immigration Officer, ex parte Bostan Khan* (1) did say of this particular subsection:

'It seems to me perfectly clear that that provision is designed to meet the case of a student coming to this country to take a particular course of study and then go away again.'

I respectfully agree that that is the main need which is to be met by s 2 (3) (b), but I do not think LORD PARKER meant, and I certainly myself would not regard the section as meaning, that a would-be immigrant under this provision must show a positive intention to go home again. The fact that the immigrant has in mind the possibility, among other things, of being allowed to stay in this country should not, in my judgment, affect his or her right of entry, provided that the course of instruction is the primary purpose with which the entry into this country is made. I think that there should be no real difficulty for immigration officers to distinguish between these two cases, the case where the course of instruction, although genuinely intended, is really no more than a convenient key to obtain entry into the country, and the case where the course of instruction is the primary or overriding purpose for which the immigrant seeks to obtain entry. I hesitate to suggest yet another form of test or yet another construction of the Act, but in many cases it seems to me that much will turn on whether the immigrant attaches so much importance to the course that he or she will come to the course anyway, regardless of whether he can stay in the country afterwards or not, or whether the course played such a relatively minor part in his calculations that he would not dream of coming for the course alone, but merely regards it as a stepping stone to other and more permanent sojourn here.

For these reasons I regard the adherence of the tribunal to para 19 as a perfectly satisfactory and proper approach to the problem, and directing themselves in that way they have reached a conclusion as a matter of fact that the primary purpose of the appellant in coming to this country was not attendance at the proposed course, but settlement. That seems to me to be a determination on the right principle, and one which on the evidence they were entitled to reach if they saw fit. For those reasons I would refuse the application.

**WILLIS J:** I agree.

**BRIDGE J:** I have felt much greater difficulty than has beset LORD WIDGERY CJ and WILLIS J in the course of the argument in this case. My difficulty arises in the main from the last sentence in para 19 of the Home Office Instructions to Immigration Officers, which LORD WIDGERY has read, the sentence which says:

'Attendance at the course must be the student's primary purpose in coming to the United Kingdom and he will be expected to leave when his studies are completed.'

I fully accept that if one is making a comparison between a number of purposes which are to be achieved contemporaneously, the question which is the primary purpose and which purposes are secondary may be a perfectly satisfactory comparison to make in the context of the legislation in question. But I am far from satisfied that the test, which is the primary and which is the secondary purpose, is a satisfactory

(1) (12th March 1969) unreported.

one or is not at least open to misinterpretation if it is applied to make a comparison between purposes which are to be achieved in successive periods of time.

It seems to me that when an immigrant seeks entry for a temporary purpose, whether that contemplated by s 2 (3) (b) of the Commonwealth Immigrants Act 1962, with which we are immediately concerned, or by s 2 (3) (c), which deals with temporary visits, then the only question which really matters as regards any intention which the would-be immigrant may have in mind with respect to the period following any temporary permit which he may be granted is the question whether or not he has in mind to effect that intention lawfully.

I would seek to illustrate what I mean more precisely. If a student seeks entry for the period of a course which he is going to take, then so long as any intention which he may have of remaining in this country after the course of study is complete is conditional in his mind on his being granted a further permit to stay, it seems to me that such an intention is really quite irrelevant for any purposes which have to be considered under s 2 (3) (b).

To take the example which was canvassed in the course of argument, suppose that a medical student comes to this country to seek to qualify and has in mind the hope and belief and the firm intention when he has qualified to remain and practice in this country provided he can obtain permission to do so. How can that consideration, if I may put the point in a form of a rhetorical question, detract from the conclusion that the purpose of his entry under what will necessarily be a temporary permit is his proposed course of study?

On the other hand, of course, if the purpose of a student in taking a course of study, although it be quite real and genuine in the sense that he fully intends to take that course, has superimposed on it a further purpose in the shape of an intention to remain in this country after he has concluded his studies in any event, that is to say whether he gets a further permit or not, then it is obvious to my mind that one can properly conclude that his intention to undergo a course of study is a mere device to gain entry for the ulterior purpose of staying in circumstances in which he knows he is unlikely to be permitted to stay.

That, as it seems to me, is the essential distinction which ought to be present in the mind of an immigration officer or an appeal tribunal concerned with a question under this provision, and it is because I have felt doubt whether the contrast between a primary and a secondary purpose is apt to cover the distinction I have sought to make that the case has troubled me.

I observe that the sentence I quoted from para 19 is immediately preceded by the sentence which reads:

'In particular, the immigration officer should be on his guard against attempts to abuse enrolment for a course of study as a means of obtaining admission without a voucher.'

So long as that is always borne in mind, it may be that that makes clear what is meant by a 'primary' purpose in the succeeding sentence.

It is because of my doubts as to the aptness of the primary purpose test that I felt doubt whether the tribunal here applied the right test, but bearing in mind that at the end of the day it is for the applicant to show that the tribunal misdirected themselves and not for the tribunal to satisfy the court that they had applied the right test, I am not prepared to press my doubts to the point of dissent, and I therefore agree in the order proposed by LORD WIDGERY and WILLIS J that the application be refused.

*Application refused.*

Solicitors: Daniel P Debidin; Treasury Solicitor.

Reported by T R Fitzwalter Butler, Esq, Barrister.

## FAMILY DIVISION

(LATEY, J)

12th June 1972

C v C AND C

*Evidence—Paternity—Photographs—Facial resemblance between child and husband.*

On an issue as to the paternity of a child during the hearing of a divorce petition in which the husband alleged that the wife had been guilty of adultery and that he was not the father of a child which she had had after the parties had separated the wife sought to prove that there was a facial resemblance between the child and the husband and also the husband's grandfather, and for this purpose desired to put certain photographs in evidence.

HELD: the evidence was admissible, but the court must keep prominently in mind when considering its weight the perils which had been pointed out in more than one previous case.

## PETITION for divorce.

The husband presented a petition for divorce on the ground of the wife's adultery, alleging that his wife had left him and that she had had a child, J., of which he was not the father. On an issue as to the child's paternity the wife sought to put in evidence photographs to show that there was a facial resemblance between the child and the husband.

F B Purchas QC and S G Lambert for the husband.

Leonard Lewis QC and A H Tibber for the wife.

Robert Pryor for the Official Solicitor.

**LATEY J:** At a very late stage in the evidence in this case the mother's advisers made it plain that they were proposing to adduce evidence of a suggested facial resemblance between J and the husband, and, I think, the latter's grandfather. There has not been much time for counsel to carry out researches into the law on the matter, though in the time available to them they have produced a number of reported cases in this country and one in Ireland. Counsel for the husband and counsel for the Official Solicitor object to this evidence being admitted and contend that it is inadmissible, and that is the question that I have to decide. The weight of such evidence, if the law is that it is admissible, is, of course, another question.

Counsel have researched in Stone's Justices' Manual, 1971 and 1972 editions, to see whether there is any reference there to the point within the context of affiliation proceedings, which is where one would have expected to find authority. There is none. However, in *Burnaby v Baillie* (1), which was concerned with an issue as to paternity, evidence was admitted bearing on resemblance. It is quite plain that in that case the point was not argued. That case is not binding on me. In *Bagot v Bagot* (2) the point was argued and the evidence was admitted. That decision is not binding on me. In *Russell v Russell and Mayer* (3), where the issue was being tried before HILL J with a jury, HILL J admitted such evidence while giving the jury a very strong warning about the dangers of acting on it and describing it as very unsafe and conjectural. That case also is not binding on me. In *Slingsby v Attorney-General* (4) such evidence

(1) (1889), 42 Ch D 282.

(2) (1878), 1 LR Ir 308.

(3) (1923), 129 LT 151.

(4) (1915), 31 TLR 246; CA (1916), 32 TLR 364; HL 33 TLR 120.

was admitted by BARGRAVE DEANE J and the decision there was that the child was the child of the husband. That decision was reversed in the Court of Appeal. There was an appeal to the House of Lords, and there LORD LOREBURN in his speech was plainly of the opinion that the evidence was admissible and that the judge's own observation of a child, its alleged father, photographs, and so on, might play a part in the determination of the case. LORD SHAW expressed himself in the very strongest terms that, save in the one instance of difference of colour, such evidence had never been admitted in Scotland and should not be admitted in England. LORD SUMNER said that in view of the decision of the House of Lords upholding the decision of the Court of Appeal it was not necessary to determine the question of the admissibility of such evidence. I think it is right to say that what their Lordships said about the point was not essential to their decision, and so, therefore, what they said in that case is not binding on me.

Counsel for the Official Solicitor informed me that in the latter's department, enquiries had been made and the Official Solicitor's belief is that certainly in no recent case has evidence of facial resemblance been adduced. He instructed counsel to contend that such evidence should be excluded because of its unreliability and therefore the lack of safety in admitting it. And counsel for the husband, as his second line of argument, contended similarly.

As I have said, although, in my opinion, there is no authority which binds me one way or the other, it is quite plain that in a number of reported cases (some of which I have mentioned) at first instance such evidence has been admitted and notably it was admitted by so wise and eminent a judge as HILL J. I think that the right view for me to take is that I should not depart from that body of jurisprudence and rule that the evidence is inadmissible, although, as I have no doubt I shall be reminded again later in the case, I must keep in the forefront of my mind, in deciding what weight to attach to it, the perils which have been pointed out in more than one case. Accordingly the evidence will be admitted.

Solicitors: Philip G Sherwood & Co, Brighton; Leslie Wilner, Brighton; Official Solicitor.

Reported by G F L Bridgman, Esq, Barrister.



COURT OF APPEAL (CRIMINAL DIVISION)

(CAIRNS, STEPHENSON, LJ AND WILLIS, J)

8th, 27th June 1972

R v GILKS

*Criminal Law—Theft—Overpayment by mistake—Acceptance with knowledge of excess—Theft Act, 1968, s 1 (1).*

The appellant at a betting shop placed a bet on a horse called F.S. to win a certain race. F.S. did not win, but a horse called F.T. won. The relief manager of the shop paid to the appellant some £106 believing that he had backed F.T. When he was paid the money the appellant knew that a mistake had been made and that he was not entitled to the money, but he kept it. He was convicted of theft contrary to s 1 (1) of the Theft Act, 1968, it being alleged that he had dishonestly appropriated property belonging to another with the intention of permanently depriving that other of it.

Held: where a person was paid by mistake a sum in excess of that properly payable and accepted the overpayment with knowledge of the excess he was guilty of theft, and, therefore, the appellant was rightly convicted.

*Criminal Law—Theft—Property obtained by another's mistake—Obligation to restore—Legal obligation.*

PER CURIAM: The obligation placed on a person by s 5 (4) of the Theft Act, 1968, to restore property which he got by another's mistake is a legal obligation as distinct from a moral or social obligation.

APPEAL by Donald Gilks against his conviction at South West London Quarter Sessions of theft, contrary to s 1 of the Theft Act 1968.

Brian Galpin for the appellant.

Suzanne Norwood for the Crown.

*Cur adv vult*

27th June. CAIRNS LJ read the following judgment of the court: WILLIS J, who is unable to be present this morning, has read this judgment and expressed his concurrence with it.

On 12th July 1971, at South West London Quarter Sessions, the appellant was convicted of theft and fined £250.

The facts were as follows. On 27th March 1971 the appellant went into Ladbrokes' betting shop at North Cheam and placed some bets on certain horses. One of his bets was on a horse called 'Fighting Scot'. 'Fighting Scot' did not get anywhere in the race which was in fact won by a horse called 'Fighting Taffy'. Because of a mistake on the part of the relief manager in the betting shop, the appellant was paid out as if he had backed the successful horse with the result that he was overpaid to the extent of £106.63. He was paid £117.25 when the amount he had won (on other races) was only £10.62. At the very moment when he was being paid the appellant knew that a mistake had been made and that he was not entitled to the money, but he kept it. He refused to consider repaying it, his attitude being that it was Ladbrokes' hard lines.

The questions of law arise under the following sections of the Theft Act 1968. Section 1 (1):

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.'

## Section 2 (1):

'A person's appropriation of property belonging to another is not to be regarded as dishonest—(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it . . .'

## Section 5 (4):

'Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.'

The deputy chairman gave rulings in law to the following effect. He ruled that at the moment when the money passed it was money 'belonging to another' and that that ingredient in the definition of theft in s 1 (1) of the Act was therefore present. Accordingly, s 5 (4) had no application to the case. If he was wrong about that then, he said, 'obligation' in s 5 (4) included an obligation which was not a legal obligation. He told the jury that it was open to them to convict the appellant of theft in respect of the mistaken overpayment. And he directed them that the test of dishonesty was whether the appellant believed that 'when dealing with your bookmaker if he makes a mistake you can take the money and keep it and there is nothing dishonest about it'.

In the grounds of appeal it is contended that all these directions were wrong. The main foundation of one branch of the appellant's case at the trial and in this court was the decision of the Court of Appeal in *Morgan v Ashcroft* (1). In that case a bookmaker, by mistake, overpaid a client £24. It was held that the bookmaker was not entitled to recover the money by action because that would involve taking accounts of gaming transactions which were void under the Gaming Act 1845. The argument proceeded as follows. When Ladbrokes paid the appellant they never supposed that they were discharging a legal liability; even if he had won they need not, in law, have paid him. They simply made him a gift of the money. The deputy chairman was wrong in saying that at the moment of payment the money 'belonged to another'. At that very moment its ownership was transferred and therefore the appellant could not be guilty of theft unless the extension given by s 5 (4) to the meaning of the words 'belonging to another' could be brought into play. But s 5 (4) had no application because under the rule in *Morgan v Ashcroft* the appellant had no obligation to repay.

The deputy chairman did not accept this line of argument. He held that it was unnecessary for the prosecution to rely on s 5 (4) because the property in the £106.63 never passed to the appellant. In the view of this court that ruling was right. The subsection introduced a new principle into the law of theft but long before it was enacted it was held in *R v Middleton* (2) that where a person was paid by mistake (in that case by a post office clerk) a sum in excess of that properly payable, the person who accepted the overpayment with knowledge of the excess was guilty of theft. Counsel for the appellant seeks to distinguish the present case from that one on the basis that in *R v Middleton* the depositor was entitled to withdraw 10s from his Post Office Savings Bank account and the clerk made a mistake in thinking he was entitled to withdraw more than £8, whereas in the present case there was no mistake about the appellant's rights—whether his horse won or lost he had no legal right to payment. In our view this argument is fallacious. A bookmaker who pays out money in the

(1) [1937] 3 All ER 92; [1938] 1 KB 49.

(2) (1873), 37 JP 629; LR 2 CCR 38.

belief that a certain horse has won, and who certainly would not have made the payment but for that belief, is paying by mistake just as much as the Post Office clerk in *R v Middleton*.

The gap in the law which s 5 (4) was designed to fill was, as the deputy chairman rightly held, that which is illustrated by the case of *Moynes v Cooper* (1). There a workman received a paypacket containing £7 more than was due to him but did not become aware of the overpayment until he opened the envelope some time later. He then kept the £7. This was held not to be theft because there was no animus furandi at the moment of taking, and *R v Middleton* was distinguished on that ground. It was observed that the law as laid down in *R v Middleton* was reproduced and enacted in s 1 (2) (i) of the Larceny Act 1916. It would be strange indeed if s 5 (4) of the 1968 Act, which was designed to bring within the net of theft a type of dishonest behaviour which escaped before, were to be held to have created a loophole for another type of dishonest behaviour which was always within the net.

An alternative ground on which the deputy chairman held that the money should be regarded as belonging to Ladbroke's was that 'obligation' in s 5 (4) meant an obligation whether a legal one or not. In the opinion of this court that was an incorrect ruling. In a criminal statute, where a person's criminal liability is made dependent on his having an obligation, it would be quite wrong to construe that word so as to cover a moral or social obligation as distinct from a legal one. As, however, we consider that the deputy chairman was right in ruling that the prosecution did not need to rely on s 5 (4), his ruling on this alternative point does not affect the result.

The other main branch of the appellant's case is the contention that the deputy chairman misdirected the jury on the meaning of 'dishonestly' in s 1 (1) of the Theft Act. The relevant part of the appellant's evidence is set out in the summing-up in a passage of which no complaint is made:

'Now, what [the appellant] says is that he did not act dishonestly. He says in his view bookmakers and punters are a race apart and that when you are dealing with your bookmaker different rules apply. He agreed it would be dishonest if his grocer gave him too much change and he knew it and kept the change; he agreed it would be dishonest, but he says bookmakers are different and if your bookmaker makes a mistake and pays you too much there is nothing dishonest about keeping it.'

The deputy chairman, having referred to this evidence, and to evidence that the appellant had not hurried away from the betting shop after receiving this large sum, said:

'Well, it is a matter for you to consider, members of the jury, but try and place yourselves in [the appellant's] position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly.'

In our view that was in the circumstances of this case a proper and sufficient direction on the matter of dishonesty. On the face of it the appellant's conduct was dishonest; the only possible basis on which the jury could find that the prosecution had not established dishonesty would be if they thought it possible that the appellant did have the belief which he claimed to have. (There is no complaint about the direction as to onus. The deputy chairman expressly said: 'The prosecution have to satisfy you that he did appropriate the money dishonestly'.)

Counsel for the appellant thought that the jury should be specifically reminded of the terms of s 2 (1) (a) of the Act and suggested this to the deputy chairman. The deputy chairman then summarised the subsection, gave a somewhat irrelevant illustration of a case where it might apply, and then added:

(1) 120 JP 147; [1956] 1 All ER 450; [1956] 1 QB 439.

'Nor would somebody be guilty of theft if he believed, even if he was wrong, but nevertheless believed he had some right in law to take the property and that, you see, is the reason why [counsel] puts the case on behalf of the [appellant] that [he] believed that when dealing with your bookmaker if he makes a mistake you can take the money and keep it and there is nothing dishonest about it.'

The complaint is centred on the word 'and'. It is contended that the jury may have understood this direction to mean that the appellant would be acting dishonestly unless (a) he believed he had the right to take the money and keep it and (b) he believed there was nothing dishonest about that conduct. It is said that the jury may have thought that the appellant's state of mind was: 'I believe that in law I am entitled to take from my bookmaker anything he is foolish enough to pay me, though of course I know that it would be dishonest to do so', and he pointed out that under s 1 (1) this would entitle him to be acquitted whereas the direction might be taken to mean that he would be guilty.

In our opinion this is too refined an argument. We think it is clear that in the context the word 'and' meant 'and therefore' or 'and so' and the jury would understand it in that way. A few minutes earlier the deputy chairman had accurately stated the effect of the subsection in words that could not be clearer. The appellant in his evidence had drawn no distinction between what he believed he was in law entitled to do and what he believed it was honest to do. His own words were 'there is nothing dishonest about keeping it', not 'I think you are entitled in law to keep it'. If the two expressions are taken to have different meanings the appellant had not made out any case under s 2 (1) (a); if they are taken to have the same meaning then no complaint can be made of the way in which the deputy chairman dealt with the matter. For these reasons this court is of the opinion that all the grounds of appeal fail and that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Carnt & Mudie*; Solicitor, *Metropolitan Police*.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

11th July, 1972

WASTIE v PHILLIPS

*Animals—Protection—Cruelty—Order of disqualification—Defendant disqualified for having custody of 'cattle'—Subsequent custody of sheep—Protection of Animals (Amendment) Act, 1954, s 1 (1).*

In May 1968, the appellant was convicted of an offence under the Protection of Animals Act, 1911, and an order under s 1 (1) of the Protection of Animals (Amendment) Act, 1954, was made disqualifying him from having custody of any 'cattle' for a period of five years. In July, 1971, on a farm occupied by the appellant there were found sheep belonging to him and in his care, and he was convicted, under s 2 of the Act of 1954, of having the custody of cattle in breach of the disqualification order. On appeal,

**Held:** the conviction was right since the word 'cattle' in the order was to be construed in accordance with the relevant legislation, and under s 4 of the Act of 1954, which incorporated s 15 (c) of the Act of 1911, 'cattle' included any horse, ass, mule, bull, sheep, goat or pig.

**CASE STATED** by Leominster and Wigmore, Herefordshire, justices.

On 9th September, 1971, an information was preferred by the respondent, Peter Charles Phillips, against the appellant, Henry Joseph Wastie, charging that he on

<b>LOCAL AUTHORITY</b> - Declaration - Registration by defendant of claims to properties under Commons Registration Act, 1965 - Declarations sought by authority that defendants' claims not valid - Jurisdiction of court. <i>Thorne Rural District Council v. Bunting</i> .. .. .	ChD	355
<b>LOCAL AUTHORITY</b> - Negligence - Negligence of building inspector - Inadequate foundations of house passed as good - House after completion found to be defective - Liability of authority to purchaser from building owner. <i>Dutton v Bognor Regis United Building Co Ltd</i> .. .. .	CA	201
<b>LOCAL GOVERNMENT</b> - Elections. See ELECTIONS.		
<b>LOTTERY.</b> See GAMING.		
<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <i>R v Coleshill Justices. Ex parte Davies</i> .. .. .	QBD	51
<b>MAGISTRATES</b> - Summary trial - Election by defendant - Application to withdraw consent - Duty of magistrates to hear and determine. <i>R v Southampton Justices. Ex parte Briggs</i> .. .. .	QBD	237
<b>MAGISTRATES</b> - Warrant - Non-payment of fine and compensation order - Warrant for committal to prison - Defaulter already remanded in custody on other charges - No knowledge on part of justices - Warrant not executed during remand in custody - Acquittal of defaulter - Execution of warrant - Defaulter taken to prison to serve outstanding term in respect of original committal - Validity of execution in view of delay - Need for warrant to be delivered to governor of prison - Magistrates' Courts Rules, 1968, r 80 (5). <i>R v Leeds Governor. Ex parte Huntley</i> .. .. .	QBD	551
<b>MARKET</b> - Statutory monopoly - Injunction to restrain unlicensed person holding market - Birmingham Corporation (Consolidation) Act, 1883, s 89. <i>Birmingham Corporation v. Perry Bar Stadium Ltd</i> .. .. .	ChD	359
<b>MARKET.</b> Sunday market. See SHOP.		
<b>MOTOR CAR</b> - Driving. See ROAD TRAFFIC.		
<b>NUISANCE</b> - Statutory nuisance - Failure to comply - Nuisance order made by justices - Appeal to quarter sessions - Relevant date for considering circumstances of offence - Public Health Act, 1936, s 94 (2). <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>NUISANCE</b> - Statutory nuisance - Notice of abatement - Failure to comply - Proceedings by local authority - Information laid before justices - Jurisdiction of justices to hear information - Non-compliance with notice of abatement an 'offence' - Information proper method of commencing proceedings despite use of word 'complaint' - Public Health Act, 1936, s 94 (1), (2) - Magistrates' Courts Act, 1952 s 42. <i>Northern Ireland Trailers Ltd v County Borough of Preston</i> .. .. .	QBD	149
<b>OBSCENITY.</b> See CRIMINAL LAW; CUSTOMS AND EXCISE.		
<b>OBTAINING PROPERTY OR PECUNIARY ADVANTAGE BY DECEPTION.</b> See CRIMINAL LAW.		
<b>OFFENSIVE WEAPON</b> - Carrying. See CRIMINAL LAW.		
<b>PATERNITY</b> - Evidence - Photographs - Facial resemblance between child and husband. <i>C v C and C</i> .. .. .	Fam. Div.	775
<b>PILOT.</b> See SHIPPING.		
<b>POLICE</b> - Obstructing constable in execution of duty. See CRIMINAL LAW.		
<b>POLLUTION.</b> See RIVER.		
<b>POST.</b> Sending obscene article through. See CRIMINAL LAW.		
<b>PUBLIC ORDER</b> - Insulting behaviour conducive to breach of peace - 'Insulting' - Conduct displeasing and annoying to other people - Public tennis match - Disruption of match by appellant jumping over barrier and running on court - Public Order Act, 1936, s 5, as replaced by Race Relations Act, 1965, s 7. <i>Brutus v Cozens</i> .. .. .	QBD 390; HL 636	
<b>PUBLIC ORDER</b> - Public place - Open space to which public have access - Tennis court - Grounds consisting of courts, administrative buildings, and partly covered stands around one court - Match disrupted on that court - Public Order Act, 1936, s 9. <i>Cozens v Brutus</i> .. .. .	QBD	390
<b>QUARTER SESSIONS</b> - Civil proceedings - Costs - General rule - Highway - non-repair - Proceedings by householder against highway authority - Proprietary right of complaint directly affected by outcome of proceedings - Complainants' right to costs. <i>Riggall v Hereford County Council</i> .. .. .	QBD	172



<b>RACE RELATIONS</b> – Housing – Council houses – Tenants restricted to British subjects – Validity – Action for declaration by local authority – Competency – Race Relations Act, 1968, s 2 (1), s 19 (2) (10). <i>London Borough of Ealing v Race Relations Board</i> .. . . .	HL	112
<b>RACE RELATIONS</b> – Provision of facilities – Discrimination – Members' club – Refusal to admit coloured man as member – Members of club 'section of public' – Impersonal quality distinguishing them from public at large – Clubs where admission by invitation – Race Relations Act, 1968, s 2 (1). <i>Race Relations Board v Charter</i> .. . . .	CA	249
<b>RATING</b> – Rateable occupation – Unoccupied premises – House held for eleven months by church available for occupation by minister – General Rate Act, 1967, sched 1, para 2 (f). <i>Bexley Congregational Church Treasurer v London Borough of Bexley</i> .. . . .	CA	532
<b>RENT CONTROL</b> – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Capricious, frivolous, or vexatious action – Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .. . . .	CA	367
<b>RENT CONTROL</b> – Contract referred to tribunal – Reference by local authority – Setting aside – Matters which must be shown – Need of tenants' consent to reference – Reference of number of contracts together – Rent Act, 1968, s 72 (1). <i>R v Barnet and Camden Rent Tribunal. Ex parte Frey Investments Ltd</i> .. . . .	QBD	11
<b>RIGHT OF WAY</b> – Land sold by Secretary for Air – Conveyance of land 'freed from rights' – Application to rights of way – Defence Act, 1842, s 14. <i>Attorney-General v Shonleigh Nominees Ltd</i> .. . . .	CA	407
<b>RIVER</b> – Pollution – 'Causes' – Common sense meaning – Liability in absence of negligence or knowledge – Novus actus interveniens – Rivers (Prevention of Pollution) Act, 1951, s 2 (1) (a). <i>Alphacell Ltd v Woodward</i> .. . . .	HL	505
<b>ROAD TRAFFIC</b> – Causing death by dangerous driving – Evidence – Previous drinking – Admissibility – Plea of guilty to driving with blood-alcohol concentration in excess of prescribed limit – Evidence of substantial excess rightly admitted on major charge – Road Traffic Act, 1960, s 1. <i>R v Thorpe</i> .. . . .	CA	301
<b>ROAD TRAFFIC</b> – Disqualification – Mitigating circumstances – Circumstances which may be considered – Gravity or triviality of previous convictions – Road Traffic Act, 1962, s 5 (3). <i>Lambie v Woodage</i> .. . . .	HL	554
See also <i>JAMES v HALL</i> and <i>COOMBS v KEHOE</i> , <i>infra</i> .		
<b>ROAD TRAFFIC</b> – Driving or attempting to drive with blood-alcohol proportion exceeding prescribed limit – Breath test – Requirement to provide specimen – 'Person driving or attempting to drive' – Pursuit by constable after suspicion – Requirement when person no longer driving or attempting to drive – Road Safety Act, 1967, s 2 (1). <i>Sakhuja v. Allen</i> .. . . .	HL	414
<b>ROAD TRAFFIC</b> – Driving or being in charge of vehicle with blood-alcohol proportion exceeding prescribed limit – Specimen of blood for laboratory test – Analyst's certificate of proportion of alcohol – Admissibility in evidence – Failure to serve copy on defendant – Waiver – No objection to evidence before close of case for prosecution – Road Traffic Act, 1962, s 2 (2). <i>R v Banks</i> .. . . .	CA	306
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – 'Accident' – Broken down car pushed by other car – Interlocking of bumpers – Breath test – Damage to both cars – Road Safety Act, 1967, s 2 (2). <i>R v Morris</i> .. . . .	CA	194
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Breath specimen – Requirement to provide – Defendant in hospital Words spoken by constable in honest and reasonable belief that they would be understood – Failure by defendant to hear or comprehend request – Validity of requirement – Road Safety Act, 1967, s 3 (2) (b). <i>R v Nicholls</i> .. . . .	CA	481
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Disqualification – Special reasons – Vehicle parked on highway – Driving of vehicle few yards from highway to private parking place – Road Traffic Act, 1962, s 5 (1). <i>James v Hall</i> .. . . .	QBD	385
<b>ROAD TRAFFIC</b> – Driving with blood-alcohol proportion above prescribed limit – Disqualification – Special reasons – Vehicle parked on highway – Vehicle driven from one parking place to another – Route covering 200 yards along busy street – Potential source of danger to other road users – Road Traffic Act, 1962, s 5 (1). <i>Coombs v Kehoe</i> .. . . .	QBD	387

<b>ROAD TRAFFIC</b> - Driving with blood-alcohol proportion above prescribed limit - Laboratory test - Requirement to provide specimen - 'Person driving or attempting to drive' - Requirement made after driving ceased - Need only for requirement to be closely related to episode of driving - Road Safety Act, 1967, s 3 (3) (4).		
<b>Brooks v Ellis</b> .. .. .	QBD	627
<b>ROAD TRAFFIC</b> - Insurance - Third-party insurance - Policy - Charges of using car and permitting use without insurance - Onus of proof of existence of valid cover on defendant - Road Traffic Act, 1960, s 201 (1).		
<b>Leathley v Drummond. Leathley v Irving</b> .. .. .	QBD	548
<b>ROAD TRAFFIC</b> - Motorway - Hard shoulder - Part of verge - Marginal strip - Part of carriageway - Motorways Traffic Regulations, 1959, regs 3 (1) (a), (d), (h), (f).		
<b>Wallwork v Rowland</b> .. .. .	QBD	137
<b>ROAD TRAFFIC</b> - Motorway - Prohibition against stopping on verge - Stopping permitted 'by reason of any accident, illness or other emergency' - 'Emergency' - Need for element of suddenness - Danger alleged to constitute emergency not apparent before driver got on motorway - Drowsiness - Motorways Traffic Regulations, 1959 (SI 1959 No. 1147), regs. 7 (2), 9.		
<b>Higgins v Bernard</b> .. .. .	QBD	314
<b>ROAD TRAFFIC</b> - Notice of intended prosecution - Service within fourteen days - Notice sent by recorded delivery service - Notice not capable of being delivered in ordinary course of post within fourteen days period - Road Traffic Act, 1960 s 241 (2), as amended by Road Traffic Act 1962, sch 4.		
<b>Nicholson v Tapp</b> .. .. .	QBD	718
<b>ROAD TRAFFIC</b> - Regulations relating to construction, etc., of vehicles - Using vehicle on road in contravention of regulations - 'Using' - Vehicle driven by person other than owner's servant at owner's request - Road Traffic Act, 1960, s 64, as substituted by Road Traffic (Amendment) Act, 1967, s 64.		
<b>Crawford v Haughton</b> .. .. .	QBD	234
<b>ROAD TRAFFIC</b> - Trade licence - 'Recovery vehicle' - Vehicle equipped for raising disabled vehicle from ground, but not equipped for drawing disabled vehicle - Vehicles (Excise) Act, 1941, s 16 (8) - Road Vehicles (Registration and Licensing) Regulations, 1971, reg 35 (3).		
<b>E Pearson &amp; Son (Teesside) Ltd v Richardson</b> .. .. .	QBD	758
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Pilotage by unlicensed pilot after offer - Ship moving from one mooring to another - Pilotage district byelaws - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws Part IX, byelaw 2.		
<b>McMillan v Crouch</b> .. .. .	QBD 179; HL 643	
<b>SHIPPING</b> - Pilot - Pilotage district - Offer by licensed pilot - Ship moving from mooring to discharge berth - Pilotage by unlicensed pilot after offer - General offer insufficient - Need of specific offer communicated in relation to particular movement of ship - Pilotage Act, 1913, s 30 (3), s 32 - London Pilotage District Bye-Laws, Part IX, byelaw 2.		
<b>Montague v Babbs</b> .. .. .	QBD	441
<b>SHOP</b> - Sunday trading - Offence - 'Place where any retail trade or business is carried on' - Premises other than shop - Market stalls - Whether sufficient degree of permanency - Question of fact and degree - Stalls erected on Saturday and taken down after trading on Sunday - No defined space for stall marked out on market site - Possibility of components of stalls varying from week to week - Shops Act, 1950, ss 47, 58.		
<b>Maby v Warwick Borough Council</b> .. .. .	QBD	631
<b>SUNDAY TRADING.</b> See <b>SHOP</b> .		
<b>TAPE RECORDING</b> - As evidence. See <b>CRIMINAL LAW</b> .		
<b>TOWN AND COUNTRY PLANNING</b> - Advertisements - Control - Display on walls of public houses - Condition that advertisements should not contain letters, figures, symbols, emblems or devices above permitted height - Advertisements showing cigarette packet, man holding glass of beer, and beer glass - Objects shown all above permitted height - Town and Country Planning (Control of Advertisements) Regulations, 1969, reg 14 (2) (a).		
<b>McDonald v Howard Cook Advertising Ltd</b> .. .. .	QBD	79
<b>TOWN AND COUNTRY PLANNING</b> - Appropriation of land - Power to override easements and other rights - Conveyance by local authority of land to company - Re-development of area - Appropriation of conveyed land to housing purposes - Town and Country Planning Act, 1971, s 127 (1) (2).		
<b>Dowty Boulton Paul Ltd v Wolverhampton Corporation</b> .. .. .	ChD	677
<b>TOWN AND COUNTRY PLANNING</b> - Building preservation - Notice - Service - Validity - Service on company owner and occupier of untenanted building - Registered office in building - Notice addressed to company's registered office - Postman unable to find office - Demolition after attempted delivery - Interpretation Act, 1889, s 26 - Town and Country Planning Act, 1962, s 214 - Town and Country Planning Act, 1968, s 48.		
<b>Maltglade Ltd v St Albans Rural District Council</b> .. .. .	QBD	707

<b>TOWN AND COUNTRY PLANNING</b> - Compulsory purchase - Compensation - Assessment - Land in area zoned for residential building - No prospect of permission being given for that use - Land Compensation Act, 1961, s 16 (2). <b>Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council</b> .. .. .	CA	93
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Appeal - Jurisdiction of Minister to hear - Mandatory time limit - Letter sent to Minister as notice of appeal within time limit - Not valid notice as failing to comply with statutory requirements - Subsequent letter complying with statutory requirements but out of time - Town and Country Planning Act, 1968, s 16 (1), (2) <b>Howard v Secretary of State for Environment</b> .. .. .	QBD	754
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Material change of use - Planning unit - Determination - Factors to be considered - Whole unit of occupation generally to be taken as planning unit - Exception where smaller unit recognisable as site of activities so as to amount to separate use physically and functionally. <b>Burdle v Secretary of State for the Environment</b> .. .. .	QBD	720
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Mining operations - Notice specifying substantial area - Actual working only in two smaller areas within specified area - Some operations more than four years before service of notice - Town and Country Planning Act, 1962, s 45 (1) (2). <b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</b> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Notice to be served within four years from carrying out of development - Mining operations - Initial working of area more than four years prior to notice - Subsequent working of area within four-year period - Whether new development or continuation of original development - Validity of notice - Town and Country Planning Act, 1962, s 12 (1), s 45 (2). <b>Thomas David (Porthcawl) Ltd v Penybont Rural District Council</b> .. .. .	QBD	276
<b>TOWN AND COUNTRY PLANNING</b> - Enforcement - Notice - Service on occupier of land affected - 'Occupier' - Licensee of caravan site - Right to be served with notice - Control over site - Duration of enjoyment - Town and Country Planning Act, 1962, s 45 (3). <b>Stevens v London Borough of Bromley</b> .. .. .	CA	261
<b>TRADE DESCRIPTIONS</b> - False description - Motor car - False mileage recorded on odometer - Sale by motor dealer - Defence of reasonable precautions and due diligence - Dealer ignorant of alteration of odometer - Condition of car consistent with mileage recorded on odometer - Trade Descriptions Act, 1968, ss 1 (b), 24 (1), (3). <b>Naish v Gore</b> .. .. .	QBD	1
<b>TRADE DESCRIPTIONS</b> - False description - Price - Misleading - 4d refund label on bottle - Refusal of refund - Trade descriptions Act, 1968, s 11 (2). <b>Doble v David Greig Ltd</b> .. .. .	QBD	469
<b>WARRANT</b> - Committal. See MAGISTRATES.		
<b>WITNESS</b> - Intimidation. See CONTEMPT OF COURT.		
<b>YOUTHFUL OFFENDER</b> , See CRIMINAL LAW; MAGISTRATES.		

11th July, 1971, had in his custody at the Buzzards, Shobdon, Herefordshire, cattle, contrary to s 2 of the Protection of Animals (Amendment) Act, 1954, in that on 29th May 1968 a magistrates' court sitting at Wigmore, Herefordshire, had made an order under s 1 (1) of the 1954 Act disqualifying him from having the custody of any cattle for a period of five years from 9th July, 1968. The justices convicted the appellant and discharged him subject to the condition that he committed no offence during a period of two years from the date of the order. The appellant appealed.

*K Wheeler* for the appellant.

*Brendon Shiner* for the respondent.

**MILMO J:** The appellant was convicted on 9th December 1971 before the Leominster justices on an information which charged him with an offence under s 2 of the Protection of Animals (Amendment) Act 1954 in that an order was made against him on 29th May 1968 disqualifying him from having custody of any cattle for a period of five years from 9th July 1968, the allegation being that he had, in contravention of that order, had custody of cattle on 11th July 1971. It is now common ground, and was so found by the justices, that on 11th July 1971 there were on a farm occupied by the appellant and his sister, both bovine animals and some sheep. The bovine animals belonged to and were cared for by the sister, but the sheep belonged to and were cared for by the appellant.

The hearing of the case took a somewhat strange course, because there was no submission or argument as far as the court can ascertain on the law, and at the close of the case for the defence, the appellant having given evidence, counsel for the prosecution was not invited to argue the case or any points arising thereunder. The justices retired and in due course returned and convicted the appellant on the footing that, although he did not have in his custody any bovine animals, he nevertheless was in breach of the order made against him in 1968 inasmuch as he did have in his custody sheep, and sheep were cattle within the meaning of the order which had been made against him in May 1968.

The question which arises for this court to determine is whether the justices in so finding came to a correct decision in law. What this court has to decide in essence is: What was the meaning to be attached to the order which was made under the Protection of Animals (Amendment) Act 1954 against the appellant ordering that he be disqualified from having the custody of cattle for a period of five years?

Section 1 (1) of the Protection of Animals (Amendment) Act 1954 provides:

'Where a person who has been convicted under the Protection of Animals Act, 1911, or the Protection of Animals (Scotland) Act, 1912, of an offence of cruelty to any animal is subsequently convicted under either of those Acts of such an offence, the court by which he is convicted on the subsequent occasion may, if it thinks fit, in addition to or in substitution for any other punishment, order him to be disqualified, for such period as it thinks fit, for having custody of any animal or any animal of a kind specified in the order.'

Throughout the four sections of that Act, the word 'cattle' does not appear, but the interpretation section, which is s 4, reads as follows:

'(1) In this Act—(a) expressions used have, in relation to England and Wales, the same meanings as in the Protection of Animals Act, 1911 ...'

When one refers to the Act of 1911 one finds that the expression 'cattle' does not appear at all throughout the Act until one gets to the definition section, which is s 15. Then it appears only in para (e) of that section. It appears in this context:

'the expression "knacker" means a person whose trade or business it is to kill any cattle not killed for the purpose of the flesh being used as butcher's meat, and the expression "knacker's yard" means any building or place used for the purpose, or partly for the purpose, of such trade or business, and the expression "cattle" includes any horse, ass, mule, bull, sheep, goat, or pig.'

That is the only definition that one finds of 'cattle', and indeed the only mention of cattle in this legislation, linked as it is by the definition clause, s 4 in the 1954 Act.

In those circumstances, when the word 'cattle' is used in an order made by the justices under this legislation the word 'cattle' must, in my judgment, be interpreted in the same way as the only definition which is found of that word in this legislation. For that reason I am of opinion that this conviction must be upheld and that the justices were right in interpreting the order and the word 'cattle' in particular as including sheep.

**MELFORD STEVENSON J:** I agree.

**LORD WIDGERY CJ:** I also agree and I am reinforced in the view given by MILMO J by the fact that the word 'cattle' is commonly and ordinarily used to include sheep as appears from the first relevant meaning in the Shorter Oxford Dictionary where 'cattle' is defined as 'a collective name for live animals held as property, or reared to serve as food, or for the sake of their milk, skin, wool, etc'.

Furthermore it seems to me that if a man is convicted of being cruel to bovine animals, it is the most natural thing in the world that the justices seeking to impose a restriction on his future custody of such animals should include other cattle as well. The probability seems to me to be that the justices in imposing this disqualification intended it to refer to sheep. The appeal is dismissed with costs.

*Appeal dismissed.*

Solicitors: *Smiles & Co*, for *Moore, Brown & Dixon*, Tewkesbury; *Ward, Bowie & Co*, for *Beaumont Smith & Davies*, Hereford.

Reported by N P Metcalfe, Esq, Barrister.



## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, WILLIS AND BRIDGE, JJ)

21st June, 6th July 1972

Re V.E. (Mental Health Patient)

*Mental Health—Admission of patient to hospital—Compulsory admission—Treatment of mental disorder stated to be 'mental illness'—Application to mental health review tribunal for discharge—Application for admission amended by tribunal by substitution of 'psychopathic disorder' for 'mental illness'—Liability to detention of person over 21 suffering from psychopathic disorder—Mental Health Act, 1959 ss 26, 123 (3).*

In June 1971 the patient, E, aged 40, was admitted to hospital for treatment of mental disorder. The application for her admission was made by a mental welfare officer, supported by the recommendations of two medical practitioners as required by s 26 of the Mental Health Act 1959, and the particular form of mental disorder from which E suffered was stated to be 'mental illness'. In November, 1971 (within six months of her admission) E applied to a mental health review tribunal for discharge pursuant to s 31 (4) of the Act. The tribunal found that E had suffered organic brain damage which resulted in seriously irresponsible conduct, and it was necessary in the interests of her own health and safety, and for the protection of others, that she should continue to be liable to be detained. Accordingly, they declined to discharge her under s 123 (1) of the Act, but, concluding that her condition had been wrongly diagnosed and that the form of mental disorder from which she suffered was not 'mental illness' but 'psychopathic disorder', exercised the power given them by s 123 (3) to direct that the application for her admission be amended so as to substitute 'psychopathic disorder' for 'mental illness'. The question arose for the determination of the court on a Case Stated whether notwithstanding that the tribunal had on medical grounds refused to order E's discharge, she was nevertheless in law entitled to discharge on the ground that, being a person over 21 suffering from psychopathic disorder, she had never been liable to detention under the Act of 1959.

**Held:** the application for admission under s 26 of the Act remained throughout the only lawful authority for the compulsory detention of a patient in hospital, and, if an amendment to that application so altered its averments that they no longer alleged circumstances which would justify detention, the patient must be discharged; accordingly, since in the present case the amended application alleged psychopathic disorder in a patient more than 21, her continued detention under the Act could not be justified, and she was entitled to be discharged.

**Per LORD WIDGERY, CJ:** In any event E was entitled to discharge by reason of the fact that on a proper diagnosis she had never qualified for detention under s 26.

**SPECIAL CASE STATED** by the president of the Mental Health Review Tribunal for the South West Metropolitan Regional Hospital Board Area pursuant to s 124 (5) of the Mental Health Act 1959 relating to a patient who had been admitted to Graylingwell Hospital, Chichester and detained there pursuant to s 26 of the Act.

*Gordon Slynn* for the Mental Health Review Tribunal.

*David Smith* for the patient.

*Brian Galpin* for the hospital board.

*Cur adv vult*

6th July. The following judgments were read.

**LORD WIDGERY CJ:** This matter comes before the court on a Special Case stated by the Mental Health Review Tribunal for the South West Metropolitan Regional Hospital Board Area pursuant to s 124 (5) of the Mental Health Act 1959.

On 11th June 1971 the patient was admitted to Graylingwell Hospital, Chichester, for treatment for mental disorder. The application for her admission was made by a mental welfare officer supported by the recommendations of two medical practitioners as required by s 26 of the Act, and the particular form of mental disorder from which the patient suffered was said to be 'mental illness'. On 4th November 1971 (within six months of her admission) the patient applied to the tribunal for her discharge from hospital pursuant to s 31 (4) of the Act. The tribunal obviously took the greatest pains in considering the application. Their findings were that the patient had suffered organic brain damage which resulted in seriously irresponsible conduct, and that it was necessary in the interests of the patient's health and safety, and for the protection of others, that she should continue to be liable to be detained. The tribunal accordingly declined to discharge her, but nevertheless concluded that her condition had been wrongly diagnosed, and that the form of mental disorder from which she suffered was not mental illness but 'psychopathic disorder' as defined in s 4 (4). They thereupon exercised the power given to them by s 123 (3) to direct that the application for her admission be amended so as to substitute 'psychopathic disorder' for 'mental illness'.

At the material time the patient was aged 40. There is no age limit for the reception of patients under s 26 if the relevant mental disorder is mental illness, but if the relevant disorder is psychopathic disorder no such application can be made if the patient is over the age of 21 (s 26 (2)).

The question of law for the consideration of the court is whether, notwithstanding that the tribunal refused to order the patient's discharge on medical grounds, she is nevertheless entitled to be discharged on the ground that as a person over 21 suffering from psychopathic disorder she was never liable to be detained under Part IV of the Act at all.

Section 31 (1) of the Act provides that an application 'duly completed in accordance with the foregoing provisions of this Part of this Act shall be sufficient authority for the applicant . . . to take the patient and convey him to the hospital', and by s 31 (2) the same application is sufficient authority for the managers of the hospital to detain the patient 'in accordance with the provisions of this Act'. Section 32 provides for the amendment within 14 days of any application or supporting medical recommendation which is found to be 'incorrect or defective', and thereafter the amended document is deemed to have had effect as if it had been originally made as so amended. I take this to be a 'slip rule' to permit the correction of accidental mistakes in the form of the documents themselves.

Section 31 (4) enables the patient to apply to the tribunal for discharge at any time within six months of admission. Subject to this, the continuing authority for the patient's detention is contained in s 43, which provides:

'(1) Subject to the following provisions of this Part of this Act, a patient admitted to hospital in pursuance of an application for admission for treatment . . . may be detained in a hospital . . . for a period not exceeding one year beginning with the day on which he was so admitted . . . but shall not be so detained . . . for any longer period unless the authority for his detention . . . is renewed under the following provisions of this section.'

Section 43 (3) goes on to provide for the examination of the patient by the responsible medical officer within two months of the date when the authority for the detention would expire, and for a renewal of that authority if it appears to that officer that

'it is necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained'

and the officer reports accordingly. The renewal of authority will be for one year in the first instance and for two years thereafter. By s 43 (6) a patient dissatisfied with the report of the responsible medical officer may apply to the tribunal.

By s 123 (1):

'Where application is made to a mental health review tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if they are satisfied—(a) that he is not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; or (b) that it is not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained . . .'

The tribunal must therefore direct discharge if it finds that *none* of the mental disorders which might authorise an application for admission for treatment still obtains, or if detention is no longer necessary in the interests of the patient or of others. The Act is conspicuously silent whether the tribunal should itself order the discharge of the patient whose release is undesirable in his own or the public interest and who still suffers from some mental disorder merely because the nature of that disorder would not justify a new application for admission made at the present time. In substance the argument for the hospital board is that if a patient is once detained by virtue of a valid application, his detention can be continued so long as he continues to suffer from some mental disorder and his release is undesirable in his own or the public interest.

I would not be wholly surprised if the Act had had this effect, but on consideration of its terms as a whole I am satisfied that it does not. To begin with, it is clear that the application and its supporting recommendations must specify the particular form of mental disorder relied on, and that if the relevant disorder is psychopathic disorder the application cannot be made if the patient is over 21 (s 26). Further by s 44 (1) a patient who is liable to be detained by virtue of an application for admission as a psychopathic or subnormal patient shall cease to be so liable on attaining the age of 25 unless the responsible medical officer considers that he is likely to act in a manner dangerous to himself or others (s 44 (2)). In deciding whether a particular patient is detained 'as a psychopath' for this purpose one's attention is directed to the form of the application, and, what is more significant, provision is made for the amendment of the application as necessary.

Under s 38 (1) if the responsible medical officer reports that the patient is suffering from a form of mental disorder different from that specified in the application the latter 'shall have effect as if that other form of mental disorder were specified therein'. If as a result of such a report the application has effect as specifying psychopathic disorder only, the patient is to be treated as liable to be detained as a psychopathic patient (s 59 (3)). Accordingly a patient originally detained on account of mental illness who is reclassified as a psychopath under s 38 must, in my judgment, be treated as a psychopath, and cannot be detained after the age of 25 unless reported on under s 44 (2) as potentially dangerous. This alone shows that it cannot be the general policy of the Act to treat as irrelevant a change in the patient's condition which takes him out of one class of mental disorder and into another.

I come back to the tribunal's powers under s 123. Section 123 (3) provides:

'Where application is made to a mental health review tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged, the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the relevant application . . . direct that that application . . . be amended by

substituting for the form of mental disorder specified therein such other form of mental disorder as appears to the tribunal to be appropriate.'

If it was intended that a reclassification under s 123 (3) might itself produce a situation requiring the discharge of the patient, it is strange that this was not specifically recognised. I cannot, however, see why a reclassification under s 123 (3) should have a different effect from one made under s 38. I feel driven to the conclusion in each case that if an amendment of the application so alters its averments that they no longer allege circumstances which would justify detention, the patient must be discharged.

In the present case the amended application alleges psychopathic disorder in a patient aged 40. This is not a situation which justifies detention under the Act and I think that she is entitled to be discharged.

Even if I had taken a different view of the general scheme of the Act, I should have held that this patient was entitled to discharge by reason of the fact that on a proper diagnosis she never qualified for detention under s 26 at all. It is one thing to say that a patient once properly detained can remain in detention notwithstanding a change in circumstances and quite a different thing to say that an initial mistake in diagnosis can be upheld. I would answer the question put by saying that the patient must be discharged.

**WILLIS J:** On 11th June 1971 the patient was admitted to Graylingwell Hospital, Chichester, and there detained, pursuant to an application made under s 26 of the Mental Health Act 1959, until 15th October 1971 when she was granted leave of absence. She was readmitted on 26th October 1971 pursuant to the same authority.

On 4th November 1971 the patient applied under s 31 (4) of the Act to be discharged. Her application was heard by a mental health review tribunal ('the tribunal') which had before it, *inter alia*, the opinion of the responsible medical officer that she was not then, nor was she, in his view, at the date of the application in June 1971, suffering from 'mental illness', but from some other disorder or disability of mind within the definition of 'mental disorder' in s 4 (1) of the Act.

The powers of a tribunal to whom application for discharge of a patient is made, or for discharge of a person subject to guardianship under the Act, are set out in s 123. Discharge of a patient is mandatory in the circumstances set out in s 123 (1), namely if the tribunal is satisfied:

'(a) that he is not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; or (b) that it is not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained; or (c) in the case of an application under s 44 (3) or s 48 (3) of this Act, that the patient, if released, would not be likely to act in a manner dangerous to other persons or to himself.'

By s 123 (3) it is provided:

'Where application is made to a mental health review tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged, the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the relevant application, order or direction, direct that that application, order or direction be amended by substituting for the form of mental disorder specified therein such other form of mental disorder as appears to the tribunal to be appropriate.'

In this case the tribunal concluded that the patient ought not to be discharged; since, however, it was satisfied on medical grounds that 'the label', as it is called, of 'mental illness' on which her admission and detention had up to then been founded, was wrong, it directed that there should be substituted the description of the condition from which it found the patient to be suffering, mainly by reason of organic brain damage, namely, 'psychopathic disorder' which in terms of s 26 might be termed 'the minor disorder'.

It would, therefore, seem clear that the necessary medical recommendations on which the original application was based were erroneous. It follows that, if what the tribunal found in January 1972 to be the correct diagnosis had been the medical view in June 1971, there would have been no lawful basis for the application made under s 26, and thus no lawful authority for the patient's admission and detention, since by s 26 (2) (a) (ii) 'psychopathic disorder' can only form a ground for admission for treatment when the patient is under 21, and this patient was 40 at the relevant time.

Has the amendment of the application by the tribunal, therefore, effectively invalidated its authority for the continued detention of the patient? I confess that I have been greatly puzzled that such a result could have been intended from what seems to me on its face to be no more than an administrative correction by a tribunal which considered that the patient should not only not be discharged but had concluded that to do so would involve danger to the patient, if not to others, and that she should therefore remain under custodial treatment. If the result contended for by counsel for the patient does follow from a reclassification by the tribunal under s 123 (3) or by the responsible medical officer in the hospital under s 38, it might be expected that a less oblique form of achieving it would have been used, and it has, therefore, been necessary to consider other sections in the Act to see if light can thereby be thrown on the question what is the real status of the application under s 26 in this complex legislation.

It is clear from s 26 (2) that under Part IV of the Act, which deals with compulsory admission to hospital and guardianship, for reasons which have not been explained to us and which are not readily apparent, Parliament has provided for a diagnostic dichotomy which depends on the age of the patient at the time of the relevant application. Whereas an application can properly be made if backed with the appropriate medical recommendations on the grounds of 'mental illness or severe subnormality' ('the major disorder') in respect of a patient of any age, it is only in the case of a patient under the age of 21 that an application can be made when the diagnosis of 'mental disorder' is 'psychopathic disorder or subnormality'. It follows that any one over 22 suffering from the latter or minor form can never be admitted to or detained in hospital under s 26. It also seems to follow on the facts of this case that Mrs E should never have been so admitted or detained in the first place.

By s 31 (1) of the Act a duly completed application is to be 'sufficient authority' for the patient's admission within 14 days and thereafter for his detention in the hospital in accordance with the provisions of the Act, and by s 31 (4) a patient may apply generally to the tribunal within six months of admission.

By s 32 errors in the medical recommendations which become apparent within 14 days of admission can be corrected, and the application is given retrospective effect as amended. This, however, does not seem to me to be a power which could have been intended to correct and at the same time to validate an application where the correction was from, for example, 'mental illness' ('the major disorder') to 'psychopathic disorder' ('the minor disorder') in the case of a patient over the age of 22 at the date of the relevant application.

Omitting further reference to s 38 (reclassification), which, it seems to me, must be approached on the same basis as s 123 (3), one comes, in particular, to ss 43 and 44.



Section 43 provides machinery for continued detention by renewing the authority to effect it in all cases where, subject to application by the patient to the tribunal, it is thought advisable. The authority which is renewed under this section must, it seems to me, be the same authority as is referred to in s 31 or as amended under s 32, namely the application under s 26.

Section 44 sets out special provisions for psychopathic and subnormal patients. A patient who has been admitted as such ceases to be liable to detention on reaching the age of 25, unless there is furnished a medical report, subject to application to the tribunal, to the effect that his release would be likely to constitute a danger to others or himself, in other words that he is considered to be a dangerous psychopath. Thereafter the report renews the authority for his continued detention as such, but without prejudice to the review provisions of s 43. It thus appears that Parliament thought it necessary to provide for (a) special release procedure to deal with young people suffering from 'the minor disorder', but at the same time (b) special restrictions where release would be likely to be dangerous. It seems to me inconceivable that it was intended that a patient other than one within this special category could be brought within this procedure by way of subsequent amendment of a current application. Finally, by s 59 (3)—and this seems to me to be almost conclusive in this difficult matter—it is provided that a patient shall only be liable to be detained by virtue of an application for admission for treatment as a psychopath etc ('the minor disorder') if the form of disorder specified in the application (or the application as amended under s 38) is the minor form.

Section 123 (3) operates not only on applications but also on 'orders and directions', which are to be found mainly if not exclusively in later Parts of the Act. I desire only to say that it seems to me that a consideration of certain later provisions tends to reinforce the view to which I have finally come on Part IV alone that the application for admission, in its original form or as amended, remains throughout the only lawful authority for a patient's compulsory detention in hospital, and that as soon as that application ceases to reflect the type of mental disorder on which a patient could have been lawfully admitted and detained under s 26 (2), so soon does there cease to exist any lawful authority for that patient's continued detention.

In an Act which deals explicitly with the procedure for discharge in general, I find it difficult to understand why in the case of a changed diagnosis from the major to the minor disorder in the case of a patient over the age of 21 on admission such an obscure method of bringing about a discharge, namely, by an incidental invalidation of the authority for detention, should have been chosen. I am, however, at the end satisfied that it must have been Parliament's intention that, whether under s 32, by reclassification under s 38, or as a result of 'relabelling' under s 123 (3), a patient who was over 21 at the time of the original application can no longer be lawfully detained, even though, paradoxically under s 123 (3) this comes about through the action of a tribunal which considers that the patient should continue to be detained, if the altered label becomes one which would not have been lawful to effect admission and detention under s 26 (2). Since, therefore, the patient is not suffering from one of the major disorders which alone would have justified her admission, I have reached the conclusion (regretfully in this particular case because she clearly ought to remain a patient in her own interest) that there is no longer any lawful authority for her custody, and that the case should be remitted to the tribunal with the opinion of this court as proposed by LORD WIDGERY CJ.

**BRIDGE J:** The question of law asked in the Case Stated by the mental health review tribunal is difficult and important. I find it helpful, before seeking the answer to it, to consider the scheme of the Mental Health Act 1959 in broad outline.

The Act provides for two forms of compulsory restraint on the liberty of the mentally disordered patient, namely, detention in hospital and guardianship. Liability to either form of restraint may result from (i) an application by the patient's nearest relative or a mental welfare officer under Part IV of the Act; (ii) an order of the court under Part V of the Act; or (iii) a direction by the Secretary of State under Part V of the Act. Although the duration of the authority for restraint initially conferred by the application, order or direction may be renewed from time to time as provided by the Act, it is nevertheless the application, order or direction, as the case may be, which remains the essential foundation for that authority throughout its duration: see ss 31 (2), 63 (1) (b) and 72 (3).

The mental disorder of the patient liable to restraint (which must of course be established in support of the application, order or direction, as the case may be, in the manner provided in that case) may take any one of four forms, namely, mental illness, severe subnormality, psychopathic disorder or subnormality. It will be convenient to refer to the first pair of these conditions as 'major disorders' and to the second pair as 'minor disorders'. This dichotomy is certainly of crucial importance to the initial liability to restraint of a person in respect of whom an application, order or direction is to be made. Under Part IV an application may be made in respect of a patient who suffers from a minor disorder only if he is aged under 21, but an application in respect of a patient who suffers from a major disorder may be made at any age: s 26 (2). Under Part V an order or direction may be made in respect of a patient suffering from a minor disorder only if he has been convicted of crime: ss 60 (1) and 72. But in respect of a person suffering from a major disorder an order or direction may be made in the circumstances indicated in ss 60 (2), 73 and 76 in respect of a person who has been accused of crime but not convicted.

All patients who become subject to detention or guardianship under the Act (except those subject to a restriction on discharge under ss 65 or 74, who can be ignored for present purposes) have a right (exercisable by themselves or their nearest relatives) of application to a mental health review tribunal both initially (within prescribed time limits from the making of the application, order or direction) and periodically thereafter so long as their liability to restraint continues. The case of any patient may also be referred to the tribunal at any time by the Minister.

The provisions of the Act immediately relevant are the following. Section 38 (1) provides:

'If in the case of a patient who is for the time being detained in a hospital in pursuance of an application for admission for treatment, or subject to guardianship in pursuance of a guardianship application, it appears to the responsible medical officer that the patient is suffering from a form of mental disorder other than the form or forms specified in the application, he may furnish to the managers of the hospital, or to the guardian, as the case may be, a report to the effect; and where a report is so furnished, the application shall have effect as if that other form of mental disorder were specified therein.'

Section 44 provides:

'(1) . . . a patient who is subject to guardianship by virtue of a guardianship application as a psychopathic or subnormal patient shall cease to be so subject on attaining the age of twenty-five years; and a patient who is liable to be detained by virtue of an application for admission for treatment as a psychopathic or subnormal patient shall cease to be so liable on attaining that age unless the authority for his detention is renewed under the following provisions of this section.'

'(2) Within the period of two months ending on the day on which a patient would cease under this section to be liable to be detained in a hospital in default of the renewal of the authority for his detention, the responsible medical officer shall examine the patient, and if it appears to him that the patient, if released from the hospital upon attaining the age of twenty-five years, would be likely to act in a manner dangerous to other persons or to himself, shall furnish to the managers a report to that effect in the prescribed form; and where a report is duly furnished under this subsection the authority for the detention of the patient shall be thereby renewed, and shall continue in force accordingly after the patient attains the said age . . .'

Section 44 (3) provides a right of application to a mental health review tribunal where a report has been made under sub-s (2).

Section 59 (3) provides:

'For the purposes of this Part of this Act a patient who is liable to be detained or subject to guardianship by virtue of an application for admission for treatment or a guardianship application shall be treated as being so liable or subject as a psychopathic or subnormal patient if the form of disorder specified in the application, or in the application as amended under section thirty-eight of this Act, is psychopathic disorder or subnormality, or psychopathic disorder and subnormality, and no other form of mental disorder.'

Section 123 (1) provides:

'Where application is made to a mental health review tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if they are satisfied—(a) that he is not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; or (b) that it is not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained; or (c) in the case of an application under s 44 (3) . . . that the patient, if released, would not be likely to act in a manner dangerous to other persons or to himself.'

Section 123 (2) contains provisions corresponding to s 123 (1) (a) and (b) in the case of guardianship. Section 123 (3) provides:

'Where application is made to a mental health review tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged, the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the relevant application, order or direction, direct that that application, order or direction be amended by substituting for the form of mental disorder specified therein such other form of mental disorder as appears to the tribunal to be appropriate.'

With regard to the foregoing provisions it is to be observed that s 44 does not apply to cases under Part V of the Act, but the provisions of ss 38 (1) and 59 (3) are applied, *mutatis mutandis*, for the purposes of Part V by s 63 (3) and Sch 3. Section 123 applies equally to both Parts. There are certain cases, arising under Part IV of the Act, where the effect of amending the application authorising the patient's detention or guardianship consequent on a reclassification of the form of his disorder is quite clear. These are as follows. (i) The patient subject either to detention in hospital

or to guardianship in respect of a minor disorder pursuant to an application made when the patient was under 21 is reclassified as suffering from a major disorder before attaining the age of 25. When he attains that age, in consequence of the amendment of the application, the special provisions of s 44 will not apply to him. (ii) A patient subject to guardianship as suffering from a major disorder is reclassified as suffering from a minor disorder. In the light of s 44 the amendment of the application in this case must at least have the effect of limiting the duration of the guardianship to terminate when the patient attains the age of 25, or if the patient is already over that age it must terminate the guardianship immediately.

It is argued for the hospital board that in the instant case of a patient over 40 years of age reclassification and consequential amendment of the application to substitute a minor for a major disorder have no effect on the application as a continuing authority for her detention in hospital. However sensible this result might be in the particular circumstances of this case, I can find no basis for it in the provisions of the Act. It is true that a person over 25 may be liable to detention in hospital as suffering from a minor disorder if he was initially the subject of an application when under 21 and at the age of 25 the authority to detain him has been renewed under s 44. It is said that there is an anomaly if other psychopathic patients likely to be a danger to themselves or others must be released. But if this be an anomaly it seems to arise directly from the deliberately limited scope of Part IV as applied to persons over 21 suffering from minor disorders.

Much greater anomalies, in my judgment, are involved in accepting the argument for the hospital board. Thus a patient detained, as in the instant case, on the basis of an erroneous diagnosis who could not have been lawfully detained at all if correctly diagnosed at the outset would have no redress under the Act, if the error was only discovered and corrected at a later stage. Similarly, a patient over 25 suffering only from a minor disorder could become liable to indefinite detention without ever satisfying the special test prescribed by s 44 ('likely to act in a manner dangerous to other persons or to himself') which alone renders the patient suffering from a minor disorder, who has been properly detained when under 21, liable to continued detention beyond 25.

Earlier in this judgment I have made reference to the provisions of Part V of the Act because it is apparent that a parallel question to that which we have to determine can arise on amendment of an order or direction under that Part consequent on reclassification of the patient's disorder either under s 123 (3) or under s 38 (1) as applied to Part V cases. I am very conscious that these provisions were not canvassed in argument before us, but it seemed to me right to consider them, if only to see if they cast any doubt on the foregoing conclusions reached on consideration of Part IV. I find on the contrary that they appear to provide confirmation of those conclusions. Anything said as to Part V is, of course, entirely obiter and should be treated with due reserve. What appears to me to emerge, however, is that, since s 44 has no application to Part V orders and directions, the only purpose of applying ss 38 (1) and 59 (3) to Part V cases, as also of providing for amendment of orders and directions under s 123 (3), must be to ensure that an unconvicted person liable to restraint pursuant to an order or direction based on a major disorder will cease to be so liable (so far as that order or direction is concerned) if reclassified as suffering only from a minor disorder.

The problem of construction in this case, which looks so formidable at first blush, arises from the absence of any express provision in ss 38 (1) or 123 (3) indicating that amendment may lead to immediate discharge. The explanation of that drafting peculiarity must lie, I think, in the consideration that reclassification and amendment, as indicated earlier in this judgment, can have a variety of different consequences in

different circumstances, none of which are spelt out in these sections but must be sought elsewhere in the Act. The draftsman may have sacrificed clarity to economy of language, but if one looks at the Act as a whole, there can, as it seems to me, be no real doubt of his legislative intent.

*Answer to question accordingly.*

Solicitors: Treasury Solicitor; Wannop & Falconer, Chichester; C H Brown.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(MELFORD STEVENSON, MILMO AND BROWNE, JJ)

21st July 1972

CLAYTON v ALBERTSEN

*Shipping—Pilot—Compulsory pilotage—Ship carrying passengers—'Passengers'—Lorries driven on and off ship by lorry drivers—Drivers on ship during voyage—No fares paid for drivers—Meals and cabins provided free of charge—No work or duty on part of drivers in connection with ship—Pilotage Act, 1913, s 11 (1).*

Informations were preferred against the respondent, the master of a motor vessel, alleging that he had failed to be under pilotage after a licensed pilot had offered to take charge of the ship in circumstances in which pilotage was compulsory in the Tyne pilotage district for the purpose of entering and making use of the port of Tyne when the ship was carrying passengers, contrary to s 11 of the Pilotage Act, 1913. The district was not one in which pilotage was compulsory except when the ship was carrying passengers. The motor vessel was a 'roll-on, roll-off' ship plying between Newcastle and Denmark. Lorries with their trucks were driven straight on the ship by the lorry drivers who remained on board and drove them off the ship at the port of destination. At the date of the alleged offence the vessel was carrying four lorry drivers. They paid no fare and were provided with meals and cabin accommodation free of charge. They did not perform any work or duty in connection with the ship, but carried out routine maintenance of their lorries while on board. They had the same food as the crew, but ate it in their own mess, and their cabin accommodation was separate from that of the crew. If the ship carried ordinary fare-paying passengers, as happened on rare occasions, those passengers occupied their own cabins and ate with the master and officers. No allowance was made in the calculation of freight for any payment towards the maintenance or fare of any of the drivers. The justices held that the lorry drivers were not 'passengers' within the meaning of s 11 (1) of the Act of 1913 and dismissed the informations. On appeal by the prosecutor,

**HELD:** since the drivers were being carried on the vessel for the sole purpose of being taken from the point at which they had driven their lorries on board to the point at which they would drive them off, they were 'passengers' within the meaning of s 11 (1); the fact that they did not pay fares and that no consideration was paid to the shipowners for their carriage was immaterial; the appeal must, therefore, be allowed and the case remitted to the justices with a direction to convict.

**CASE STATED** by Tynemouth justices.

On 15th September 1971 informations were preferred by the appellant, Robert John Clayton, against the respondent, Elvin Herman Albertsen charging that he on 9th May 1971 and 11th July 1971, then being the master of the m/v Somerset, failed to be under pilotage, after a licensed pilot of the district had offered to take charge of



the ship, in circumstances in which pilotage was compulsory in the Tyne pilotage district for the purpose of entering and making use of the port of Tyne in that the ship was carrying passengers, contrary to s 11 of the Pilotage Act 1913. There were further charges that he failed to display a pilot signal, contrary to s 43 of the Act.

It was contended by counsel for the appellant that on each occasion the Somerset was carrying passengers for the purpose of s 11 (1) of the Pilotage Act 1913, and therefore ought to have been under the pilotage of a licensed pilot of the district and ought also, in accordance with s 43 (1), to have displayed a pilot signal and kept the signal displayed until a licensed pilot came on board. Counsel for the appellant submitted that the facts proved in evidence brought the lorry drivers within the description 'passengers' for the purpose of s 11 (1). Counsel for the respondent submitted that none of the lorry drivers was at any time a passenger for the purposes of s 11 (1), but that they were in a special category of person carried on board ship who was neither a member of the crew nor a passenger but (to use a word referred to in the authorities) a 'nondescript', and that, accordingly, there had been no offence committed under either s 11 (1) or s 43 (f). The justices were of the opinion that the lorry drivers were not passengers within the meaning of the Act and dismissed each of the five charges. The prosecutor appealed.

*B C Sheen QC and R A Percy for the appellant.*

*R F Stone QC and Geoffrey Brice for the respondent.*

**MELFORD STEVENSON J:** This is an appeal by way of Case Stated by the justices for the county borough of Tynemouth in respect of their adjudication as a magistrates' court at North Shields whereby they dismissed five summonses brought under the Pilotage Act, 1913, alleging that the respondent to this appeal, being the master of a motor vessel, the Somerset, failed to be under pilotage after a licensed pilot of the district had offered to take charge of the ship in circumstances in which pilotage was compulsory in the Tyne pilotage district for the purpose of entering and making use of the port of Tyne in that the ship was carrying passengers, contrary to s 11 of the Pilotage Act 1913.

Section 11 (1) provides, so far as is material for the purposes of this case:

'Every ship . . . while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be . . . (a) under the pilotage of a licensed pilot of the district . . .'

There follows a provision which does not arise in this case. Then s 11 (2) goes on to provide for the offence which we have to consider in relation to the summonses laid under this section:

'If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence [to pay the penalty that is there provided for].'

There were also summonses under s 43 of the same Act, which imposes on the master of a ship within the class in which it is admitted the motor vessel Somerset falls that when navigating in the circumstances in which pilotage is compulsory under this Act, he must display a pilot's signal and keep the signal displayed until a

licensed pilot comes aboard. Those two sections were the basis of each of the five charges which related to different dates (I need not go into the details) on which the justices had to adjudicate.

The Case states that it is a test case, and that is one reason why there was no dispute between the parties as to any of the material facts. The justices find that on each of the occasions to which the summonses referred the respondent was master of the vessel; that on each of the occasions the vessel was in fact navigating for the purpose of entering, leaving or making use of the port of the River Tyne; that on each occasion a Tyne pilot licensed by the Tyne pilotage authority offered to take charge of the Somerset, and each time the offer was refused; and that on each of those occasions the ship was not displaying a pilotage signal, and was within the Tyne pilotage district as defined in an order to which reference is made.

The district is not a pilotage district in which pilotage is compulsory, but the provisions of s 11 of the Pilotage Act, 1913, which I have already read, require that every ship carrying passengers navigating in such a pilotage district shall be under the pilotage of a licensed pilot. The only issue between the parties was whether certain lorry drivers who were carried on board the Somerset were passengers or not. No question arose about the provision in s 11 (1) (b) relating to a pilotage certificate because it was agreed that the master did not possess one.

The Somerset is what is known as a 'roll-on, roll-off' ship, and that means that lorries are driven with their trailers straight on the ship and at their port of destination are driven off the ship. There is a finding that in relation to two of the charges, the Somerset was carrying four Danish lorry drivers; in relation to two other charges it was carrying five Danish lorry drivers and one British lorry driver, and on the occasion to which the last charge referred the ship took on four lorry drivers of Danish and British nationality, and on each occasion each lorry driver had a lorry which he was employed to drive. The circumstances in which the drivers were carried on the ship were for all practical purposes the same on each occasion.

It is an important fact that no fares were paid in respect of any of the drivers; it is also found that the drivers were provided with meals free of charge whilst on the ship. They did not perform any work or duty in connection with the ship as such, but they occupied themselves, if at all, with routine maintenance of their lorries while on board. As I have already said, they drove their lorries on and off the ship for the purpose of loading and discharge. Then followed another, as I think, very relevant fact. The drivers were accommodated in one cabin; the crew on the other hand each had cabins of their own. If the Somerset carried passengers in the ordinary sense of fare paying passengers, which happened on rare occasions, those passengers occupied their own cabin, and ate with the master and officers, but in the case of the drivers they ate in their own mess, although they had the same food as the crew.

All that I have so far quoted from the Case I think demonstrates that the system described in all those paragraphs was a system regularly observed and followed for the voyages on which this vessel engaged. It is found that there was no allowance made in the calculation of freight for any payment towards the maintenance or fare of any of the lorry drivers. The contracts of freight under which the lorries were carried were not, as I understand it, before the justices, and no reference to those contracts is made in the Case Stated, from which I infer that nothing in the contracts in question could have assisted me in forming a view on the vital question in this case, whether the lorry drivers fell within the category of passengers which s 11 and the other similar provisions of the Act contemplate.

The Case does say that if a lorry was carried on the ship without a driver, the rate of freight would be precisely the same as if it were accompanied by a driver. In fact the freight was based on the square footage occupied by each vehicle or its trailer

or both; some difference in freight occurs according to whether the lorry is loaded or unloaded. That is a finding of fact that as far as I can see does not help either way in approaching the question before the court, nor indeed do the photographs which were exhibited to the Case, although the court was invited to draw inferences from the appearance of the vessel as it appears in the second of those photographs as to the number of lorries and therefore the number of drivers that were likely to be accommodated. I draw no such inference because I do not think it would be justified on the facts comprised in the Stated Case. I mention it because there is a statutory provision dealing with the carrying of 12 passengers or more, which might be relevant if we knew what in fact was the capacity of this ship as regards the numbers of drivers carried.

Counsel for the appellant contended that on each of the occasions charged the lorry drivers were within the description of passengers, and so the Somerset was carrying passengers for the purpose of s 11 (1), and ought to have been under the pilotage of a licensed pilot of the district and to have displayed a pilot's signal in accordance with s 43. That is the matter which this court has to consider. The justices determined that the lorry drivers were not passengers on any of the occasions to which the summonses before them referred.

One starts I think usefully with a reference to the dictionary definition of 'passengers' to which our attention has been drawn in the Shorter Oxford English Dictionary in which as the second definition of 'passenger' there are these words:

'One who travels in some vessel or vehicle, especially on board ship or in a ferry or passage boat.'

and then the dictionary goes on to refer to any public conveyance entered by fare or contract. One is tempted to approach, and indeed conclude, this case with the answer, based on that definition, that by applying it it is not possible to avoid the conclusion that these drivers were passengers. But our attention has been drawn to s 267 of the Merchant Shipping Act 1894, a section which appears in Part III of the Act, which is dealing with passenger and emigrant ships, and contains the following definition:

'For the purpose of this Part of this Act—The expression "passenger" shall include any person carried in a ship other than the master and crew, and the owner, his family and servants'.

There then follows a definition of 'passenger steamer' which I do not think has any application to the present case, and I emphasise that this definition is expressly applied only to this part of this Act dealing with passenger and emigrant ships, which manifestly the Somerset was not. Indeed, one enters on the maze of legislation connected with merchant shipping with some apprehension about losing one's sense of direction. Reference was also made to s 26 of the Merchant Shipping (Safety Convention) Act 1949, which again refers to Part III of the principal Act, and also to the Merchant Shipping (Safety and Load Line Conventions) Act 1932. Section 26 of the 1949 Act provides:

'the expression "passenger" means any person carried in a ship, except—  
(a) a person employed or engaged in any capacity on board the ship on the business of the ship'.

Then there follow two further sub-paragraphs:

'(b) a person on board the ship either in pursuance of the obligation laid upon the master to carry shipwrecked, distressed or other persons, or by reason of

any circumstance that neither the master nor the owner nor the charterer (if any) could have prevented or forestalled, and (c) a child under one year of age.'

I refer to those definitions because emphasis has been placed on them in the course of an argument designed to persuade the court that these drivers were not passengers. It is necessary also to refer to s 37 (3) of the Merchant Shipping (Safety Convention) Act 1949 because that, like other similar provisions in earlier statutes dealing with merchant shipping, provides:

'Except so far as the context otherwise requires, this Act shall be construed as one with the Merchant Shipping Acts, 1894 to 1948, and, without prejudice to the generality of this provision, references in those Acts to the Merchant Shipping Acts shall be construed as including references to this Act.'

I may observe there is an earlier provision which makes it quite clear that the 1913 Act with which we are concerned in this case is incorporated in the same code and required to be construed as part of it, that is to say s 62 of the Pilotage Act, 1913.

Argument has been devoted to the fact that no fare in any sense was paid or payable in respect of these drivers. In the ordinary course of events, if one is enquiring whether a particular person falls within the class of passenger as popularly understood, the fact that he is being carried without the payment of a fare might be a most relevant fact. On that our attention was drawn to a judgment of HEWSON J in a case called *The Alletta and the England* (1). The very long report deals with a number of matters relevant to negligence, as I understand it, and towards the end of the judgment references are made to the word 'passenger' in its meaning in Part III of the Merchant Shipping Act 1894, and a number of authorities are referred to, in particular *The Clymene* (2), where GORELL BARNES J said: "There is no definition of the word "passenger" in the Act except for the special purposes of Part III..." Later GORELL BARNES went on to say:

'In my judgment, according to the ordinary acceptance of the term which involves the principle of an agreement to carry and a payment of fare, these distressed seamen, whom the shipowner was compelled to take on board, and for whom he was paid what practically amounts to little more than maintenance, were not passengers within the meaning of s 625 [of the Merchant Shipping Act 1894].'

HEWSON J went on to say:

'The facts in these cases do not embrace such facts as are available in the present case; but they indicate to me that one of the circumstances to be considered in arriving at whether or not a person is a passenger is whether a fare is paid or not, though that is not necessarily the conclusion of the matter.'

With that I find myself in complete agreement.

He then went on to deal with the position of the master's wife:

'As the wife in this case signed articles she was bound by such articles to obey the master's orders. This can hardly be the case if she paid a fare. It seems to me that who is, or who is not, a passenger is very much a matter of first impression and, gathering such assistance as I may from the cases I have cited, in my view, the wife and the baby in arms should be regarded as being in some sort of special

(1) [1965] 2 Lloyd's Rep 479, *aff'd* CA [1966] 1 Lloyd's Rep 573.

(2) [1897] P 295.

category, neither passengers nor working members of the crew with any duties assigned to them.

I need not embark on the question whether the drivers in this case fall into the kind of special class which HAWSON J is there contemplating. I think that it is not only a fair but an inevitable inference from the language of this Case and the facts which the justices have set out that there was a practice, and I choose that word carefully, of carrying these drivers for the purpose of loading and unloading their lorries at either end of the voyage. It is a fair inference that there was an established practice from the facts that a cabin was provided for them, that they were given opportunities to mess together, and were provided with food, albeit the same, or similar, food as that which the crew had, and it is I think a fair inference from the Case that the drivers were expected to be and were in fact accommodated for the purpose of driving the lorries on and off, and were permitted to be on the ship for that purpose, although there is no evidence that any consideration passed to the shipowners from the owners of the lorries for the provision of these facilities.

Those matters in my view bring these drivers quite clearly within the concept of 'passenger', and that leads to the conclusion that they were persons who imposed on the master, by reason of their presence, the obligations contained in s 11 and the other relevant sections of the Pilotage Act 1913 to which I referred. I would therefore allow this appeal and remit the case to the justices with a direction to convict.

**MILMO J:** I agree. I can find nothing in the legislation nor in the decided authorities to which we have been referred, which supports the contention that as a matter of law these drivers were other than passengers within the meaning of s 11 of the Pilotage Act 1913. Indeed, as a matter of law I am of opinion that they clearly were passengers. We have not got the contract of carriage under which the owners of these lorries had their lorries and cargoes carried on 'roll on, roll off' terms which are referred to in the Case Stated, but, in my view, on the facts as found in the Case it is abundantly clear what the practice was between the owners of the lorries and the owner of this ship which plied between Newcastle and Denmark, taking aboard loaded lorries which were driven on by their drivers on behalf of the owners, and at the port of destination were driven off by the drivers on behalf of the owners, and then taken to their inland destination where they discharged their loads. It would seem, however, that there were two practices in operation. In the case with which we are immediately concerned the driver of the lorry drove his lorry on to the vessel and accompanied the lorry throughout the voyage. Another way in which it emerges that these contracts of freight were implemented was that the lorry would be driven on to the vessel at the port of embarkation, and then would be met by another driver on behalf of the owner who would drive it off at the port of disembarkation. What does appear perfectly plainly is that there was provision made by the ship-owners for the carriage of drivers whom the lorry owners wished to accompany the lorry throughout the voyage. They were provided with cabin accommodation, they were provided with a separate mess, and they were provided with food. It seems to me that it matters not whether the food supplied was the same food as the food which was provided for the crew. They definitely were not members of the crew, and they took no part whatsoever in the navigation of the vessel itself and did nothing in connection with the vessel itself. They were being carried on the vessel for one purpose and for one purpose only, namely, to take them from the point where they had driven their lorries on to the vessel, to the point at which they were going to drive them off. In these circumstances I find the conclusion inescapable that these people were passengers and were nothing other than passengers.



Accordingly I would remit this Case to the justices with a direction to convict on each information.

**BROWNE J:** I agree, and for the reasons given by MELFORD STEPHENSON J. and MILMO J. For the purposes of the Pilotage Act 1913 only three possible categories have been suggested into which people carried in ships can fall. The two main categories are crew and passengers, but there is a third category of people described in some of the authorities as 'nondescript'. So far as the authorities cited to us go, these 'nondescript' people seem to be either shipwrecked people picked up in distress, or relations or friends of the master who have sometimes been carried without the owners' authority and sometimes I think with it. I find it impossible to find any common factor in these nondescript people which would enable one to identify a clearly defined class. In one of the passages from the judgment of Hewson J which MELFORD STEPHENSON J has already read, he says that the question who is or who is not a passenger is very much a matter of first impression. Making this approach, I have no doubt what my impression is. These lorry drivers were clearly not crew. I cannot find any analogy between them and any of the people who have been held in the earlier authorities to fall into the 'nondescript' class. My own impression is quite clear that they are passengers, and I do not repeat the reasons which have already been given by MELFORD STEPHENSON J and MILMO J. I would only add this. I do not place any reliance on the statutory definitions for the special purposes of Part II of the Merchant Shipping Act 1894, although I appreciate the force of counsel for the appellant's argument based on the absurdity of the results which would follow if we gave a different interpretation to the word 'passenger' in this case. For these reasons I agree with the order which has been proposed.

*Case remitted with direction to convict.*

Solicitors: *Maples, Teesdale & Co, for Botterell, Roche & Temperley, Newcastle; Bentleys, Stokes & Lowless.*

Reported by T R Fitzwalter Butler, Esq. Barrister.

## COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, MR, PHILLIMORE AND CAIRNS, LJJJ)

20th, 21st June 1972

## PERILLY v TOWER HAMLETS BOROUGH COUNCIL

*Street Trading—Licence—Application—Determination on merits—Need to state street or streets in which trading proposed—London County Council (General Powers) Act, 1947, s 21 (1) as substituted by London County Council (General Powers) Act, 1962, s 33; s 21 (2).*

By s 21 (1) of the London County Council (General Powers) Act, 1947, as substituted by s 33 of the London County Council (General Powers) Act 1962: 'A person requiring an annual licence [for street trading] or the renewal of an annual licence shall make application in writing to the borough council and shall in such application state—(a) his full name and address; (b) the nature of the articles or things which he intends to sell or expose or offer for sale under the authority of the licence if granted or renewed; (c) the place, if any, at which the articles or things will be stored by him at all times while they are not exposed or offered for sale; (d) the street or streets in which he intends so to sell or expose or offer for sale and the nature and type of any receptacle which he intends to use in connection with any sale or exposure or offer for sale; and may specify the name and address of a relative of his who is associated with, or dependent upon, the business of street trading in respect of which the application is made and to whom he desires the licence to be granted in the event of his death.'

By s 21 (2) of the Act of 1947: 'As soon as reasonably practicable after the receipt of an application under this section the borough council shall . . . grant or renew an annual licence to the applicant'.

Section 21 (2) does not impose any rule that a council must decide applications by a rigid rule of 'first come first served' so that an application would be granted even though a subsequent applicant possessed superior merits. When the sub-section says that a licence shall be granted 'as soon as reasonably practicable after the receipt of an application' it only means that the relevant committee of the council shall meet to consider the application as soon as reasonably practical: *Stepney Borough Council v Schneider* (1960), (124 JP 401) overruled.

Under the provision in s 21 (1) that the applicant must state 'the street or streets in which he intends to sell . . .' the applicant must state with particularity and as a matter of strictness the actual street or streets in which he proposes to trade.

APPEAL by Monty Perilly against a decision of the Divisional Court setting aside a decision of justices for the Thames Petty Sessional Division, by which they allowed the appellant's appeal against a decision of the respondents, the Tower Hamlets Borough Council, refusing to grant him a licence to trade at pitch 30, Wentworth Street, London E1

C W G Ross-Munro QC and Gerald Levy for the appellant.

Nicholas Bridges-Adams for the respondents.

**LORD DENNING MR:** This case raises the question: What is the correct way of allocating pitches for street traders? Mrs Perilly, who traded under the name of Mrs Celia Franks, had a pitch, no 30, Wentworth Street, E1. Ever since 1942 she had had a licence for that pitch for the sale of hosiery and haberdashery on Sundays only. Year by year she applied for the licence. Year by year she was granted it. Her son, the appellant, helped her there. On 17th November 1970 she died. She was buried the next day, 18th November. On the morrow, 19th November, her son applied for pitch 30, Wentworth Street. You would have thought he had a good claim to it. But on 7th December the committee of the respondent council met and 'with

regret' refused Mr Perilly's application, although he and his mother and the family had had that pitch for 30 years. The reason why the committee refused it was that a gentleman called Mr Benny King had got in first. He had gone to the council on 18th November—the day of the funeral—and had put in an application. In it he said that he wanted to sell gramophone records. In answer to the question in which street he wanted to trade, he put 'Any vacant position Petticoat Lane E.1.'

On 7th December the committee met. They had before them Mr King's application, which was stamped by the clerks 'Received 18th November 1970'. Mr Perilly's was stamped 'Received 19th November 1970'. The committee felt that they were bound to apply a rule 'first come, first served'. So they gave the licence to Mr King. Not only did they give him a licence, but (although he had applied for 'any vacant position') they gave him pitch 30, Wentworth Street, which was the best available pitch.

Mr Perilly appealed to the justices. The justices were told that in *Stepney Borough Council v Schneider* (1) it was said that there was a fixed rule in these cases of 'first come, first served'. The justices could not get round that decision as it still stood. But they did justice in another way. They held that Mr King's application was not in order, because he had only applied for 'Any vacant position Petticoat Lane', whereas the London County Council (General Powers) Act 1947, as they read it, made it necessary for him to state 'the street or streets' in which he intended to sell. The justices thought that Mr King had not satisfied that requirement, because on the evidence there is no such street as 'Petticoat Lane'. There may have been a lane of that name in olden times up to about the year 1830. But then the name was changed, and it was called Middlesex Street. It has been Middlesex Street ever since. Nowadays ten streets in that neighbourhood together are often called 'Petticoat Lane'. The Petticoat Lane market is the whole market area comprising these ten streets: Middlesex Street, Wentworth Street, Toynbee Street, Goulston Street, Cobb Street, New Coulston Street, Leyden Street, Bell Lane, Old Castle Street and Strype Street.

The justices held that, as Mr King had failed to name a particular street or streets, his application was void, but they stated a Case. The Divisional Court held that the justices were wrong, and that Mr King's application for 'Petticoat Lane' was quite sufficient. So Mr Perilly did not get the licence. It went to Mr King. The Divisional Court refused Mr Perilly leave to appeal, but we gave him leave, and he now comes before us.

The first point is whether the committee of the council are bound to decide these applications by rigid rule of 'first come, first served'. This rule is derived from *Stepney Borough Council v Schneider* in 1960. In that case it was held that the material date is the date when the application is received, and that the committee must consider the applicants in the order in which each application is received and award the licence, accordingly. In *Schneider's* case the Divisional Court thought that the rule 'first come, first served' was imposed by s 21 (2) of the London County Council (General Powers) Act 1947. It says this:

'As soon as reasonably practicable after the receipt of an application under this section the borough council shall . . . grant or renew an annual licence to the applicant.'

I do not think that subsection imposes any such rule. When the subsection says that the 'borough council shall . . . grant' a licence, it means the borough council acting through a properly authorised committee. When the subsection says that it shall be done 'as soon as reasonably practicable', it only means that the committee

(1) (1960), 124 JP 401.

shall meet to consider the application as soon as reasonably practicable. If there are several applications, they should meet to consider them all as soon as reasonably practicable after they are received. I can see nothing in that section which says that when there are several applications, they have got to be decided according to the date when they are received at the town hall. Suppose that half a dozen applications are received on the same day by the same post, how is the committee to decide? If the rule is 'first come, first served', I would ask: Has the committee to enquire which of the applications was put first into the letter-box, or taken out first, or which of the envelopes was opened first, or which of the applications is on the top of the pile coming before the committee? That cannot be the right way of deciding. There must, in such a case, be a discretion in the committee to decide between the applications according to the merits. Suppose next that several applications are received, not all on one day, but on one day after another before the committee meets. The clerks in the office put a date stamp on each application as it is received. Is the committee to decide 'first come, first served' according to the date stamp put on by the clerk? If that were so, the decision would be made by the clerk, and not by the committee. That cannot be right. But it is the way in which it has been done since *Schneider's* case. There is no rhyme or reason in it. There is certainly no justice in such a rule.

Look at the consequences. The justices stated:

'There was a practice in the market of buying and selling pitches. They changed hands at between £500 to £1,000. A man would go into the Public Control Department to surrender a licence and a minute later by arrangement another person who had paid the first man would put in an application for a licence for the pitch just surrendered.'

That is a pretty state of affairs! It is obvious that the rule gives rise to great injustice. It did so in the present case. It also did so in *Lewisham Borough Council v Porritt* (1). We have a transcript of the judgment. There again a family pitch was lost. The father died on 15th May 1961. A stranger applied on the next day—16th May. The widow and son applied on 25th May. The stranger got the licence. MacKENNA J, 'with very great regret', felt they must follow *Schneider's* case.

Some mitigation of *Schneider's* case was afforded by Parliament in 1962. The 1947 Act was amended by the London County Council (General Powers) Act 1962 so as to enable the holder of a licence to designate a relative to succeed after his death, but, for that purpose, he had to fill in a space on the back of the form. Mr Perilly's mother might have done so in this case, but, like many other street traders, she did not look at the back of the form. At any rate, she did not fill it in. If she had, no doubt she would have filled it in in favour of her son. Is he to lose the pitch on that account? I think not. I think that *Schneider's* case was wrongly decided. It should be overruled. There is no such rule in the 1947 Act as 'first come, first served'. No doubt, the committee in exercising their discretion can look at the dates of the applications. They have to see what spaces are available at those dates. They can say to themselves: 'other things being equal, first come first served'. But, when other things are not equal, it seems to me plain that they ought to consider the merits of each case. When the merits are so strong, as they are in this case, in favour of a son following on the family pitch after all these years, they ought to give effect to those merits and grant the pitch to him. They should not grant it to an interloper who jumped in on the day of the mother's funeral.

I would also mention one more thing about *Schneider's* case. It altered the previous practice. We have been referred to a case which was decided three years before

(1) (30th January 1962) unrep.

*Schneider's* case. It was *Greenbaum v Gritzman* (1). It shows that at that time the borough councils in London were deciding these applications by exercising a wise discretion, according to the merits. *Schneider's* case altered that practice. It was wrong to do so. The previous practice should be restored.

The second point is of practical importance in the day to day administration. The justices thought that the application of Mr King, which said 'any vacant position Petticoat Lane', did not comply with the 1947 Act. There are various provisions about the designation of streets. Section 16 requires the council to 'designate any street' in which street trading can be carried out. Section 21 (1) provides:

'A person requiring an annual licence . . . shall make application in writing to the borough council and shall in such application state . . . the street or streets in which he intends so to sell . . .'

Section 21 (5) provides that the licence shall be in the prescribed form and may prescribe '(a) the street or streets in which and the position or place in any such street at which' the licence is to operate.

The question in this case is whether 'Petticoat Lane' is a sufficient statement of the 'street or streets' in the application. The justices held that it was not. They said:

'On the evidence and using our own local knowledge we found that the term "Petticoat Lane" did not mean Middlesex Street alone but referred to the whole market area.'

They held that the application was insufficient. The Divisional Court took the other view. They thought that 'Petticoat Lane' was simply shorthand for the ten streets, and it was just the same as if the applicant had set out the ten streets.

I must say that I agree with the justices. It seems to me that the Act requires the particular street, or streets, to be named in the application, just as it does when the licence itself is granted. In this very case, the licence, when issued, says 'No. 30 Wentworth Street', and I think the application should be just as specific.

It appears that in the past the council considered an application for 'Petticoat Lane' to be sufficient. If licences have been granted on such applications they will no doubt be valid, but, it seems to me, that as a matter of strictness, the street or streets ought to be specified, and I hope that it will be done in the future.

At any rate, I would not disturb the decision of the justices, who exercised their own local knowledge, and I think they did not err in law. I would, therefore, allow the appeal. Mr Perilly should be granted a licence for pitch 30, Wentworth Street.

**PHILLIMORE LJ:** I entirely agree on both points, and would only add a few words of my own. The justices came to the conclusion that *Schneider's* case (2) was binding so that, if they had to allocate this pitch between the applicants, it was a question of first come, first served. It is common ground—both counsel agree—that the result was unjust; that if justice was to be done in this case, then it was very desirable that there should be a discretion in the committee, that they should be able to give full effect to the facts, the past association of Mr Perilly and his mother with this pitch over so many years, and to put that heavily in the scale, more especially as Mr King had only applied for 'any vacant position in Petticoat Lane'. He had not asked for this pitch; he had not asked for this particular street. The fact of the matter is that strict rules generally tend to cause injustice and the strict rule laid down in *Schneider's* case clearly caused injustice here. As LORD DENNING has pointed out, obviously before *Schneider's* case was decided, discretion was exercised as

(1) (29th January 1957) unrep.

(2) (1960), 124 JP 401.



between applications. That is quite clear from *Greenbaum v Gritzman* (1), to which LORD DENNING has referred. If these applications had been dealt with in that way, the injustice which has resulted would not have resulted. I agree that there is nothing in the words of the statute to justify this rule of first come, first served, and, of course, it is administratively impossible to apply it. If a mass of applications are received by the same post, which comes first? Is it the one that is opened by the clerk first, and, if so, why? It then becomes a pure question of a lottery.

Turning to the second question, it seems to me that the whole scheme of this legislation requires that the applicant should specify the street. The provisions of s 21 (1) are mandatory:

'A person requiring an annual licence or the renewal of an annual licence shall make application in writing to the borough council and shall in such application state . . . (d) the street or streets in which he intends so to sell . . .'

The very form makes provision for the applicant stating the actual street and indeed where in the street it is desired to sell, and there are provisions for naming the number of the pitch and for stating outside what premises that pitch stands. It is impossible to be sure that Mr King, when he wrote 'Any vacant position Petticoat Lane E.I.', was in fact applying for any vacant position in any one of the ten streets which some people refer to collectively as 'Petticoat Lane', or whether he was intending to apply for a pitch in Middlesex Street which other people regard as being the proper appellation for Petticoat Lane. This was a mandatory provision. He did not comply with it. I think the justices were perfectly right in saying that this application was void. It will be realised, of course, that in these ten streets there are daily markets in some, Sunday markets only in others. In the result, an application made for 'any vacant position in Petticoat Lane' is extremely vague as a practical matter. If this is to be said to be sufficient, it leaves it to the clerks to the council to decide first of all whether it means any of the ten streets or merely Middlesex Street, and, if it means any of the streets, is any preference to be given if there are vacant pitches in more than one? Here on this vague application they allotted this particular pitch in Wentworth Street which happened to be in their view—although it does not follow that it would be so in anybody else's view—the most desirable vacant pitch in the whole of the market area. I think this application was void; it did not comply with the requirements of the Act. I therefore agree that this appeal should be allowed.

**CAIRNS LJ:** I agree that this appeal should be allowed on the ground that the 1947 Act does not require an application which is first in time to be given precedence over a later one; and I accordingly agree that the case of *Stepney Borough Council v Schneider* (2) was wrongly decided.

On the other point I regret that I cannot agree with the view which LORD DENNING and PHILLIMORE LJ have formed. I consider that the Divisional Court were right in their conclusion that in Mr King's application it was sufficient to describe the street to which his application related compendiously as 'Petticoat Lane', and I base that opinion on the findings of fact of the justices. There is a section in the Case Stated which is headed 'Opinion', and which in fact is partly a recitation of some of the evidence, partly findings of fact, and partly determinations in law. So far as the relevant matter is concerned, the evidence which is recorded is:

'(a) The respondent [Mr Perilly] said that he considered Petticoat Lane to be another term for Middlesex Street but conceded that to some people the whole area was known as Petticoat Lane. (b) Mr King said that the description

(1) (29th January 1957) unrep.

(2) (1960), 124 JP 401.

he gave was intended to indicate that he would take any vacant pitch in the whole market area. (c) The deputy chief officer of the Public Control Department said that his department regarded the term "Petticoat Lane" as meaning the whole of the ten designated streets in the area and the committee of the council took the same view. He had lived in the district for twenty-seven years and it was well known that the whole market area (meaning the aforesaid ten designated streets) was known as Petticoat Lane. He agreed that there was no actual Petticoat Lane and that "Petticoat Lane" was not a designated street or streets.'

Then comes the finding of fact by the justices:

'(d) On the evidence and using our own local knowledge we found that the term "Petticoat Lane" did not mean Middlesex Street alone but referred to the whole market area.'

And from what had gone before it was clear that in making that finding as to the whole market area, they were saying that Petticoat Lane meant the ten designated streets. So far this section of the case is dealing with facts. Now we come to the decision in law on the matter, where the justices say:

'(e) We considered, however, that in failing to name a particular street or streets Mr King had not complied with the mandatory requirements of the appropriate sections and that his application was void.'

The matter turns on what are the mandatory requirements of s 21 (1) (d). The justices formed the view, which is the one which LORD DENNING and PHILLIMORE LJ have accepted, that that paragraph means that the street or streets must be named individually. For my part, I can see no necessity for that. It is evident that it was open to Mr King to set out the names of the ten streets in any of which he was willing to carry on his trading. I cannot accept that any guidance as to the interpretation of this paragraph is to be found in s 21 (5) (a), where the authority, in granting the licence, have to specify not only the street or streets, but the position or place in any such street in which the licensee may sell. I can see no difficulty in an application being widely framed, although when the licence is granted, the authority naturally must be more specific in stating in respect of what particular place the licence is given. We were informed by counsel on behalf of the respondents that in practice applications worded in the way this one was worded have frequently been received and have caused no difficulty. I am bound to say it appears to me unfortunate that in future, in view of the judgment of this court, any application in that form will have to be treated as an invalid application, and the applicant will have to take it back and set out the names of all the streets.

For those reasons I am unable to agree with LORD DENNING and PHILLIMORE LJ on the second point in this case, but on the first one I am in complete agreement, and therefore agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: Tringhams; Edward Fail, Bradshaw & Waterson.

Reported by G F L Bridgman, Esq. Barrister.

## CHANCERY DIVISION

(GOULDING, J)

4th July, 1972

## THORNE RURAL DISTRICT COUNCIL v BUNTING AND ANOTHER

*Contempt of Court—Undertaking to court—Effectiveness dependent on consent of third parties—Failure to give consents—Commons Registration Act, 1965, s 1, s 5.*

The three defendants, WB, JB, and NB, registered certain land under the Commons Registration Act, 1965. Later, the rural district council began proceedings claiming declarations that the defendants were not entitled to any common rights over the land and that none of the land was registrable by them as common land. JB and NB undertook to procure the removal or amendment of the registrations made by them; WB undertook that, having taken all steps to remove all land of a certain area from the registration effected by him, he would not withdraw such steps and would assist the registrar to effect the removal. The registrar then stated that he required the consent of JB and NB before he could give effect to WB's withdrawal. The council sought to commit JB and NB for contempt of court in that they had deliberately failed to give the necessary consents.

**Held:** the mere fact that WB's undertaking was of no value unless JB and NB gave their consent could not be regarded as a defiance of the court amounting to contempt; JB and NB had never undertaken to consent nor had any order been made against them compelling them to do so; there was no evidence that either was a nominee or servant of WB, and it was not suggested that WB was procuring their inaction; accordingly, the application for committal for contempt must fail.

**MOTION** by Thorne Rural District Council for an order that William Bunting, Joyce Bunting, and Nicholas Bunting, be committed to prison for contempt of court.

*Ian McCulloch for the rural district council.*

*J R Macdonald for Joyce.*

*Richard White for Nicholas.*

**GOULDING J:** This motion arises out of litigation between the rural district council of Thorne, a place in the West Riding of Yorkshire, and members of a family resident at Thorne called Bunting. The father of the family is William Bunting; his wife is Joyce Bunting; and there is a son named Nicholas Bunting. They are people who appear to be much concerned in such matters as commons and footpaths.

In order to understand the application that comes before me it is necessary to have some knowledge of the provisions of the Commons Registration Act 1965. That, no doubt with a view to possible further action by the legislature, set up an elaborate scheme for the registration of common land and town or village greens and related matters.

By s 22 of the Act the term 'common land' employed in the Act, unless the context otherwise requires, means land subject to rights of common, whether exercisable at all times or only during limited periods, and the waste land of a manor not subject to rights of common, but does not include a town or village green or any land which forms part of a highway. Section 1 of the Act provides for the registration during the ensuing years of common land as defined by the Act, or town or village greens, and of rights of common either over common land or over town or village greens, and of persons who are owners of such types of land. Section 4 includes among others the following subsections:

(1) Subject to the provisions of this section, a registration authority shall register any land as common land or a town or village green or, as the case may

be, any rights of common over or ownership of such land, on application duly made to it and accompanied by such declaration and such other documents (if any) as may be prescribed for the purpose of verification or of proving compliance with any prescribed conditions.

(2) An application for the registration of any land as common land or as a town or village green may be made by any person, and a registration authority—  
(a) may so register any land notwithstanding that no application for that registration has been made, and (b) shall so register any land in any case where it registers any rights over it under this section . . .

(4) Where, in pursuance of an application under this section, any land would fall to be registered as common land or as a town or village green, but the land is already so registered, the registration authority shall not register it again but shall note the application in the register . . .

And then there are provisions under which such registration is to be provisional only until confirmed in manner provided by the Act itself. Section 5 makes provision for the lodging of objections to registrations under s 4 and in sub-s (5) it gives a discretionary power to the registration authority to cancel or modify a registration to which objection is made. That is enough of the Act, I think, to make intelligible what happened in this case.

Members of the Bunting family made a number of registrations pursuant to the 1965 Act of which I must mention three. The first was a registration effected by the father, William Bunting, alone. That was a registration of the whole of the manor of Hatfield as common land within the meaning of the Act. It was stated in argument that the manor of Hatfield is co-terminous with the Thorne rural district. The registration authority gave the number CL 401 to the unit of registration constituted by the manor. There were also two other registrations of alleged common rights over land in that unit. They were numbered respectively 2279 and 2281 and both of them were made by the three Buntings, William, Joyce and Nicholas, as joint applicants. The rural district council took exception to those registrations and on 26th March 1971 the council commenced an action by writ against all three Buntings as defendants. They claimed, among other things, a declaration that the defendants were not entitled to any common rights of specified kinds over the land in the manor of Hatfield and a declaration that none of the land in the manor was registrable by the defendants or any of them as common land pursuant to the 1965 Act. The council also claimed a number of injunctions, among them being injunctions compelling the defendants and each of them to procure the removal of the registrations of common rights made under the application numbers 2279 and 2281.

As far as Joyce and Nicholas Bunting are concerned the action was disposed of at an early date. On 23rd April 1971, before PLOWMAN J, it was agreed between the rural district council on the one hand and Joyce and Nicholas Bunting on the other that a motion before the learned judge should be treated as the trial of the action, and those two defendants, Joyce and Nicholas, gave undertakings obliging them forthwith to procure removal or amendment of the registrations made under application numbers 2279 and 2281 so as to exclude from those registrations all those parts of the manor which were in the ownership of the plaintiff council.

Those undertakings, as I have said, extended only to a part of the whole unit of land registration, namely, the manor of Hatfield. Before they were fully performed the action came to trial against the other defendant, William Bunting. He also gave a certain undertaking, but it was of a very different character from that given by his wife and son.

So far as material the undertaking given by William Bunting was in the following terms:

'that having taken all steps to remove all land outside the area [shown on a certain plan] from registration CL 401 he will not withdraw such steps and will assist the registration officer to effect such withdrawals . . .'

It will be observed that William Bunting did not undertake to procure or attempt to procure the registration to be cancelled in respect of the whole manor but only as to a certain part. That part included almost all—although I think not quite all—of the land in the manor owned by the rural district council, but it also included a large area which was not owned by the council and therefore was not affected by the undertakings earlier given by Joyce Bunting and Nicholas Bunting.

Joyce and Nicholas do not appear to have been very speedy in performing their own undertakings and indeed there is evidence that Joyce used some language indicating a contumacious attitude to the court. I shall say no more about that because it is conceded that those two persons' undertakings were in the end complied with and the joint registrations of common rights have been cancelled as regards the land owned by the council.

The trouble that has now arisen is this. William Bunting has attempted in terms of his undertaking to assist the registration officer to effect the withdrawal of the agreed area from the unit of land registration CL 401 but the registrar says—and it is not suggested that he says otherwise than correctly—that before he can give effect to William Bunting's request he requires the consents of Joyce and Nicholas Bunting because they have subsisting registrations of rights of common over the land now in question and while there may be rights of common the land remains common land in terms of the Act.

The undertakings given by Joyce and Nicholas Bunting, as I have said, do not extend beyond land in the ownership of the rural district council, therefore they are of no value to the council in its present difficulty. Accordingly the council attempts to get the benefit of William Bunting's undertaking by alleging contempt of court against Joyce and Nicholas. The council seeks to commit Joyce and Nicholas to prison for contempt of court in that well knowing of the undertaking given by William Bunting

'they have wilfully and deliberately failed to assist the said defendant William Bunting so to assist the registration officer to effect such withdrawals by not themselves withdrawing or concurring in the withdrawal of land previously so registered by them',

and the council seek such further order as may be necessary to ensure that the effect of the undertaking given by William may not be further delayed by virtue of the alleged defaults of Joyce and Nicholas.

In so proceeding, the council seeks to apply a very well established principle of the court. It was much discussed in the leading case of *Seaward v Paterson* (1). The head-note states the principle quite clearly:

'There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the first case the order is made to enable the plaintiff to get his rights; in the second, because it is not for the public benefit that the course of justice should be obstructed. The court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it.'

(1) [1897] 1 Ch 545; [1895-99] All ER Rep 1127.



What is there said of a breach of injunction applies equally to a breach of an undertaking given to the court. The test to be applied in such cases was stated by Cross J in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* (1) in the following terms. He was there speaking of directors of a company in relation to an order made against the company and he said:

'I must consider whether it can be said in this case that the directors of the company were deliberately setting the court at defiance and were really treating the order of the court as not worthy of notice. If that is the true view, then, notwithstanding that the order has now been complied with, it may well be that a punishment ought to be inflicted on them.'

So counsel says here on behalf of the rural district council that Joyce and Nicholas Bunting are deliberately setting the court at defiance and treating the undertaking given by William to the court as not worthy of notice.

As I have said, the principles under which the court acts against persons who aid and abet the breach of injunctions or undertakings, although not themselves parties, are well understood and well established. In applying them it is always necessary to remember the warning given by RIGBY LJ in the case of *Seaward v Paterson* (2) that I have already referred to, where he said:

'It is quite right, no doubt, that when a prohibition or an injunction is granted the court should be careful to see how far it extends; and that its meaning with reference to the injunction should not be overstepped, and people be brought in as though they were prohibited or enjoined when the court never dreamt of prohibiting or enjoining them.'

In the present case, as has been pointed out on behalf of the respondents to this motion, there has, literally speaking at any rate, been no breach of an undertaking. It is common ground that Joyce and Nicholas have fully performed what they promised to do. It is also common ground that William is doing his best to procure the modification of the registration in relation to which his own undertaking was given. What is truly said is that those efforts of William are of no practical value unless Joyce and Nicholas will concur. However, they have never promised to concur in those efforts, nor has any order been made against them that they should do so.

It may even be, having regard to the terms used by MEGARRY J in his judgment in *Thorne Rural District Council v Bunting* (3), that no order could be obtained by the rural district council against Joyce and Nicholas directly compelling them to concur, but that matter has not been fully argued. The mere fact that an order made against or undertaking given by A is of no practical value to a plaintiff unless something else is done by B falls far short, in my judgment, of showing that B's refusal can be regarded as a defiance of the court or in any technical sense a contempt. The rural district council here insists that the rights claimed by Joyce and Nicholas are not in any way independent of those that have been put forward by William. On the other hand there is no evidence that Joyce and Nicholas or either of them is a mere nominee or servant of William in the matter and counsel for the rural district council expressly disclaimed any allegation that William was procuring the inaction of Joyce and Nicholas.

(1) [1963] 3 All ER 493; [1964] Ch 195.

(2) [1897] 1 Ch 545; [1895-99] All ER Rep 1127.

(3) p 355, ante; [1972] 1 All ER 439; [1972] Ch 470.

Accordingly, while I can appreciate how unsatisfactory the position is from the rural district council's point of view, I have no doubt that I must acquit both Joyce and Nicholas of the charges of contempt brought against them today, and I must dismiss the motion accordingly.

*Motion dismissed.*

Solicitors: Holloway, Blount & Duke, for Kenyon, Son & Craddock, Thorne, Yorkshire; Stileman Neate & Topping, for J J Pearlman, Leeds.

Reported by G F L Bridgman, Esq, Barrister.

### CHANCERY DIVISION

(BRISTOW, J)

12th, 13th, 14th, 15th June, 10th July, 1972

#### ATTORNEY-GENERAL v HONEYWILL AND OTHERS

*Highway—Passage with vehicles—Presumption of dedication—Twenty years public user—Way marked as bridleway on definitive map under National Parks and Access to the Countryside Act, 1949, s 32 (1)—Highways Act, 1959, s 34 (1).*

By s 32 (4) of the National Parks and Access to the Countryside Act, 1949, it is provided that a definitive map and statement prepared under s 32 (1) shall be conclusive as to the particulars contained therein, namely, by para (a), as to the existence of a footpath, and, by para (b), as to the existence of a bridleway, ie, a right of way on foot, on horseback, or leading a horse. Section 34 of the Highways Act, 1959, provides that the dedication of a way as a highway is to be deemed after proof of public use for twenty years.

**HELD:** the fact that a way was marked on the definitive map under s 32 (1) of the Act of 1949 as a footpath or bridleway did not prevent that way, in addition, on proof of twenty years user, being deemed to have been dedicated as a highway under s 34 of the Act of 1959.

**ACTION** by the Attorney-General on the relation of the Kingsbridge Rural District Council claiming a declaration that a way from Beesands village across Beesands Green to Beesands Cellars was a public highway for all purposes including passage with vehicles, and an order restraining the third defendant, Beesands Estate Ltd, its servants and agents, from obstructing the way or interfering with its user by the public. The first defendant, Thomas James Honeywill, and the second defendant, John Silas Honeywill, were the freeholders of part of Beesands Green, and the third defendant was the leaseholder of that part.

*L H Hoffmann for the plaintiffs.*

*P G Clough for the defendants.*

*Cur adv vult*

10th July. **BRISTOW J** read the following judgment: This is a relator action brought by the Attorney-General on the relation of the Kingsbridge Rural District Council. The judgment in this action will, therefore, bind not only the parties, but will be a judgment in rem.

The claim is that a way from Beesands village north across Beesands Green to Beesands Cellars, a hamlet now comprising a house and three cottages adjacent to the site of a long disused quarry and lime kiln, a way which is part of what is admittedly a right of way to pass on foot from Beesands to Torcross, has been dedicated to the public with the right to pass and repass not only on foot but with vehicles.

The first and second defendants, the brothers Honeywill, are the freeholders of that part of Beesands Green which lies south of a line projected to the sea from the southern boundary of a field occupying the northern part of the spit of land between Widdicombe Ley and the foreshore. The third defendants were leaseholders of the Honeywill's part of Beesands Green, and are now holding over from them. Miss Bertha Northover is now their managing director of what is a family company, and has run the green since 1965 as a holiday caravan site. The family acquired the site in 1958, when it was already in use for caravans.

The plaintiffs rely on s 34 (1) of the Highways Act 1959, which I will read:

'Where a way over any land, not being a way of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.'

To meet the requirements of the section the plaintiffs must prove that 'the public' has actually enjoyed the way with vehicles as of right and without interruption for a full period of 20 years back from 5th November 1969, when the parties agree the right was first brought into question. The defendants concede that during that period there has been no interruption of whatever use the public has enjoyed, and that there has been no sufficient evidence during that period that there was no intention to dedicate, either by using the machinery expressly provided by the section itself or otherwise. To establish enjoyment 'as of right' you must show that you were using the way with your vehicle as a member of the public with the honest belief that you had the right to do so, and were not doing so with the owner's permission express or implied, or regardless of his interests: see *Jones v Bates* (1). That was a decision on s 1 of the Rights of Way Act 1932, the terms of which are for the purposes of this action identical with the terms of s 34 of the 1959 Act.

On the evidence which I will consider in detail later it is clear that from where the way in question joins the road down the hill from Beeson village at the 'Crab Pot', at which spot the road turns south to Beesands village, it has been increasingly used by vehicles driven by members of the public since the 1920's. The defendants say that such use has not been enjoyment 'as a right', but only either in the belief that the owner allowed it, or regardless of the owner's interests, or in enjoyment of a private easement of way to Beesands Cellars.

The defendants also submit that irrespective of the merits on the issues raised on s 34 (1) of the Highways Act 1959, sub-s (10) of that section expressly states that neither it, nor s 35 which deals with maps and documents, shall be taken to affect the provisions of s 32 (4) of the National Parks and Access to the Countryside Act 1949. It is agreed that on the 'definitive map' prepared by the council under Part IV of the 1949 Act the disputed way, there bearing the Stokenham Parish Path no 18, is shown and described as a footpath. The defendants submit that so long as it is so shown on the map that is conclusive, and the way must as a matter of law be one on which the public is entitled to pass and repass on foot alone.

Part IV of the National Parks and Access to the Countryside Act 1949, which has been called 'the Rambler's Charter', is concerned, and I quote the Act's preamble:

'to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way . . . and for matters connected with the purposes aforesaid.'

Section 27 imposes a duty on every council in England and Wales to carry out a survey of all lands in their area over which a right of way to which Part IV applies is alleged to subsist, and to prepare a draft map showing footpaths and bridleways wherever in their opinion footpaths and bridleways, as defined, subsist or are reasonably alleged to subsist. Section 28 deals with the provision of information by other authorities. Sections 29 to 31 deal with the stages by which the map and annexed statements arrive at the definitive stage, how what is shown at the draft and provisional stages can be objected to, and how objections are to be determined. Section 33 provides for periodical revision. Section 32 (4) provides as follows:

'A definitive map and statement prepared under subsection (1) of this section shall be conclusive as to the particulars contained therein in accordance with the foregoing provisions of this section to the following extent, that is to say—(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date specified in the statement a footpath as shown on the map; (b) where the map shows a bridleway, or a road used as a public path, the map shall be conclusive evidence that there was at the said date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid; and (c) where by virtue of the foregoing paragraphs of this subsection the map is conclusive evidence, as at any date, as to a public path, or road used as a public path, shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date.'

The categories (a), (b) and (c) are reflections of the provisions in the definition section, s 27 (6), to which I turn in order to see what are the rights of way alleged to subsist over lands in the council's area which are to be the subject of the initial survey and the subsequent operations leading to the production of the definitive map, and its consequences. What its consequences are is strikingly illustrated by *Morgan v Hertfordshire County Council* (1), on which the defendants rely. By reasons of a demonstrable series of errors and omissions there was shown on the definitive map a bridleway over a strip of land in fact covered by timber trees and impassable. After ramblers had claimed the right to pass along the strip the council told the owner that they proposed to cut down his trees and clear the way. He then applied to the court for a declaration that the map was not conclusive, but the Court of Appeal decided that it was, and his only remedy was to apply to the proper authority to have the special way stopped up, for there were no provisions in s 35, the revision section, to enable a public right of way once marked on the definitive map to be deleted. Section 27 (6) defines a right of way to which this Act applies, the starting point of the whole of Part IV of the Act, as a right of way such that the land over which the right subsists is a public path. A public path is defined as a highway being either a footpath or a bridleway. A footpath is a highway over which the public has a right of way on foot alone, other than such a highway at the side of a public road. A bridleway is a highway over which the public has the right to pass on foot, or on horseback, or leading a horse, with or without the right to drive animals. A road

(1) (1965), 63 LGR 456.

used as a public path means a highway other than a footpath or bridleway used by the public mainly for the purposes for which footpaths or bridleways are used. An example is the Icknield Way over the Berkshire Downs.

It is in my judgment significant that Part IV of the 1949 Act does not deal with rights of way to pass using vehicles at all, and this is not surprising when you remember the terms of the preamble. The Act is concerned with the rambler and the pony trekker, not with the motorist. Counsel for the plaintiffs poses the dilemma of the inhabitant of Beesands when the definitive map is under preparation who wishes to have recorded that he claims a public right to drive his car over the way as far as Beesands Cellars. He does not want it put in as a footpath or bridleway. He does not want it put in as a road used as a public path because the essence of his case is that he has a right to drive a car along it, not a right mainly to walk or ride or lead or drive animals. If he went to the council and said: 'I want you to mark this as a right of way to pass with vehicles', the answer would have had to be: 'We cannot, the statute does not provide for it'. The fact that this way is marked on the definitive map as a footpath is conclusive that the public has a right to pass and repass on foot. It is not conclusive of the question: Has the public the right in addition to pass and repass with vehicles? It is not disputed, and I take it to be clear law, that if a right of way was originally dedicated for use on foot it can subsequently be dedicated for use with vehicles as well.

I now turn to examine the evidence in order to decide whether the plaintiffs have proved their case under s 34 of the Highways Act 1959, so that there is a presumption of dedication for use with vehicles. On the authorities it is clear that I must look at the whole of the circumstances in coming to a conclusion, and must consider not only what views any witness who was called may have expressed about his state of mind in relation to use of the disputed way, but what I think the state of mind of a reasonable member of the public would have been if he had been accosted by an officious Beesander on the way and asked by what right he thought himself to be driving on it.

[His Lordship then considered the facts and concluded:] Taking all the circumstances into account, as the authorities require me to do, and taking a broad view of the evidence which I have summarised at some length for that reason, my conclusion is that the case for the plaintiffs is really overwhelming, and that they have proved on more than a preponderance of probabilities that the public have used the disputed way continuously as of right for passage with vehicles for more than 20 years back from 5th November 1969. Apart from the point of law which I have already dealt with that is the only issue in this action, and accordingly I make a declaration in the terms of the prayer to the statement of claim.

*Declaration accordingly.*

Solicitors: *Togers, Dawlish, Devonshire; William Beer & Son, Kingsbridge, Devonshire; Campion, Symons & Co, Exeter, Devonshire.*

Reported by G F L Bridgman, Esq, Barrister.



## QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

14th July 1972

HOWARD v GRASS PRODUCTS, LTD.

*Road Traffic—Licence—Rate of duty—Farmer's goods vehicle—Lorry carrying grass cut on farm to factory for manufacture of animal food—'Occupation' of land by owners of lorry—Vehicles (Excise) Act, 1971, sched. 4, para 9.*

By para 9 of sched 4 to the Vehicles (Excise) Act, 1971, a 'farmer's goods vehicle' is defined as 'a goods vehicle registered under [the Act] in the name of a person engaged in agriculture and used on public roads solely by him for the purpose of the conveyance of the produce of, or of articles required for the purposes of, the agricultural land which he occupies, and for no other purpose.'

The respondents were engaged in a large way of business in drying grass which was brought freshly cut from various areas to their establishment at W. It was then dried, milled, and turned out in the form of animal food. They had arrangements with aerodrome proprietors and farmers under which they were permitted to cut grass at appropriate times. The respondents' lorry was stopped by a police officer when carrying a load of grass mowings which had been taken from a farm pursuant to an agreement which the respondents had made with the farmer. The field from which the grass was cut was being farmed by the farmer and was enclosed by a fence or locked gate. The farmer had unlocked the gate and allowed the respondents and their employees unrestricted access to the field during the cutting operation, which took three and a half days. At the time when the lorry was stopped by the police it was displaying a farmer's goods vehicle licence. The respondents were charged at a magistrates' court with using on a public road a mechanically propelled vehicle for which a higher rate of duty was chargeable than that which had been paid, contrary to s 18 of the Vehicles (Excise) Act, 1971. The justices were of opinion that the lorry was properly classified as a farmer's goods vehicle and dismissed the information. On appeal by the prosecutor,

**Held:** an occupier within the meaning of para 9 of sched 4 to the Act of 1971 was a person who had some prospect of remaining in possession, and the respondents' occupancy of the land from which the grass had been cut was merely transient and insufficient to allow them to qualify for the special concessionary rate of duty granted to a farmer's goods vehicle; the appeal must, therefore, be allowed, and the case remitted to the justices with a direction to convict.

**CASE STATED** by Oxford justices.

An information was preferred by the appellant, Aubrey Leonard Frederick Howard, against the respondent company, Grass Products Ltd, charging that on 4th April 1971 the respondents used on a public road a mechanically propelled vehicle, namely, a motor lorry, in respect of which a licence then in force had been taken out at a certain rate under the Vehicles (Excise) Act 1962, for a purpose which brought it within the description of a vehicle to which a higher rate of duty was chargeable under that Act, duty at that higher rate not having been paid before the vehicle was so used, contrary to s 18 of the Vehicles (Excise) Act 1971. The justices dismissed the information, and the prosecutor appealed.

*Christopher Oddie* for the appellant.

*I S Hill QC* and *Giles Best* for the respondent company.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the city of Oxford in respect of their adjudication at a magistrates' court at Oxford on 21st December 1971. On that day they dismissed an information laid by the present appellant against the respondent company, Grass Products Ltd, the offence charged

being that on 4th April on a public road the respondent company had used a motor vehicle, namely, a motor lorry, in respect of which a licence then in force had been taken out at a certain rate under the Vehicles (Excise) Act 1962, for a purpose which brought it within the description of a vehicle to which a higher rate of duty was chargeable under that Act, duty at that higher rate not having been paid before the vehicle was so used contrary to s 18 of the Vehicles (Excise) Act 1971. That rather complicated language describes a charge which was of the simplest possible kind.

Under the Vehicles (Excise) Act 1971 various rates of excise duty for vehicles are laid down, and what can fairly be described as a special concession is made to a vehicle defined in the Act as a 'farmer's goods vehicle'. In this particular case if the vehicle in question was a farmer's goods vehicle it was required to pay £52 odd per year by way of excise duty, whereas if, doing exactly the same work, it did not qualify as a farmer's goods vehicle, the excise rate was no less than £175. This is obviously a matter of concern to the respondent company.

The definition of 'farmer's goods vehicle' is contained in para 9 of sched 4 to the Act, and it is in the following terms:

"'farmer's goods vehicle' means a goods vehicle registered under this Act in the name of a person engaged in agriculture and used on public roads solely by him for the purpose of the conveyance of the produce of, or of articles required for the purposes of, the agricultural land which he occupies, and for no other purpose'.

So one sees that in order to claim the benefit of having a farmer's goods vehicle, first, the vehicle must be registered in the name of someone who is engaged in agriculture, and when that vehicle goes on the public roads it must be used solely for one of two purposes, for the conveyance of produce of land which the registered owner occupies or the conveyance of articles required for the purposes of the agricultural land which he occupies.

With that definition in mind, I turn to the facts found so far as they are relevant. The respondent company are engaged in a large way of business in drying grass, and they have an establishment in Buckingham at a place called Worminghall to which the grass, freshly cut from various areas, is brought. It is then dried and milled and turned out in the form of animal food. In order to produce the grass necessary for this process, the company has arrangements with aerodrome proprietors and some farmers whereby it sends its cutters and other vehicles and cuts the crop at the appropriate time, and when the vehicle in question in this case was stopped by the police it was carrying grass clippings which had been taken from a farm at Marcham near Oxford. The circumstances in which the clippings had been taken were these (and I take the words precisely from the statement of the Case) that the company had made an oral agreement with the farmer whereby they could enter and cut the grass, the farmer no doubt having some remuneration with which we are not concerned. The Case finds that in accordance with the arrangement the farmer unlocked the gate of the field, which was normally locked, thus giving access to the respondent company with its vehicles, and they went in and cut the grass. Working continuously, I suppose during working hours, it took them about 3½ days. It was on one of the lorry trips carrying grass back to the processing plant that this incident arose. The Case further finds, so far as it is relevant, that the field from which the grass was cut was being farmed by the farmer.

Well, this is primarily a problem of construction of the definition of 'farmer's goods vehicle', and the point which has given rise to difficulty and occupied most of the time of the court is whether on the facts found in this Case the respondent company were occupying the land during the period in which they were cutting the grass,

because, as I pointed out in reading the definition, the facility granted to a farmer's goods vehicle requires that that vehicle should be used for carrying the produce of agricultural land which the owner of the vehicle occupies, and the argument was concentrated on whether there was sufficient occupancy in this case in the respondent company.

The word 'occupier'—and indeed the verb 'to occupy'—is a difficult word to define. It appears constantly in the statutes of this country and it is almost as constantly subject to a special definition for the purpose of the particular statute. Whilst the reference books show a wide variety of meanings of 'occupier' by virtue of special statutory definitions, the original basic meaning is rather more difficult to discover. The word being thus capable of a number of meanings, I think one must start by trying to see what Parliament had in mind when making this concession to the farmer's goods vehicle, and I think the underlying intention here is to make a special concession to a farmer for a vehicle which he keeps to use about the business of his farm. He has got to be a farmer in the broad sense before he can have this facility at all, and the activity of the vehicle must be confined to land which he occupies. I think the broad intention here is that a farmer who has a vehicle for use about his farm should have the concession, but the farmer who uses his vehicle for collecting and carrying produce of somebody else's farm or establishment should not. I think that is the broad purpose behind the definition. I think, one can have regard to that in deciding precisely what sense or meaning is to be given to the word 'occupies'. So far as I know, the only modern survival of the word 'occupier' in its original common law sense is found in the law of rating. I do not suggest that there is any relationship between this subject and the law of rating but in the law of rating 'occupier' means a person who has possession of land and some prospect of remaining in possession—in other words, not a mere transient occupier, an overnight camper or someone like that, but someone occupying with some prospect of remaining in possession. If one gives the word 'occupier' in this definition that meaning, one will as nearly reflect what I believe was the intention of Parliament as any alternative which has been suggested to us.

Counsel for the respondent company has approached this from a number of directions, and in particular he has relied on the meaning attributable to 'occupier' and 'occupied' in other Acts connected with agriculture. I pause to observe, before looking at these other Acts, that we are not here dealing with an Act dealing with agriculture; we are dealing with an excise Act, but nevertheless it is an agricultural topic. Counsel referred to the Agricultural Holdings Act 1948, in s 2 of which provision is made which deals specifically with agreements for the letting of land or granting of licence to occupy land in contemplation of the use of the land for grazing or mowing only during some specified period of the year, and he would argue that under the 1948 Act those people can, without doing injustice to the language, be treated as occupiers. It may be they can, but that section is concerned primarily with the circumstances in which a person with an interest in agricultural land shall be promoted to the status of a tenant from year to year, and I do not find sufficient connection between that and our present subject to find it of any value.

We have also been referred by counsel for the respondent company to s 109 (5) of the Agriculture Act 1947 which contains these rather cryptic words:

'References in this Act to the farming of land include references to the carrying on in relation to the land of any agricultural activity; and in relation to any agricultural activity the person having the right to carry it on shall be deemed to be the occupier of the land.'

I confess I do not fully understand what purpose is sought to be achieved there, and I do not think counsel for the respondent company could enlighten us very much

about it. It is true that in other cases some inspiration has been obtained from the 1947 Act when construing the phrase 'farmer's goods vehicle'. Indeed, the word 'agricultural' has been given the same meaning in both statutes, but I find nothing in s 109 (5) that eases our task in this particular case at all.

I have come to the conclusion, for the reasons which I have tried to set out, that when this vehicle was travelling on this road it was carrying the produce of agricultural land, but not of land which the owner of the vehicle occupied. Accordingly, as it seems to me, the vehicle did not enjoy the privilege of carrying a farmer's goods vehicle licence. I think that the justices were wrong and that they should have found the offence proved. I would send the case back to them with a direction to convict.

**MELFORD STEVENSON J:** I agree.

**MILMO J:** I agree.

*Case remitted.*

Solicitors: Sharpe, Pritchard & Co, for J Malcolm Simons, Thames Valley Police Authority, Kidlington, Oxfordshire; Rollit, Farrell & Bladon, Hull.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

14th July 1972

LOW v BYRNE

*Customs and Excise—Importation of prohibited goods—Indecent articles—Penalty—Amount—Three times value of goods—Value to be taken as price which goods might reasonably be expected to have fetched on 'open market'—Distinction between 'black' and 'white' markets irrelevant—Ascertainment of price which would be paid by willing seller to willing buyer at port of landing—Invoice from overseas seller to intended purchaser as guide—Customs and Excise Act, 1952, s 304, s 305 (2).*

The defendant was convicted at a magistrates' court of the fraudulent evasion of the prohibition on importation of prohibited goods, namely, indecent articles, contrary to s 304 of the Customs and Excise Act, 1952. The invoice price of the articles, expressed in Danish kroner, was equivalent to £2,335. The justices sentenced the defendant to a fine of £3,000 or 12 months' imprisonment in default. He appealed to quarter sessions, who were of opinion that, since the importation of the articles was prohibited, there could be no 'open market' for them within the meaning of s 305 (2) of the Act, and that, in the absence of evidence of any price in any market in England, the maximum monetary penalty which they could impose was £100. They accordingly varied the sentence by substituting a penalty of £100 and a suspended sentence of imprisonment for the penalty imposed by the justices. On appeal by the prosecutor to the Divisional Court,

**Held:** for the purpose of deciding what was the open market value of goods of the kind with which the present case was concerned the distinction between the 'black' and the 'white' market was not applicable; what was proper to be considered was the price which a willing seller would accept from a willing buyer at the port of landing; to ascertain that price an invoice from the seller abroad to the intended recipient in England was often a very good guide and sometimes the only and conclusive guide; quarter sessions

had, accordingly applied a wrong principle in deciding what was the maximum monetary penalty which they could impose, and the case must be sent back to the Crown Court to re-assess the penalty.

#### CASE STATED BY ESSEX QUARTER SESSIONS.

On Oct. 5, 1971 the respondent, Frank Brian Patrick Byrne, was convicted at Harwich Magistrates' Court of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of indecent articles, namely, 1,000 magazines and 650 cine films, on a date unknown between 9th September 1971 and 17th September 1971, contrary to s 304 of the Customs and Excise Act 1952. He was fined £3,000 with twelve months' imprisonment in default, but on appeal by him to quarter sessions the court varied the sentence by substituting for it a penalty of £100 and ordering that the respondent be imprisoned for the space of 12 months, such sentence of imprisonment being suspended for three years. The prosecutor appealed to the High Court.

*Gordon Slynn* for the appellant.

The respondent did not appear.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by the quarter sessions for the county of Essex in respect of an appeal against sentence brought before the sessions from a decision of a magistrates' court on 30th November 1971. Before the justices on that last mentioned occasion the respondent to the present appeal in this court was ordered to pay a fine of £3,000 with 12 months' imprisonment in default, on conviction by the magistrates of an offence under s 304 of the Customs and Excise Act, 1952, namely, the fraudulent evasion of the prohibition on the importation of indecent articles, namely, 1,000 magazines and 650 cine films. There followed an appeal from the magistrates' court to quarter sessions, who varied the sentence, substituting a penalty of £100 for the penalty of £3,000 imposed by the justices and ordering that a sentence of imprisonment, suspended, should be imposed on the respondent. The reason why quarter sessions made this somewhat dramatic reduction in the amount of the fine was that they took the view that although the final penalty might amount to three times the value of the goods in question, there was no available evidence of a market value on which that value could be rested, and accordingly they imposed a basic fine of £100 which is provided for in s 304 independently of the specific value of the goods. The question for us is whether quarter sessions directed themselves properly in law in holding that they could not in the circumstances of this case impose a fine in excess of £100.

Under the Customs and Excise Act 1952, s 44, there is provision for the forfeiture of goods which are improperly imported, and the two main categories of goods falling within that description are goods which are brought in without payment of duty when there ought to have been payment, and goods which are brought into this country in the face of a prohibition against the importation of such goods. Section 45 is concerned with the appropriate penalties when a person lands goods in this country in circumstances in which they might be forfeit under s 44. It is of passing interest, and no more, to observe that under s 45 the formula for fixing the amount of the financial penalty is the same as that in the sections relevant to the case presently before us, the provision being that the importer would be liable to a penalty of three times the value of the goods or £100, whichever is the greater.

I turn to the sections which are directly relevant to the present case and they are ss 304 and 305. Under s 304 there is imposed the penalty for, amongst other things, the offence of which this man was convicted. The section provides:



'Without prejudice to any other provision of this Act, if any person . . . (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods, he may be detained and, save where, in the case of an offence in connection with a prohibition or restriction, a penalty is expressly provided for that offence by the enactment or other instrument imposing the prohibition or restriction, shall be liable to a penalty of three times the value of the goods or £100 whichever is the greater . . .'

So there, for the very offence with which we are here concerned, the maximum penalty is expressed to be three times the value of the goods. Then when one passes to the final provision which is relevant, s 305 (2), something more is said about the meaning of the value of the goods, because in s 305 (2) it is provided:

'Where a penalty for any offence under any enactment relating to an assigned matter is required to be fixed by reference to the value of any goods, that value shall be taken as the price which those goods might reasonably be expected to have fetched, after payment of any duty or tax chargeable thereon, if they had been sold in the open market at or about the date of the commission of the offence for which the penalty is imposed.'

What troubled the quarter sessions, clearly from their Case, is that these were indecent books and publications prohibited from being brought into this country and so for them there could be no open market in England in the sense of a free market not conducted in an underground fashion. Since quarter sessions took the view that there could be no open market in the sense which they gave to the words, they concluded that the maximum fine would be £100. It is contended before us today, and I think clearly the contention is correct, that in deciding what is the open market value of goods of this kind, one is not restricted by the distinction between the so-called black market and white market. What is being sought is the price which a willing seller would accept from a willing buyer for these goods as landed at the port or airport at which they were originally landed. If we can ascertain what is the price which would be paid by a willing buyer to a willing seller at the port of landing, then that is the open market value of the goods for present purposes, and the penalty accordingly can be up to a maximum of three times that value. Of course it may present difficulties to justices dealing with these cases in assessing what is the open market value in cases such as the present, but there will often be, as there was here, an invoice from the seller overseas to the intended recipient in this country. In the present case there was an invoice expressed in Danish kroner to the equivalent sterling value of £2,335, and the justices who initially dealt with this case took the view that they could regard that as evidence of the open market value and that the maximum fine which they might impose was three times that sum.

For my part I think they were entirely right. I think that the invoice price, the price which the actual seller is requiring from the actual buyer, for these goods as landed can be a very good guide to the open market value and may well be the conclusive and only guide if there is no other information available at all. What has to be discovered is what the willing buyer and willing seller would determine as being the price payable between them as at landing, the landed price, and the best material available to the justices was the invoice.

Justices hereafter may have some assistance from two authorities to which the court has been referred, which deal, not with the sections of the Customs and Excise Act 1952 concerned with the prohibition of importation, but with the calculation of the amount of duty on goods lawfully admitted, and since the same formula of open

market price is used there is some assistance to be gained I think from these authorities. The first is *Rolex Watch Co Ltd v Comrs of Customs and Excise* (1), and I refer to that principally for a passage in the judgment of BIRKETT LJ, which seems to sum this matter up. He says:

'If there is a sole concessionaire, ipso facto the free open market vanishes, and one must do the best one can, taking a notional open market, and considering all the factors bearing on the question of price.'

The reference to the sole concessionaire is because in that case the goods in question came to this country through a sole concessionaire, and thus difficulties were present in assessing the open market price. I adopt BIRKETT LJ's common sense approach, if I may say so. One must do the best one can; one must take a notional open market and consider all the facts here which bear on the question of price.

Some further assistance may be gained from the decision in *Salomon v Comrs of Customs and Excise* (2). The headnote also contains a short and pithy direction for the solution of this kind of problem. It states:

'The notional "sale in the open market" laid down in para. 1 (1) of sched. 6 to the Act of 1952 as the basis for finding value was a sale at the price payable by an importer in the United Kingdom to an overseas seller for delivery c.i.f. to the place of importation, buyer and seller being independent of each other, and was not an inland sale of goods already imported into the United Kingdom.'

It is important that justices should realise that, if the material seems scanty, the direction is that they must do their best to find the open-market-willing-seller-willing-buyer price of the goods at the port at which they landed.

I would allow this appeal and send the matter back now to the Crown Court which has taken over the jurisdiction of quarter sessions, with a direction that the fine should be re-assessed in the light of the opinion of this court.

**MELFORD STEVENSON J:** I agree.

**MILMO J:** I agree.

*Case remitted to Crown Court.*

Solicitors: G. Krikorian, Solicitor; Customs and Excise.

Reported by T. R. Fitzwalter Butler, Esq, Barrister.

(1) [1956] 2 All ER 589.

(2) [1966] 3 All ER 871; [1967] 2 QB 116.

CHANCERY DIVISION

(MEGARRY, J)

5th, 8th May, 1972

HUTTON AND ANOTHER v ESHER URBAN DISTRICT COUNCIL

*Local Government—Sewer—Construction—Right to construct in private land—Demolition of buildings—'Land'—Exclusion of buildings—Public Health Act, 1936, s 15 (1).*

In the early part of 1972 the defendant council, in order to avoid the danger of flooding on land near the River Thames, resolved to construct and lay a public surface water sewer under powers conferred by s 15 (1) of the Public Health Act, 1936. This sewer, if built in accordance with the council's plans, would have run directly through the plaintiffs' dwelling-house which stood on the river bank, and would have necessitated its demolition. By letter dated 6th March, 1972, the council informed the plaintiffs of its intention, and on 30th March, having failed to reach agreement with the plaintiffs, served on them formal notice under s 15 of the Public Health Act. On motions for injunctions to restrain the council from entering on the plaintiffs' land and demolishing their house,

HELD: (i) the word 'land' in s 15 (1) of the Public Health Act, 1936, did not include buildings and the context in which it appeared showed a sufficient intention to exclude the application of s 3 of the Interpretation Act, 1889; (ii) as 'land' did not include buildings the power to demolish buildings under s 15 (1) could not exist in the present case.

MOTIONS in an action by the plaintiffs, Majorie Gaynor Hutton and John Clifford Holtby, against the Esher Urban District Council for an injunction restraining the council, their servants and agents, contractors or any of them or otherwise howsoever, from entering on the land and premises of the plaintiffs known as 43, Queen's Drive, Thames Ditton, Surrey, pursuant to notices served on the plaintiffs by the council pursuant to s 15 of the Public Health Act, 1936, and an order that the council be restrained from pulling down, demolishing or removing the structure or any part thereof of the buildings erected on the said land.

*A J Balcombe QC and T R F Jennings for the plaintiffs.  
Douglas Frank QC and Harold Parrish for the council.*

**MEGARRY J:** At Long Ditton, opposite part of Hampton Court Park, the River Rythe runs into the Thames, not many yards east of a bungalow known as 43 Queen's Drive, Thames Ditton. I shall refer to this as 'the bungalow'. The back garden of the bungalow runs down to the Thames, and just opposite the front of the bungalow Queen's Drive takes a right-angled turn away from the Thames and becomes King's Drive. Anyone proceeding northwards along King's Drive will be proceeding straight towards the bungalow and the Thames, but when the roadway reaches the frontage of the bungalow it becomes Queen's Drive and turns away westwards, running parallel to the Thames. The bungalow is owned by the plaintiffs jointly, and is let furnished to three tenants. The land in this area is low-lying, and with much other land in the Esher urban district suffered extensive damage in the floods of 1968 and some damage in subsequent floods. The Rythe is a relatively small stream which in its lower reaches pursues a somewhat meandering course. In consequence, the defendant to this motion, the Esher Urban District Council (to which I shall refer as 'the council') has for some while had under consideration proposals to meet the danger of flooding in what is a fairly densely developed area. The motion before me arises out of the proposals adopted by the council. In brief, the plaintiffs are seeking interlocutory injunctions restraining the council from entering on the bungalow and

from pulling it down in order to carry out the council's proposal to run a sewer northwards along King's Drive and then straight along a line through the bungalow and its curtilage into the Thames. The writ was issued on 24th April and was served the next day with the notice of motion.

Before I summarise the march of events, I think I should mention one matter that arose in argument. Counsel for the plaintiffs asserted that the council had over the years changed its mind, and had transformed a scheme which would carry the Rythe in its lower reaches through a culvert along the new line into a scheme for constructing a new sewer along that line which would take surface water drainage but no water from the Rythe save in times of flood, leaving the Rythe to continue along its existing tortuous path. Speaking on instructions, counsel for the council was emphatic that the scheme had throughout remained unchanged so far as it affected the plaintiffs and the stretch of the Rythe in question, and that the council had in no way changed horses. The scheme had always been the second of the two schemes of which counsel for the plaintiffs spoke. For brevity, I may refer to the two schemes alleged by counsel for the plaintiffs as the 'river re-routing' scheme and the 'new sewer' scheme respectively.

The controversy began in 1970. On 22nd September 1970, Mr Kavanagh, the then engineer, surveyor and town planning officer to the council, wrote a letter to the second plaintiff headed 'No. 43, Queens Drive, Thames Ditton, Rythe Improvement Scheme'. The letter referred to the flooding in 1968, and said that the council had decided to embark on a comprehensive programme of main drainage and land drainage works. The Rythe Stream was of the first priority, and a capital works improvement scheme had been prepared. Very considerable thought had gone into this,

'but very great difficulties have to be overcome in finding a suitable route for the new culvert to the Thames in Long Ditton. A great deal of the difficulty arises from the meandering course of the existing stream and the vast amount of statutory undertakers' plant, such as water mains and G.P.O. cables which exist in the area. It is with regret therefore, that I have to tell you that the only reasonable solution to the problem involves routeing the last length of culvert through Kings Drive, Thames Ditton and involves the site of your property ...'

The letter then enquires whether the second plaintiff 'will be a willing vendor'.

On 30th September 1970 Mr Hutton, an architect, who is married to the first plaintiff and is the son-in-law of the second plaintiff, wrote to the clerk of the council, referring to the council's proposal and putting forward reasoned objections. Under the heading 'River Rythe Improvement Scheme', the clerk replied, stating that at the council's request the engineer and surveyor had submitted 'proposals for a scheme to improve and re-route the River Rythe', but that no formal decision had been made since the public ought first to be acquainted with the proposal and their views sought thereon. Thereafter further correspondence followed under either the same heading or under 'Rythe Improvement Scheme'. Mr Hutton invoked consulting engineers, and proposed an alternative route for the culvert which, inter alia, avoided the bungalow. On 16th December 1970 the clerk of the council wrote to Mr Hutton, referring to the recommendation of the Highways and Works Committee 'to re-route the River Rythe along Kings Drive, Thames Ditton, traversing the site of 43, Queens Drive'. The letter stated that the council had adopted the recommendation to proceed with the scheme, and had resolved to make a compulsory purchase order for the bungalow if agreement to purchase it was not reached. A letter from the engineer and surveyor to the second plaintiff dated 4th January 1971 referred to the compulsory purchase order as being one which would be made under 'the Land

Drainage Acts, 1930 and 1961, and all other powers'. There were discussions between the engineers on either side, and on 16th March 1971 the clerk wrote pointing out that the alternative route suggested by the engineers advising the plaintiffs would cost nearly £50,000 more than the council's route, the additional cost representing 'almost entirely the estimated cost of acquisition of a substantial amount of land in a considerable number of different ownerships'. It concluded by asking the engineers to advise the plaintiffs to open negotiations for the acquisition of the bungalow. The correspondence continued until on 18th January 1972 the clerk of the council wrote the last letter to appear under the heading 'River Rythe Improvement Scheme'.

On 6th March 1972 the clerk wrote a letter under a new heading, namely, 'Public Health Act 1936—Sewers Surface Water Improvement Scheme', referring to 'our previous correspondence in this matter'. There had been no previous correspondence in any matter under this heading, but the council's reference number on the letter ended with 'R18/4/4', a reference which, with varying prefixes, had appeared on previous correspondence headed 'River Rythe Improvement Scheme'. The letter referred to a statement said to have been made 'at the last meeting' that in view of the failure of negotiations for the acquisition of the bungalow

'it was likely that the council would decide to implement their power under section 15 of the Public Health Act, 1936, to construct a public sewer in private land after giving reasonable notice to the owners and occupiers. This the council have now resolved to do accordingly.'

The letter then asked for confirmation of the various property rights in the bungalow so that the notices required by s 15 might be served.

Much is new in this letter. The Public Health Act 1936 had not been mentioned in previous correspondence, nor had sewers, nor any 'surface water improvement scheme'. Compulsory acquisition, which had figured in the earlier correspondence, now disappeared, and instead there were the very different provisions of the Public Health Act 1936, s 15. The one essential that remained unchanged was that a culvert would run through the site of the bungalow. There was further correspondence in which, in a letter of 17th March 1972, the clerk asserted that the council's proposals were 'to lay a surface water sewer within the meaning of the Public Health Act 1936'. Finally, notices dated 30th March 1972 were served on the plaintiffs, headed 'Public Health Act, 1936—Section 15 Notice of Intention to Construct Public Surface Water Sewer in Private Land'. The notice recited the ownership of the land, the proposal of the council to construct a public surface water sewer terminating in an outfall into the River Thames at Thames Dutton, and continued:

It appears to the council that it is necessary for the said sewer to pass through the said land owned by you, that is to say, the property known as 43, Queens Drive, Thames Ditton aforesaid. The council hereby give you notice that not earlier than Tuesday, May 2, being a reasonable time after this notice, the council will, under and in pursuance of s 15 of the Public Health Act, 1936, by their contractor proceed to construct such sewer in your said land.

The drawing shows the line of the sewer running down the middle of King's Drive and then through the middle of the bungalow, occupying about one-third of its total width. It is common ground that the scheme necessarily involves the total demolition of the bungalow. A covering letter with the notice draws attention to the right to claim compensation under s 278 of the Public Health Act 1936. Similar notices were given to the three tenants, with a covering letter offering to provide alternative accommodation.



In addition to the evidence provided by the letters, there are in evidence copies of three sets of minutes, one of the Highways and Works Committee of the council for 25th November 1970, and two of the Finance and Policy Committee of the council for 24th January 1972 and 17th April 1972. All three sets of minutes were duly approved and adopted by the council shortly afterwards. The 1970 minutes are in terms of an improved watercourse and new culvert, with reference to the Land Drainage Acts 1930 and 1961 and compulsory purchase. The two sets of minutes for 1972, on the other hand, relate to sewers and the Public Health Act 1936, s 15. A reason for these differences is explained by an affidavit of Mr Harris, the present engineer, surveyor and town planning officer to the council. Put briefly, the initial decision, based on the Land Drainage Acts, was made in the expectation of receiving a substantial grant from the national exchequer. When this expectation proved ill-founded, the council resolved instead to proceed with a sewerage scheme under the Public Health Act 1936, for reasons connected with loan sanctions.

Now it may be that the physical details of the works to be executed have, so far as is relevant, remained constant throughout: there is not enough evidence before me to resolve that. I can do no more than consider the correspondence, minutes and affidavits put before me. Mr Harris's affidavit states what the scheme now is, and plainly it is a 'new sewer' scheme. While he does not in terms assert that it has throughout been a 'new sewer' scheme, his evidence certainly reads as if this is the case. However, it seems quite plain that what was initially represented to the plaintiffs was that it was a 'river re-routing' scheme, requiring the acquisition of the bungalow by compulsion if not by agreement, whereas later it was represented as being a 'new sewer' scheme, with compensation for damage but no compulsory acquisition. In those circumstances, and after re-reading the evidence, I find much difficulty in following counsel for the council's emphatic assertion that so far as the plaintiffs are concerned the scheme for this stretch of the Rythe has been the same scheme throughout. If from the start the scheme has been to leave the River Rythe to run its present course, save only that in times of flood some of it will overflow into a new sewer, and to construct a new sewer to take surface water drainage and the overflow from the river in times of flood, then to describe the scheme as being one 'to re-route the River Rythe along Kings Drive' seems to me to be at best misleading: it asserts an intention to do what will not be done, and omits any mention of what will be done. If that is how the clerk of the council understood the scheme when he wrote his letter of 16th December 1970, and other letters before 1972, it is not surprising that the plaintiffs and others should have thought that this was what was proposed. No intelligible explanation of this use of language has been put before me.

On the view that I take of the case, this point does not arise for decision, and I may leave it for resolution, if need be, hereafter. But it is right to say something of it in view of certain matters raised in argument. Without making any attack on the bona fides of the council, counsel for the plaintiffs suggested that the council had changed the scheme in order to avoid the merits and demerits of the original scheme being tested at the public enquiry that would normally follow the plaintiffs' objections to the compulsory purchase order which the council initially proposed but now would not arise under the procedure of the Public Health Act 1936, s 15. That may be as it may be: certainly the council is now employing a procedure which avoids any public enquiry, although it would be quite wrong to attempt to decide on affidavit evidence how far, if at all, a desire to avoid a public enquiry played any part in the decision. A further consideration is that in opposing the grant of any injunction counsel for the council urged the importance of the scheme to the many inhabitants of the urban district who would be affected by further floods, and the delay that the opposition of the plaintiffs is causing. Important the scheme no doubt is, but when

since 1970 the council has apparently been proceeding on the footing of a 'river re-routing' scheme involving the compulsory purchase of the bungalow and the public enquiry that the plaintiffs desire, it is hardly for the council to cast the plaintiffs for the role of holding-up the scheme when in 1972 the council substitutes, or appears to substitute, a 'new sewer' scheme, and proposes to proceed by compulsory purchase no longer but by a procedure without any public enquiry under the Public Health Act 1936, s 15. If the council had done what in December 1970 it had resolved to do, namely, made a compulsory purchase order for the bungalow, it seems probable that by now the resulting public enquiry would have been held and determined. There is nothing before me to show that the resolution of the council to make a compulsory purchase order has been revoked. Indeed, the minutes of the Finance and Policy Committee for 22nd January 1972, approved and adopted by the council on 1st February 1972, refer to the resolution, but state that

'To date it had not been possible to reach agreement with the owner and in view of the urgency of this matter the committee agreed that notices under section 15 of the Public Health Act, 1936, should be served . . .'

Of course, if the council fails for over a year to act on its resolution to make a compulsory purchase order, matters may become urgent.

Let me say at once that the council has made it clear before me that not only is it prepared to purchase the bungalow from the plaintiffs, but also that, once the sewer is laid, the council will, subject to planning permission being granted, allow a new dwelling to be erected on the site. Furthermore, counsel for the council has stated that the council is prepared to pay compensation for the demolition of the bungalow and the construction of the sewer under the Public Health Act 1936, s 278, on the basis of equivalent reinstatement, so that the plaintiffs will get the cost of erecting an equivalent for the bungalow. The plaintiffs thus have no rational objection on merely financial grounds. What they want, however, is the opportunity of being heard at the public enquiry that would have resulted from their objections to the compulsory purchase order formerly proposed, and of having the pros and cons of the alternative schemes examined. It would then emerge, say that plaintiffs, that the alternative that they put forward is so much better than the council's proposals that the compulsory purchase order would not be confirmed, with resulting benefit not only to them but also to others in the district. The plaintiffs point with force to the council's resolution in 1970 to make a compulsory purchase order, and say that all that they ask is that the council should do what it resolved to do nearly 1½ years ago, and not adopt a different procedure which avoids any opportunity for the plaintiffs to present their case at a public enquiry.

With that, I turn to the Public Health Act 1936, s 15 (1), under which the council is proposing to act. It runs as follows:

'A local authority may within their district and also, subject to the provisions of the next succeeding section, without their district—(i) construct a public sewer—(a) in, under or over any street, or under any cellar or vault below any street, subject, however, to the provisions of Part XII of this Act with respect to the breaking open of streets; and (b) in, on or over any land not forming part of a street, after giving reasonable notice to every owner and occupier of that land; (ii) construct sewage disposal works on any land acquired, or lawfully appropriated, for the purpose; (iii) by agreement acquire, whether by way of purchase, lease or otherwise, any sewer or sewage disposal works, or the right to use any sewer or sewage disposal works.'

What the council contends is that para (i) (b) of that subsection authorises the council, after giving reasonable notice to the owners and occupiers, to enter on the bungalow, demolish it and construct the proposed sewer through the site. 'Land', says the council, includes buildings by virtue of the Interpretation Act 1889, s 3. This provides that in every Act passed since 1850

'unless the contrary intention appears . . . The expression "land" shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure.'

As for the demolition of the bungalow, counsel for the council accepts that there is nothing in s 15 which in terms authorises this, but he contends that the power to demolish buildings is inherent in an implied power to carry out any ancillary works requisite for the exercise of the statutory power to construct a public sewer.

Counsel for the plaintiffs, on the other hand, made three points. First, he contended that what is proposed to be constructed is not a 'public sewer' within s 15 (1). He developed something of an argument on this point, but ended by accepting that as matters stood he could not take the point very far on motion, and that it was improbable that he could make a sufficient case for an interlocutory injunction on this point alone. He has thus given due notice to counsel for the council of a contention that may be advanced at a later stage in this action, but little more, and accordingly I need say no more about it now. Counsel for the plaintiffs' other two points, however, were pursued with vigour. Counsel on both sides concurred in stating that there was no authority on them, although their suggested reasons for that lack of authority differed widely. Put shortly, counsel for the plaintiffs' two points were, first, that 'land' in s 15 (1) does not include buildings because a contrary intention appears which ousts the Interpretation Act 1889, s 3; and, second, that s 15 (1) confers no power to demolish buildings. Though authority on the points is wanting, the first point has been discussed in a book and an article to which counsel for the plaintiffs referred me in support of his contention. Confidence in these writings is, however, somewhat diminished by reason of each of them misquoting the phrase being construed: in a phrase so brief as 'in, on or over', the omission of a preposition and a comma cannot be accounted trivial.

I must now consider these points in turn. First, does 'land' in s 15 (1) include buildings? By s 343 (1) of the Public Health Act 1936, unless the context otherwise requires, "'land" includes any interest in land and any easement or right in, to or over land'. Neither side was able to found any contention on this provision, and so one is driven back to the terms of s 15 (1). The two limbs of para (i) of that subsection differ in that, as counsel for the council pointed out, the power to construct a public sewer is exercisable under the second limb only 'after giving reasonable notice' to the owners and occupiers of the land, whereas there is no such restriction under the first limb. Paragraph (i) deals with three types of property: two of these, namely, 'any street, and any cellar or vault below any street', are in the limb not requiring notice, whereas the third, consisting of 'any land not forming part of a street', is the limb which does require notice. If the word 'land' in the last category is to be expanded in accordance with the Interpretation Act 1889, s 3, it must include buildings, so that Parliament is contemplating not merely bare, unbuilt-on land which does not form 'part of a street', but also buildings (including 'messuages', 'tenements' and 'houses') which do not form 'part of a street'. The contrast, it seems, is with buildings which do form part of a street. If a building is part of a street, it must, as such, be included under sub-para (a), not requiring reasonable notice; if a building is not part of a street, it must, as such, be included under sub-para (b), requiring reasonable notice.

I find the concept of houses and other buildings which form part of a street somewhat difficult. I also find some difficulty in perceiving why Parliament should

wish to distinguish between the two types of buildings as regards the giving of notice. These difficulties arise only if 'land' is construed as including buildings: they vanish if it does not. Furthermore, the whole subject of the construction of public sewers seems to me to be, if I may be pardoned for saying so, of the earth, earthy. When reference is made to the construction of sewers, there readily spring to mind thoughts of making excavations in streets and digging trenches across fields. It may be that to the mind of the civil engineer or borough surveyor there also spring thoughts of the construction of sewers 'in' buildings, or 'on' buildings, or 'over' buildings: on that there is no evidence. But Parliament is not composed of civil engineers and borough surveyors, and what I am concerned with is a statute passed by Parliament which uses the word 'land' in the context of the construction of public sewers. Furthermore, the statute is one which gives powers to borough councils, urban district councils and rural district councils (see s 1 (2)), and one may more readily envisage Parliament giving to all these councils power to construct public sewers 'in, on or over' bare, unbuilt-on land simply on giving notice to every owner and occupier, without any right of appeal, than one can conceive of Parliament giving all these councils power to construct public sewers 'in, on or over' any building simply on giving that notice. I accept, of course, that the proposition that an Englishman's house is his castle is not, as such, a formal statement of the law. Nevertheless, there are many instances of Parliament and the courts paying special attention to the sanctity of the home, and I should be slow to impute to Parliament the intention to provide that any local authority, by the simple expedient of passing a resolution and giving reasonable notice, should be entitled to enter a citizen's home and construct a public sewer 'in, on or over' it. Houses and gardens may well be very different for this purpose: however little a man may like having a sewer constructed through his garden, it does not destroy his home. For that matter, I have never heard it averred that an Englishman's garden is his castle.

I turn from that to the second point, the power to demolish buildings. Counsel for the council contended that just as the power to construct a public sewer must, by necessary implication, carry with it the power to excavate the soil in order to accommodate the pipes and so on, so there must be an implicit power to demolish any buildings in the line of the sewer if this is necessary in order to construct the sewer. Such a power, he said, was merely ancillary to the power to construct the sewer. Counsel for the plaintiffs described this use of the phrase 'merely ancillary' as being 'incredible'. Nevertheless, on the footing that 'land' in s 15 (1) includes buildings, there seems to me to be force in the contention that, if power is given to construct public sewers 'in, on or over' any building, at least some measure of demolition must have been contemplated. Yet the stronger the argument on this second point, the more destructive of counsel for the council's argument on the first point it seems to be. Parliament could, of course, provide that once any council resolves on the line on which a public sewer is to be constructed, this constitutes the sewer a juggernaut, and authorises the demolition or removal of all that stands in its way, whether factories, offices, houses or anything else. The question is whether Parliament has manifested an intention to do this. The wider and more extensive the power, especially when brought in by what is said to be implicit and ancillary, the more striking it becomes that no safeguards are provided. There is no provision for a public enquiry, and none for any appeal. Nothing is needed save a resolution of the council and reasonable notice. Given that, all that stands in the path of the sewer may be demolished, no matter what alternative route is available. Doubtless some restraining influence is exercised by s 278 (1) of the Public Health Act 1936, requiring the council to 'make full compensation' to any person who has 'sustained damage' by reason of the exercise of the council's powers under the Act, the compensation to be determined by arbitration. Nevertheless, I find it difficult to believe



that when Parliament conferred on local authorities the power to construct public sewers 'in, on or over land' Parliament thereby intended, without providing any safeguards, to confer as a mere ancillary to that power the right to demolish any building in the line of the sewer, leaving the landowner with the site of the demolished building and whatever compensation for damage he may be entitled to receive. If 'land' does not include buildings, the power to demolish buildings which is said to be merely ancillary is or may be considerably more powerful and drastic than the principal power: the ancilla outranks her mistress.

I also bear in mind the Public Health Act 1936, s 25. This requires a local authority to reject the plans of a building which it is proposed to erect over any sewer shown on the statutory map of sewers, unless the authority is satisfied that 'in the circumstances of the particular case' the authority 'may properly consent to the erection of the proposed building', with or without any requirements specified in the consent. In the present case, the council is willing to give the necessary consent; but in other cases such a consent may be refused. Certainly the terms of s 25 suggest that the giving of such consents will be the exception rather than the rule. Accordingly, if s 15 (1) is as wide as counsel for the council would have it, the power is a power to demolish buildings and lay a sewer which may preclude the erection of any buildings, whether by way of replacement or otherwise, over the sewer. On his argument, all this flows from the simple words 'construct a public sewer . . . in, on or over any land not forming part of a street', coupled with the Interpretation Act 1889.

I do not think that this argument can be right. If Parliament had intended to confer so extensive and far-reaching a power as that for which counsel for the council contends, I think that language would have been chosen which would have made the extent of the power far more explicit than is done by the language in fact employed. In my judgment, the context in which 'land' appears shows a sufficient intention to exclude the application of the Interpretation Act 1889, s 3, so that 'land' in s 15 (1) of the Public Health Act 1936, does not include buildings. I say nothing of other structures, such as fences and walls not forming part of a building. Subject to the question of discretion, I therefore hold that the plaintiffs are entitled to the second of the injunctions claimed in the notice of motion, restraining the council from pulling down, demolishing or removing the structure or any part thereof of the buildings on 43 Queen's Drive. As regards the first of the injunctions claimed, I do not think that the council should be enjoined from entering on the land (as distinct from the buildings) comprised in 43 Queen's Drive, for the power conferred by s 15 (1) is wide enough to authorise the construction of a public sewer in the garden of a house. But I do not consider that it confers any power to enter the bungalow itself, and accordingly, again subject to the question of discretion, if counsel for the plaintiffs wishes to have an injunction with a reduced ambit, merely restraining entry on the bungalow itself, I think that he is entitled to it. In fact, as it is accepted that the scheme cannot be carried out in its present form without demolishing the bungalow, the other injunction may suffice the plaintiffs: but that is for them to say.

As for the question of discretion, the grant of one or both of the injunctions would maintain the status quo. It would also accord with the balance of convenience. The demolition of the bungalow would be an irreversible act, though of course a new bungalow could be erected to replace the old. Furthermore, it was not until this year that the council resolved to proceed by way of constructing a sewer under the Public Health Act 1936. The flooding of the district is, of course, a serious matter; but it is nothing new, and the council cannot expect to have the opposition to its proposals which it has known about since 1970 swept aside as soon as the council resolves on a new procedure, if that procedure appears on motion to be



contrary to law. The case is not one in which the essential facts are in dispute, and each side has developed the arguments on the law in full. Accordingly, the balance appears to be strongly in favour of granting the injunctions rather than withholding them. I therefore hold that the plaintiffs are entitled to the first of the injunctions claimed, and also, if they desire it, to the second of those injunctions, though in the modified form that I have indicated.

Solicitors: *Prentis, Seagrove & Co*, for *Chas D Mason, Surbiton*; *Sharpe, Pritchard & Co*, for *The Clerk, Esher UDC, A E Gilbert*.

Reported by Miss Philippa Price, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, WILLIS AND BRIDGE, JJ)

22nd June 1972

R v CRIMINAL INJURIES COMPENSATION BOARD,  
Ex parte LAWTON

*Criminal Injuries—Compensation—Personal injury directly attributable to arrest or attempted arrest of suspected offender—Detention of suspected offender at police station—History of mental illness—Completion of application for admission to mental hospital—Attempted escape while waiting to be taken to hospital—Pursuit by police officer—Injury during pursuit—Compensation for Victims of Crimes of Violence Scheme, 1964 (1969 revision), para. 5.*

By para 5 of the Compensation for Victims of Crimes of Violence Scheme 1964 (1969 revision): 'The board will entertain an application for ex gratia payment of compensation in any case where the applicant . . . sustained . . . personal injury directly attributable to . . . an arrest or attempted arrest of an offender or suspected offender . . .'

Two police officers found W in possession of articles which they suspected had been dishonestly obtained. They took him to a police station, where he showed signs of being mentally disturbed. Arrangements were made for W to be seen by a suitably qualified doctor with a view to his being admitted to a mental hospital under s 29 of the Mental Health Act, 1959. He was examined by a doctor and the mental welfare officer made the necessary application for his admission to hospital. After the formalities had been completed and there was, accordingly, in being an effective application to detain W under the Act, W was sitting in a waiting room in the mental welfare office with a police officer waiting for the ambulance which was to take him to hospital, when he suddenly got up, pushed the police officer aside, and jumped through a window. The police officer immediately followed him through the window and pursued him, and in so doing he was injured accidentally. The officer claimed compensation under the Criminal Injuries Compensation Scheme, but the board refused the application on the ground that the officer did not come within para 5 of the Scheme. On an application by the officer for certiorari to quash the decision of the board,

**Held:** while the application by the mental welfare officer for W's admission to hospital gave the officer a fresh and independent right to detain W, it did not deprive him of the right which he had had all through to detain W by virtue of his original suspected offence, and when the officer was pursuing W, the pursuit was authorised both by the application completed under the Mental Health Act, 1959, and also by reason of the original detention as a suspected offender; the officer, therefore, came within the terms of para 5 of the scheme, and certiorari to quash the decision of the board must issue.

**MOTION** by Pc Michael Lawrence Lawton for an order of certiorari to bring up and quash a determination of the Criminal Injuries Compensation Board whereby they

declined to consider an application by him for compensation under the Criminal Injuries Compensation Scheme.

*F B Purchas QC and W L M Davies for the applicant.  
Gordon Slynne for the board.*

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of Pc Michael Lawrence Lawton for an order of certiorari to bring up and quash a determination of the Criminal Injuries Compensation Board reached on 8th September 1971 whereby the board declined to consider an application of the applicant for compensation under the Criminal Injuries Compensation Scheme. I use the phrase 'declined to consider' because in effect what they did was to consider the scheme and the facts, and decide that the applicant did not come within the enabling words.

The essential facts are quite brief. Two police officers on patrol saw a man called John Anthony Watts in the vicinity of a motorway. He excited their interest, they went and had a word with him, they found him in possession of goods which it seemed unlikely he had come by honestly, he could not explain his movements during the immediately preceding hours, and he also showed some signs of being mentally disturbed. The police officers therefore took him into the police station. It is not absolutely clear whether they arrested him in the technical sense or not, but the board itself in its written decision refers to Mr Watts as having been arrested at this time, and I think for myself that is the only fair conclusion to be reached. When he was brought into the police station, the station sergeant, hearing or recognising that he was a local man, sent the applicant down to see Mr Watts's mother. The applicant there discovered that Mr Watts had been a patient in a mental hospital before and his mother thought it would be a very good thing if he went back. He reported this on his personal radio to the sergeant, and the sergeant then apparently on his own responsibility decided to make arrangements for this man to be seen by a suitably qualified doctor with a view to his being admitted to a mental hospital under the emergency provisions contained in s 29 of the Mental Health Act 1959.

After an interval which may have taken an hour or more, appropriate arrangements were made, the applicant and another officer were sent with Mr Watts to the surgery of the doctor who was to examine him, and in due course he was examined and the mental welfare officer made the necessary application for his admission to hospital.

The point had been reached when all the formalities had been completed, when an application effective to detain Mr Watts in hospital had been duly made, and the two police officers and Mr Watts were sitting in a waiting room or office in the vicinity of the mental welfare officer's office waiting for the ambulance which was to take him to hospital. Whilst they were there, Mr Watts suddenly got up, pushed the applicant aside and jumped through the window, obviously with a view to obtaining his liberty. The applicant immediately followed him through the window and unfortunately hurt himself accidentally as a result of so doing. He made a claim on the board, basing his claim on the Criminal Injuries Compensation Scheme. The only point which the board considered in the course of its hearing of this matter was whether the applicant was entitled to make an application having regard to the scope of the scheme as defined in para 5. Paragraph 5, omitting inessential words, states:

'The board will entertain an application for ex gratia payment of compensation in any case where the applicant... sustained... personal injury directly attributable to a crime of violence... or to an arrest or attempted arrest of an offender or suspected offender...'

It is not suggested here that the injuries suffered by the applicant were directly attributable to a crime of violence, and what he contended, and contends today through the mouth of counsel, is that he suffered this injury whilst he was attempting to arrest an offender or suspected offender. As the board say in one sentence in the course of their findings, the question which they had to decide was whether at the material time the applicant was attempting to arrest an offender or suspected offender.

The argument which appealed to the board in the end and which is supported before us today by counsel for the board is that as soon as the application for the admission of Mr Watts to hospital had been duly completed and as soon as the recommendation of the doctor had been put on paper and signed so that Mr Watts could legally be kept in custody and taken against his will to hospital, he lost any previous character which he may have had as an offender or suspected offender, but became a person who was in lawful custody solely by reason of the authorisation under the Mental Health Act 1959. Section 31 of that Act makes it perfectly clear that such an application authorises the officer who applies for the patient's admission, or anyone authorised by him to take the patient to hospital. The argument is that when Mr Watts broke away from the police officers he did so as a person in lawful custody under the Mental Health Act only, that he was not an 'offender' within para. 5 of the scheme that by, breaking away in those circumstances he committed no offence, and accordingly it cannot be said that the applicant in these proceedings, when he gave chase, was attempting to arrest an offender or suspected offender.

I would like to make it clear at the outset that I wholly accept counsel for the board's submission that if a man who is in lawful custody simply because the machinery of the Mental Health Act 1959 has been used in his case and he has lost his liberty on that account, makes his escape without committing any criminal offence as part of the escape itself, then, although it is proper for the police to pursue and apprehend him if they find him, he would not be apprehended as an offender or a suspected offender. It is clear to my mind that a person detained under the Mental Health Act who makes his escape does not thereby commit an offence, and if we were here dealing with the case of a patient whose detention was solely attributable to the machinery of the Mental Health Act, I would have no doubt that counsel for the board was right in submitting that the re-taking of such a person on his making an escape would not be an arrest of an offender or suspected offender.

However, that is not this case. In this case one starts at the beginning of the day with the police officers, as I think, arresting Mr Watts, and bringing him to the police station. He was then in custody as a person suspected of theft. Nothing was done to determine that custody, that is to say, he was not granted bail and no order was made releasing him from the original arrest or the custody derived from it. In my judgment when the application for Mr Watts's admission to hospital was completed, while that may very well have given a fresh and independent right to detain him and deprive him of his liberty, I see no reason why at that point it should have deprived the police officers of the right to detain him which they had all through the day by virtue of his original suspected offence. I can see nothing illogical in a situation arising when the man in question is liable to be detained on two counts, and I do not see any reason why those two counts should be regarded as mutually exclusive.

Accordingly, it is not, I think, open to the board to say that when the applicant chased Mr Watts through the window he was chasing him merely as an escaped mental patient. I think that the chasing was sanctioned both by the original detention as a suspected offender and also by the application completed under the Mental Health Act 1959.

I accept counsel for the board's argument that one must consider in these cases whether the police officer is arresting or retaking the individual as an offender or in some other capacity, but where, as here, the police officer had authority so to act in one of two capacities, it seems to me to be wholly unreal and quite unnecessary to pause and consider whether at the moment when he jumped through the window, he had in mind one or the other.

I think, if it were necessary to make fine distinctions of that kind, we should be introducing an unduly legalistic note into this essentially informal procedure. It is quite impossible to suppose that any officer in his situation would ever apply his mind to the situation as to which of his hats he was wearing or which authority he was exercising. Since he had both authorities, he was entitled to go to the board and say he suffered his injuries when attempting to arrest an offender, and that is enough for the present application. Accordingly it seems to me that the applicant comes within the terms of the scheme and I would allow the order for certiorari to go.

**WILLIS J:** I agree.

**BRIDGE J:** I agree.

*Order for certiorari.*

Solicitors: Russell Jones & Walker; Treasury Solicitor.

Reported by T R Fitzwalter Butler, Esq, Barrister.

# CHANCERY DIVISION

(GOFF, J)

14th April, 15th May, 19th June, 1972

## LAVERSTOCK PROPERTY CO LTD v PETERBOROUGH CORPORATION

*Open Space—Sale by local authority—Statutory trust to hold for enjoyment by public—Power of sale—Open Spaces Act, 1906, s 10—Local Government Act, 1933, s 165, s 179.*

By s 10 of the Open Spaces Act, 1906: 'A local authority who have acquired any estate or interest in or control over any open space . . . under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—(a) hold and administer the open space . . . in trust to allow, and with a view to, the enjoyment thereof by the public as an open space . . . and . . . for no other purpose. . . .'

By s 165 of the Local Government Act, 1933: 'A local authority may, with the consent of the Minister,—(a) sell any land which they may possess and which is not required for the purpose for which it was acquired or is being used . . .'

By s 179 of the Act of 1933: 'Nothing in this Part of this Act shall . . . (d) authorise the disposal of land by a local authority, whether by sale, lease, or exchange, in breach of any trust, covenant or agreement binding upon the authority . . .'

A local authority contracted to sell to a company for £3,000 land acquired by them under the Open Spaces Act, 1906, the sale being subject to the release of the land from the restrictions of that Act and the requisite Ministerial approval being given. By a subsequent agreement the company was to begin developing the land by building thereon and to pay the purchase price as if Ministerial consent had been obtained and the sale completed. It was further agreed that, if the consent were not forthcoming and the conveyance of the land did not take place, the £3,000 was to be repaid to the company who, if required would restore the land to its former condition. The company duly developed the land and thereafter assigned all its interest to the plaintiffs. At no time was the consent of the Minister obtained nor were the provisions of the Act of 1906 rendered inapplicable.

On a summons to determine whether the authority was bound to convey the legal estate in the land to the plaintiffs,

HELD: the trust mentioned in s 179 of the Act of 1933 was not limited to a trust created by one of the parties thereto or one arising by implication of law, but included a statutory trust, and so applied to a trust created by s 10 of the Act of 1906; s 165 of the Act of 1933 must be read as subject to s 179 of that Act; and, therefore, the authority had no power to exercise the power of sale given them by s 165.

ORIGINATING SUMMONS by which the plaintiff company asked the court to determine whether, on the construction of certain agreements, the defendant authority was legally bound to convey a property known as The Bridge, Peterborough to the company, and sought other relief.

Jack Hames QC for the plaintiffs.  
Gavin Lightman for the defendants.

*Cur adv vult*

June 19. **GOFF J** read the following judgment: In 1954 the defendants were the owners of a piece of land then lying waste containing some 4,656 sq yds situate in the city of Peterborough, now known as 'The Bridge', which it is common ground they had acquired under the Open Spaces Act 1906. For some reason they did not wish to use it for the purpose for which it had been acquired, and they entered into a contract in writing, dated 12th January 1954, to sell it to Mitchell Engineering Ltd at the price of £3,000. That contract very properly contained the following provision, special condition K:

'The sale is conditional upon all necessary approvals consents and orders of the appropriate Ministers being obtained and in particular upon an order being obtained releasing the property from restrictions and obligations imposed thereon by the Open Spaces Act 1906.'

Some time having elapsed and that term or condition not having been satisfied, Mitchell Engineering Ltd were anxious to proceed with the development of the site, and accordingly they entered into an agreement with the defendants under seal and dated 30th August 1954, to the terms of which I must refer in some detail. I begin at recital (2):

'The [defendants] have agreed to sell the said land to the company for the sum of £3,000 subject to provisions as have been mutually signified between the [defendants] and the company by a written agreement (hereinafter called "the said agreement") dated Jan. 12, 1954, and in particular it has been requisite to include in such agreement that the legal conveyance to give effect to the proposed transaction shall be conditional upon all necessary approvals consents and orders of the appropriate Ministers being obtained and in particular upon an order being obtained releasing the property from restrictions and obligations under the Open Spaces Act 1906.

'(3) It has been ascertained from the Minister of Housing and Local Government that the formalities for releasing the property from such restrictions under the Open Spaces Act 1906, are dependent on the making and confirmation of an order under section 42 of the Town and Country Planning Act 1947, and that this in turn is dependent on the prior approval of the Minister to the development plan submitted under the said 1947 Act by the Soke of Peterborough County Council and that the carrying out of these formalities cannot be anticipated for completion for a period of at least some months from the date hereof.



'(4) The company for the urgent purposes of the carrying out of their functions are anxious to make an early start on the construction of offices which was the purpose for which they entered into the said agreement for the purchase of the said land and the [defendants] so far as may be in their power are willing to encourage such construction.

'(5) The company having examined such risks as may be attendant in proceeding with such construction prior to the completion of the formalities aforesaid are desirous of proceeding forthwith and have for such purpose agreed to enter into these presents with the [defendants]'.  
 Then the agreement witnessed:

'1. In consideration of the [defendants] permitting the company to enter upon the said property and proceed with the construction of offices . . . as if the land had been duly conveyed to them by legal conveyance in pursuance of the said agreement the company hereby pay (and the [defendants] hereby acknowledge the receipt of) the sum of three thousand pounds due to be paid on completion of the conveyance pursuant to the said agreement . . .

'3. The [defendants] for their part shall raise no objection nor commence any proceedings by virtue of the company having entered the said land and commenced or carried out any construction as aforesaid thereon despite the non-obtaining of the Ministerial consents referred to in the said agreement . . .

'4. In the event of any party or parties other than the [defendants] taking action by virtue of the non-obtaining of the consents aforesaid (whether as the result of entry or construction as aforesaid or otherwise) the company shall indemnify the [defendants] . . . though without prejudice to the absolute provisions of this clause the [defendants] for their part will use their best endeavours to protect against and to oppose any such acts or proceedings.

'5. In the event of any acts or proceedings as referred to in the preceding clause being taken and resulting in the abandonment (whether as a temporary or permanent measure) of any construction as aforesaid either being or having been carried out by the company on the said land the company shall have no claim whatsoever against the [defendants] in respect of the authority given by these presents or for any construction in pursuance hereof and (whether under the provisions of common law statute or otherwise any such construction shall be the legal property of the [defendants] or the company) in the event of such happenings as aforesaid the company shall if so required at the direction of the [defendants] take all necessary steps by way of removal of any such construction as are required to restore the said land to its condition as open space all at the expense of the company

'6. Nothing herein contained shall affect the legal vesting of the said land which pending the execution of any conveyance pursuant to the said agreement shall remain the freehold of the [defendants]

'7. The [defendants] shall continue their best endeavours to secure all the Ministerial consents referred to in clause "K" of the said agreement and on the obtaining thereof proceed to the legal conveyance of the said land in pursuance of such agreement . . .

'8. If the formal conveyance of the property to the company shall in due course proceed pursuant to the said agreement the three thousand pounds paid on execution of this deed pursuant to clause 1 hereof shall be treated in satisfaction of the three thousand pounds purchase price provided for in the said agreement . . .

'9. If by reason of the non-attaining of Ministerial consents as aforesaid or for any other reason the conveyance to the company pursuant to the said agreement

shall not proceed then the three thousand pounds paid under the provisions of this deed shall be repaid by the [defendants] to the company . . .'

The £3,000 was duly paid and Mitchell Engineering Ltd entered on the land and developed it by building offices and other buildings thereon at very considerable expense. It is now a most valuable property, but the legal estate remains outstanding in the defendants, and no consent has been obtained or order made abrogating the provisions of s 10 of the Open Spaces Act 1906.

The title of Mitchell Engineering Ltd, such as it is, has in due course devolved on the plaintiffs. The defendants have not sought to eject them, but the plaintiffs are anxious to regularise their position, and accordingly they have issued this originating summons by which they ask:

'1. That it may be determined whether upon the true construction of the agreement made the 12th January 1954 between the [defendants] and Mitchell Engineering Ltd. and the deed made the 30th August 1954, between the same parties and in the events that have happened and in the light of an agreement made the 28th November 1969, between Mitchell Engineering Limited acting by its receiver and manager Ian Glendenning Watt and Greytown Properties Ltd. and a deed of assignment made the 12th June 1971, between Mitchell Engineering Ltd. and its receiver and manager, Greytown Properties Ltd., and the [plaintiffs], the defendants are legally bound to convey the property now known as The Bridge, Peterborough, to the [plaintiffs].

'2. If it be held that the defendants are so bound to convey the said property an order directing the defendants to convey the same to the [plaintiffs] and all consequential directions.

'3. If it be held that the defendants are not presently so bound that it may be determined what steps, if any, the defendants should now take in order to become so bound.

'4. An order directing the defendants to take the aforesaid steps.

'5. Alternatively, damages for breach of the above mentioned agreement and deed of 1954.'

No claim for damages was argued before me. The defendants, as a responsible authority, are willing to do anything which they properly can to perfect the plaintiffs' title, but they recognise their duties to their ratepayers and they do not feel able to convey without a decision that it is right for them to do so; and their counsel very properly submitted the arguments against their ability to make title in the circumstances. I am not on this summons concerned with any question whether the defendants could if so minded recover possession or whether that would involve them in any liability to pay compensation for the improvement (if such it be) of the property; and that was not argued either.

The question was canvassed whether condition K truly made the agreement of 12th January 1954 a conditional contract or whether it was merely a term as to title: see *Property and Bloodstock Ltd v Emerton* (1). However, in my judgment, nothing turns on that. Condition K is clearly not something which can be unilaterally waived, and it was in the end common ground that the plaintiffs cannot call for a conveyance unless and until they are able to show that in the events which have happened there is no necessity for any such consent, order or release as thereby envisaged, and conversely, if that be so, the defendants must convey.

The recitals to the deed of 13th August 1954 show that it was then thought that title would be perfected by the making and confirmation of an order under s 42 of

the Town and Country Planning Act, 1947. That, however, had to await the approval of the development plan, which did not occur until 1959. The plan was not put in evidence and no order was in fact made or confirmed under s 42. Prima facie it would seem that an order might have been made under that section (see *Burnell v Downham Market Urban District Council* (1)), although there may be a question about that, because in the Act of 1947 'open space' was given the meaning defined by the Acquisition of Land (Authorisation Procedure) Act, 1946, and that definition is different from, and in some respects narrower than, that in s 20 of the Open Spaces Act 1906. The land was clearly an open space within that Act, because s 20 includes the words 'or lies waste and unoccupied', but those words do not appear in the Acts of 1946 and 1947, which refer only to land laid out as a public garden or used for the purposes of public recreation.

Even if it might have been done that way initially, it may be that Mitchell Engineering Ltd, having taken possession and built on the land, the section cannot now be utilised, because the defendants can no longer appropriate the property for any purposes of their own, at all events whilst leaving the plaintiffs in possession and still less conveying the legal estate to them. These questions have not yet been argued, and I reserve them for consideration, if necessary, at a further hearing.

The matter was argued before me on the footing that the land can and should now be conveyed to the plaintiffs free from the provisions of s 10 of the Open Spaces Act 1906, in exercise of the power conferred on the defendants by s 165 of the Local Government Act 1933, which is in these terms:

'A local authority may, with the consent of the Minister—(a) sell any land which they may possess and which is not required for the purpose for which it was acquired or is being used . . .'

It was further argued that, by virtue of s 26 (1) of the Town and Country Planning Act 1959, the consent of the Minister is not now required. That section is as follows:

'Subject to the following provisions of this section, where by any enactment—(a) power is conferred on any authority to whom this Part of this Act applies, or on any class of such authorities, to dispose of land, but (b) that power is so conferred subject to a provision (in whatever terms the provision is expressed and whether it is contained in the same or in any other enactment) that the power is not to be exercised except with the consent of a Minister specified in that provision, with or without a further provision enabling conditions to be imposed by such a Minister in respect of the exercise of the power, the enactment shall have effect, in relation to any exercise of the power after the commencement of this Act by an authority to whom this Part of this Act applies, as if it conferred that power free from any such provision as is mentioned in paragraph (b) of this subsection.'

After some confusion on the point it was ultimately accepted by both sides that the defendants are an authority to whom the relevant part of the Act applies.

In these circumstances the first question I have to determine is whether the power conferred by s 165 (a) can be utilised at all, because the Act of 1959 creates no new power. The most it does (if having regard to sub-s (2) it does that much) is to remove the necessity for Ministerial consent.

I will assume in favour of the plaintiffs that if s 165 of the 1933 Act stood alone this general power would override the express provisions of the special Act of 1906, but in my judgment, even so, the plaintiffs face an unanswerable difficulty since s 179 of the 1933 Act provides as follows:

(1) 116 JP 168; [1952] 1 All ER 601; [1952] 2 QB 55.

'Nothing in this Part of this Act shall . . . (d) authorise the disposal of land by a local authority, whether by sale, lease, or exchange, in breach of any trust, covenant or agreement binding upon the authority . . .'

and s 10 of the 1906 Act expressly created a trust. It was sought to overcome this by submitting that in the context afforded by the presence in s 179 (d) of the words 'covenant or agreement', 'trust' must be limited to trusts created by act of the parties, or perhaps implication of law, but excluding trusts created by statute. In the course of the argument counsel for the plaintiffs was constrained to admit (and in my judgment rightly so) that he could not put his case as high as that.

He then sought to say that the word 'trust' in s 10 must be given a narrow meaning and certainly narrower than as used in s 179 (d) of the Act of 1933, importing in the earlier statute no more than 'statutory duty'. The context of s 179 (d) in the reference to covenant or agreement is, as I see it, irrelevant to this argument, and I can find no justification whatever for so limiting or altering the clear words of s 10. Reliance was placed on the words in s 10 of the 1906 Act 'and with a view to', but their presence is fully explained by the opening words of the section, 'hold and administer'. The local authority is to hold in trust to allow, and to administer with a view to, the enjoyment by the public. Moreover, the scheme of the Act of 1906 excludes giving the word 'trust' in s 10 a narrow or special meaning. Sections 2 to 8 confer various powers to transfer open spaces to local authorities. Correlatively s 9 gives those authorities power to acquire the same, and s 10 deals with the position where they have done so, and the earlier sections contemplate clear examples of trusts properly so called on any showing.

Counsel for the plaintiffs endeavoured to support his limited construction of s 10 by asking me to draw some inference from s 26 of the 1959 Act, particularly having regard to the difference of definition to which I have referred; but I cannot see how that helps him. It is true that if and where s 165 is applicable the difference in definition may create an anomaly in that some open spaces will be saleable only with Ministerial consent while in other cases it will not be required, but that anomaly, if such there be, is inherent, since not all open spaces are such within the meaning of the 1959 Act, and it has nothing to do with the question whether the language of s 10 of the 1906 Act imports a trust within the meaning of s 179 (d) of the 1933 Act.

If indeed the definitions had been identical and if no open space could be held by any local authority save one acquired under the Act of 1906 there might be an inference to be drawn that at least the legislature in 1959 thought that the power in s 165 was exercisable to override the statutory trust in s 10; but that is not the position.

The argument then shifted its ground, and it was said that unless s 165 does apply then an open space within the meaning of the Act of 1906 can never be sold save under a specific statutory authority. That, again, is too wide, first because open spaces within the meaning of the 1906 Act may not have been acquired under it, and, secondly, the land may in some cases be acquired subject to an express power of sale, which would be preserved, as s 10 is expressed to be, 'subject to any conditions under which the estate interest or control was so acquired'. Even so far as it is right, however (and in some cases it may be so if my construction of s 10 is the true one, subject always to s 42 of the Town and Country Planning Act 1947) still that is purely a question of the construction of s 10 of the 1906 Act and s 179 (d) of the 1933 Act, unaffected by anything in s 26 of the 1959 Act; and I have already given my reasons for the construction which I have adopted, and I see nothing in this objection to make me change it.

I understand that the Minister was in fact asked to give his consent, whether under s 165 or to some other course is not clear, and that he declined on the ground

that he had no power to do so, or could not properly do so, having regard to the decision in *Blake v Hendon Corp* (1), and I was referred to a passage in the judgment of the court. The court was there dealing with the argument (counsel for the valuation officer's alternative case) that s 164 of the Public Health Act 1875, under which the land had been acquired, and the power to let contained in s 164 of the Local Government Act 1933, were alternative and inconsistent powers, so that the local authority, it was said, could not fetter the one by dedicating the land under the other. The Court of Appeal held, however, that, even if that were the true view, the court ought to prefer the power which subserved, in preference to that which frustrated, the purpose for which the land was originally acquired. That is a different question from the one before me, where there is a power to sell land not required for the purpose for which it was originally acquired, and would not, in my judgment, prevent the Minister giving his consent under s 165 of the Act of 1933, had that section not been excluded by s 179 (d). Moreover, as at present advised, I can see nothing in *Blake's* case to prevent the Minister giving consent under s 42 of the Town and Country Planning Act 1947, if that section be applicable; but I have not heard argument on this point.

I find support for the construction I have adopted in *Burnell v Downham Market Urban District Council* (2) already mentioned. There land was conveyed on trust for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act 1906, counsel for the valuation officer did not attempt to argue that the land could be sold under s 165 of the Act of 1933, and the Court of Appeal noted this without any question or surprise. I do not doubt that the explanation lies in s 179 (d). Moreover, SIR RAYMOND EVERSHED MR, delivering the judgment of the court, referred to a suggested distinction between certain of the rating cases in these words:

'He contended, however, that the principle of the *Brockwell Park* (3) case has never been, and should not now be, extended to a case where, as here, the trusts arose out of, and only out of, the deed of the parties to it . . .'

and then dismissed that argument as follows:

'We find it unnecessary, however, to express any concluded opinion as to the validity or scope of the distinction sought to be drawn by counsel for the valuation officer, for it is, in our view, plain that the trusts here in question are in effect statutory trusts, inasmuch as the conveyance in the present case operated by virtue of s. 10 of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed by that Act to which we have already referred — in short, the duty of allowing it to be used by the public for the purposes of recreation?'

I will, therefore, answer question 1 of the originating summons in the negative, but without prejudice to any question whether there are any steps, whether under s 42 of the Act of 1947 or otherwise, enabling the defendants to convey the legal estate to the plaintiffs free from the trusts, powers and provisions of s 10 of the Act of 1906, which the defendants are bound to take or may properly take, and I will stand over the rest of the originating summons for further consideration. In doing this I expressly save the operation of the power in s 165 of the Local Government Act 1933, in conjunction with any other operation which it may be submitted abrogates the trust in s 10 of the 1906 Act, but I expressly hold that such trust cannot be overridden by that power alone.

(1) 125 JP 620; [1961] 3 All ER 601; [1962] 1 QB 283.

(2) 116 JP 168; [1952] 1 All ER 601; [1952] 2 QB 55.

(3) 61 JP 580; [1897] AC 625.



It will be for the plaintiffs to formulate in writing what they propose and to notify the defendants. I will then restore the summons for further argument on a day and at a time to be fixed, or, indeed, for a consent order should some agreed course emerge. If, however, the plaintiffs find themselves unable to formulate any proposals then I must be so informed and I will restore the summons in order to make an appropriate order finally disposing of it.

*Declaration accordingly.*

Solicitors: *Lawrence, Graham & Co; Town Clerk, Peterborough.*

Reported by Philippa Price, Barrister.

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### FAMILY DIVISION

(PAYNE AND LATEY, JJ)

19th June 1972

RE K AND M (INFANTS)

*Child—Care—Assumption by local authority of parental rights—Application by father for right of access—Jurisdiction of justices—Children Act, 1948, s 2 (1) (b)—Guardianship of Minors Act, 1971, s 9 (2) (1).*

On 19th March, 1971, a local authority passed a resolution under s 2(1) (b) of the Children Act, 1948, that all the rights and powers of the mother of two illegitimate infants should vest in the local authority. On 25th June, 1971, the father of the infants applied for an order that he should be granted access to the infants, and on 15th July justices heard the application and granted him reasonable access. On an appeal by the local authority against that order,

HELD: the discretion governing the granting of access to the father of the infants was to be exercised by the local authority in accordance with their powers under s 2 of the Children Act, 1948, and not by the justices; accordingly, in the absence of any challenge to the propriety of what the local authority had done and in view of the terms of the order made by the authority under s 2 (1) (b) of the Act of 1948, the justices, in the exercise of their discretion under s 9 (1) (b) of the Guardianship of Infants Act, 1971, should have refused the father's application and left the decision as to access to the local authority.

APPEAL by Hertfordshire County Council against an order made by justices for Hertford directing that the respondent, a putative father, should be granted access to his children who were in the care of the council.

*Elizabeth Appleby* for the local authority.

The respondent in person.

**PAYNE J:** This is an appeal from an order of the justices for the petty sessional division of Hertford under the Guardianship of Minors Act 1971, relating to two children, K born on 17th September 1969, and M born on 11th October 1968. Those children are the children of L and their father is the respondent in this appeal. The appeal involves the reconciliation of two Acts of Parliament, the Children Act 1948 and the Guardianship of Minors Act 1971, which at first sight are, in relevant respects, in conflict, but after the investigation which has been conducted before us the solution is not difficult to find.

The respondent applied on 25th June 1971 for an order that he should be granted right of access to the two children, and, on 15th July 1971 the justices heard his application and granted him reasonable access to the said infants by appointment,

but no taking out access. The local authority now appeals to this court against that order, not because they oppose the respondent having access to the children on his release from prison, where he is at the moment, but because they say that the discretion governing the conditions of access should be their discretion and not the discretion of the court exercised by an order made under the Guardianship of Minors Act 1971.

The difficulty arises in this way. The mother of these children gave her consent to an order being made under s 2 (1) (b) of the Children Act 1948. Section 2 (1) provides:

'a local authority may resolve with respect to any child in their care . . . in whose case it appears to them . . . (b) that a parent or guardian of his (hereinafter referred to as the person on whose account the resolution was passed) has abandoned him or suffers from some permanent disability rendering the said person incapable of caring for the child, or is of such habits or mode of life as to be unfit to have the care of the child, that . . . all the rights and powers of the person on whose account the resolution was passed, shall vest in the local authority.'

On 19th March 1971, under s 2 (1) (b) and with the consent of the mother, this resolution was passed, and the effect of the order is dealt with in later sections of the Act. The local authority, if such a resolution is passed, is put in the position of the parent, or parents, of the child.

Under the Children Act 1948, 'parent' is defined in s 59 (1) and 'parent' in relation to a child who is illegitimate means his mother to the exclusion of his father, so that at first sight the resolution which was passed under s 2 of the Children Act 1948 was binding on the mother but had no effect whatever on the father, because the father, under the 1948 Act, was not recognised as a parent and did not come into consideration at all. Once the local authority assumed parental rights by reason of the resolution, they could act as could any other lawful parent in relation to access to the child. They could place the child in care in an institution; they could place the child with foster parents; they could give to the mother, the parent within the meaning of the Act, or the father, if he was a lawful father, rights of access and visiting and so forth. They could act as a lawful parent would act. Up to that point, the father of an illegitimate child did not come into consideration.

When the matter was before the justices, there was unfortunately a misunderstanding which is clear from the reasons which the justices put before the court. They refer to the father, to the birth of the child, and the order under s 2 (1) (b). They deal with the application itself, and then they say:

'It appeared from the evidence that the [respondent] had been allowed to visit the children in the children's home but had not been allowed to take them out. The [respondent] asked for an order enabling him to take the children out from the children's home. Having heard such evidence as was admissible we were of the opinion that it would not be possible to allow the [respondent] to take the children out from the home as we considered it to be extremely likely that he would not return them. It transpired from the evidence that the [local authority] had been willing for the [respondent] to visit the children in the children's home. We did hear the solicitor for the [local authority] on the law but we stopped the hearing of the case before the conclusion of the evidence for the [local authority], under the apparent misapprehension that the [local authority] would have no objection in the future to the [respondent] visiting the children but that they merely objected to an order being made enabling him to take the children out from the home. Having considered ss 9 (1) and 14 (1) of the Guardianship of Minors Act 1971 we thought it proper to make an order

to the effect that the [respondent] should be granted reasonable access to the children whilst they are in the care of the [local authority], with the conditions that they are not to be taken out and that an appointment must be made beforehand.'

The local authority, as I have briefly stated, are not objecting to access. They complain here of the misapprehension referred to above. What they were saying or what they sought to say or perhaps would have said if they had been allowed to complete their argument was that the discretion governing the granting of access to the respondent was a discretion to be exercised by them in accordance with their powers under the Children Act 1948 and not by the court.

The question is: Did the local authority, and do they now, properly interpret the relevant sections? The difficulty arises because recently the father of an illegitimate child has been given rights which he did not have before. They start with the Legitimacy Act 1959. It is sufficient for my purposes to come to the Guardianship of Minors Act 1971, under which the respondent's application to the court was made. Section 9 (1) of the 1971 Act reads:

'The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding—(a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.'

That section deals with lawful fathers and mothers, but it is extended by s 14 to the father of an illegitimate child. Section 14 (1) reads:

'Subject to the provisions of this section, s 9 (1) of this Act shall apply in relation to a minor who is illegitimate as it applies in relation to a minor who is legitimate, and references in that subsection, and in any other provision of this Act so far as it relates to proceedings under that subsection, to the father or mother or parent of a minor shall be construed accordingly.'

That clearly gives in appropriate circumstances to the father of an illegitimate child the right to apply to the court for custody and/or access, and that has to be reconciled with the statutory powers of the local authority under the Children Act 1948. It so happens that this kind of conflict has received the consideration of the courts in a number of different circumstances and over a number of years; the authority to which we have been referred this morning is *Re M (an infant)* (1). In that case the local authority received an illegitimate child into care under s 1 of the Children Act 1948, and on the same day arranged for him to be boarded out with Mr and Mrs X, in whose care he had been for some two years and who signed an undertaking to return him to the local authority. Mr X died. In 1957 the local authority resolved under s 2 of the 1948 Act that all the rights and powers of the mother should be vested in them. In June 1960 the local authority formed the view that the boarding out of the child with Mrs X was not in his best interests and asked her to return the child to them. She refused and so the local authority issued a summons for an order of habeas corpus. In October 1960 on an application by the foster mother under s 9 of the Law Reform (Miscellaneous Provisions) Act 1949 the child became a ward of court. That brought before the Court of Appeal in due course a problem similar to the one before us: What should the court do where on the one hand there is an order under the Children Act 1948, and on the other hand, as in *Re M's* case, a wardship order in Chancery, and in this case, an application to the justices under the Guardian-

ship of Minors Act 1971. The conflict is resolved in this way. LORD EVERSHERD MR said:

'What then is the effect of this statute to which I have made such references as occur to me to be necessary? I think that the effect may be stated in two propositions. First, the enactment is such that in a case like the present there is in the Act a clear and comprehensive scheme laid down, (what LORD SUMNER called a *modus operandi* [in *Attorney-General v De Keyser's Royal Hotel Ltd (2)*]) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred on the authority by the words—"appears to them"—which have occurred in the citations that I have made . . . On those premises, that is to say in the absence of any challenge as to the propriety of what the local authority or its officers have done as distinct from their wisdom, I feel compelled, by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority.'

Speaking for myself, that is the way in which I would approach the present case. There is no challenge to the propriety of what the local authority have done. Their resolution was passed under s 2 with the concurrence of the mother, and, although the father of the illegitimate child has the right given him by the Guardianship of Minors Act 1971 to apply to the court for an order for custody or access, the court must then apply s 9 under which it may, on the application of the father or mother, make such order as the court thinks fit. Bearing in mind the existence of the order under s 2 of the Children Act 1948, it seems to me that the justices in the circumstances of this case had no alternative but to decline the application of the father and to leave the discretion with regard to access to the local authority. It may be—argument has been addressed to us on this basis—that one could go further and say that the justices had no power to make an order on such an application in any event. For myself I would prefer to leave that second limb of the argument until some later occasion, should it arise, when full argument on both sides may be addressed to the court. For the present, in my view, this appeal should be allowed and the order for access contained in the order of 15th July 1971 rescinded.

**LATEY J:** I agree entirely. I want to add only this. In 1948 a putative father had no rights in or over his illegitimate children. The Children Act 1948 certainly did not give such a father any rights and thus s 2 of the Act does not give the local authority any power to make a resolution under that section directed towards the putative father for the good reason that there was no need for any such resolution. Then, in 1959, in 1963 and finally in 1971 a putative father was given certain rights, but the 1948 Act was not amended. If and when there is further legislation in this area, perhaps it is fair to hope that the position might be made clear so as to avoid the kind of problem which has arisen in this case and which has resulted, as we both think, in the justices being misled as to the proper approach to a case where the facts are as they are in this case. I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: Sharpe, Pritchard & Co.

Reported by G F L Bridgman, Esq, Barrister.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW AND STEPHENSON, LJJ, AND THOMPSON, J)

14th, 17th, 28th July, 1972

R v HYAMS

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Specimen for laboratory test—Two specimens of urine provided—Second specimen sufficient for analysis—Subsequent request by police officer for specimen of blood—Specimen provided by defendant—Right to make further requirement—Road Safety Act, 1967, s 3 (6).*

By s 3 (6) of the Road Safety Act, 1967, 'A person shall not be treated for the purposes of s 2 (1) [of the Road Traffic Act, 1962] or sub-s (3) of this section as failing to provide a specimen [for a laboratory test] unless—(a) he is first requested to provide a specimen of blood, but refuses to do so; (b) he is then requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood but refuses to do so.'

Where a defendant has complied with the request to provide two specimens of urine, and the second specimen is sufficient for analysis, a further request to provide a specimen of blood is in contravention of the statute. Section 6 (c) does not contemplate that, when a requirement once made has been complied with, there may be a further requirement.

APPEAL by Mark David Hyams against his conviction at Inner London Quarter Sessions of driving a motor vehicle on a road having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained by a laboratory test exceeded the prescribed limit contrary to s 1 of the Road Traffic Act 1967, when he was fined £35, disqualified from driving for 12 months, and had his licence endorsed.

Ronald J Walker for the appellant.

Sir Harold Cassel QC and F E Wybrants for the Crown.

*Cur adv vult*

28th July. **MEGAW LJ** read the following judgment of the court: This is yet another case involving the interpretation of the complex provisions of the Road Safety Act 1967. A specimen of blood was given by the appellant. That specimen on analysis showed an alcohol content above the permitted limit. The appellant contends that the specimen of blood was provided in circumstances which involved a departure from the procedure laid down by s 3 of the Act. If that be so, then the doctrine first laid down by the Divisional Court in *Scott v Baker* (1) applies. So far at least as this court is concerned the principle of *Scott v Baker*, which has since been accepted on several occasions by this court, must be treated as being good law. It may be mentioned that in *Director of Public Prosecutions v Carey* (2) some of their Lordships indicated that at least part of the decision in *Scott v Baker* or its implications might be reconsidered in another case. However, in the most recent House of Lords decision on the Road Safety Act 1967, *Sakhuja v Allen* (3), LORD HAILSHAM OF ST MARYLEBONE LC in his introductory analysis of the Act referred in parenthesis to *Scott v Baker* without indicating any reservation as to its correctness.

As we understand the principle laid down in *Scott v Baker*, it is that if the requirements of s 2 or s 3 of the Act have not been complied with—or, if there be a challenge,

(1) 132 JP 422; [1968] 2 All ER 993; [1969] 1 QB 659.

(2) 134 JP 59; [1969] 3 All ER 1662; [1970] AC 1072.

(3) Ante p 414; [1972] 2 All ER 311.



are not proved to have been complied with—there is no discretion in the court. The conviction has to be quashed. In passing it may be mentioned that s 3 (10) provides that where a requirement is made of a person to provide a specimen of blood or urine he shall be given a warning of the possible penal consequences of a failure to comply. That subsection ends with the words: 'if the constable fails to do so, the court . . . may direct an acquittal or dismiss the charge, as the case may require.' Thus, in relation to that part of the prescribed procedure, Parliament has expressly given the court a discretion in the event of non-compliance: see *R v Brush* (1). But in the present case the question is not one of non-compliance with s 3 (10).

Thus, following *Scott v Baker*, if the specimen of blood has been obtained otherwise than in accordance with the provisions of s 3 of the Act, the certificate of analysis which incontrovertibly showed that there was an excess of alcohol in the appellant's blood is not to be regarded merely as being evidence irregularly obtained. The effect of the non-compliance is that the prosecution have failed to prove an offence under s 1 (1) of the Act and the conviction cannot stand.

The relevant facts are as follows. At 6.20 a m on 8th January 1971 the appellant drove his motor car into collision with another vehicle at the corner of Regent Street and Great Marlborough Street, was given a breath test which was positive, was arrested and taken to West Central police station, and was there given another breath test which was positive. A police sergeant, who had never before requested a urine test, then asked him to provide a specimen of urine. The warning of the penal consequences of failure was duly given. The appellant chose to give urine and at 7.04 a m provided a specimen which was thrown away in compliance with s 3 (7). Two minutes later the sergeant asked him to provide a second specimen, the requirement being accompanied again by the warning of the consequences of failure. At 7.12 a m the appellant managed to provide a second specimen, which filled a pint size container to a depth of about half an inch. The sergeant was of the opinion that that would only fill half a phial and was not enough to decant into two phials for analysis. He therefore asked for more and the appellant made two unsuccessful attempts to provide more at 7.45 a m and 8.00 a m. The sergeant then told him that as he had failed to provide within an hour either a specimen of blood or two specimens of urine he was now required to provide a specimen of blood and he was again warned of the consequences of failing to do so. He then provided the specimen of blood on which the prosecution was based. Analysis of the specimen showed that there were 116 milligrammes of alcohol in 100 millilitres of blood.

On 3rd September 1971 the appellant was convicted at Inner London Sessions of an offence against s 1 (1) of the Road Safety Act 1967. He was fined £35, disqualified from driving for 12 months and ordered to pay £50 costs. His disqualification was suspended pending the hearing of his application for leave to appeal against conviction. On 9th June 1972 this court gave him leave to appeal.

At the trial the appellant took the point that under s 3 of the Act the police officer had no right to require or request the specimen of blood after the appellant had provided two specimens of urine. It was accepted that in order to constitute the second specimen as a valid specimen the quantity of urine had to be sufficient to enable analysis to be made, including analysis of that part which (s 2 (5) of the Road Traffic Act 1962) had to be offered to the appellant. It was, however, contended that the police officer's evidence as to his inexpert and personal view of the inadequacy of the quantity of urine provided, although no doubt it was his honest belief, could not establish the inadequacy, on which issue the onus lay on the prosecution. The deputy chairman rejected that submission. He held that the police officer could give evidence of his opinion. He directed the jury that it was for them to decide whether they were

sure that the specimen of urine was insufficient in quantity. If they were not sure they should acquit the appellant. The jury convicted him.

On the hearing of the appeal counsel for the Crown fairly and properly stated that the prosecution was now satisfied on the advice of experts that the police officer's view was factually wrong, and that the quantity of urine which he mentioned in his evidence was sufficient for the purpose of analysis. Therefore the jury's verdict was wrong on the basis on which the case was left to them. We do not have to consider whether, apart from the concession of fact properly made by the prosecution, the appellant is right in saying that the police officer's opinion was inadmissible or that, in the absence of an adjournment for further evidence to be obtained by the prosecution, the case should not have been left to the jury. Clearly in the circumstances, if there were nothing more, the conviction should not stand, based on what the prosecution conceded to be mistaken, although entirely honest, evidence. The prosecution does not suggest otherwise, if there were nothing more.

But there is something more. In argument in the trial court, counsel for the Crown, faced with this submission for the defence as to the absence of proof of inadequacy of the specimen of urine, suggested that on the true construction of s 3 it did not matter whether or not the urine specimen was inadequate; there was nothing in the Act to preclude a constable from requiring or requesting a blood specimen even though the second urine specimen was in fact sufficient. Hence the blood specimen ultimately given was given in accordance with s 3. The deputy chairman ultimately rejected that submission.

In this court, that point is raised again by the prosecution and it was the main subject of argument before us. Procedurally the resulting position is curious. The prosecution accept that the jury's verdict was wrong on the basis on which the case was left to them having regard to the facts as they are now known to be, but the prosecution say that the conviction should be upheld because, if the deputy chairman had accepted the view of the law which the prosecution say is correct, the only possible verdict which a reasonable jury, properly directed, could have arrived at was a verdict of guilty. Counsel for the appellant contends that even if the prosecution are right in their submission of law, so that the deputy chairman was wrong in ruling against them on this point of law, and even if on a correct ruling the proper verdict on the admitted facts could only have been guilty, nevertheless this court should still quash the conviction. The defence, he contends, was entitled to have the opportunity of a perverse verdict. The respondent to a criminal appeal ought not to be allowed to hold the judgment of the court of trial in such circumstances. In the event, having regard to our decision on the issue of law as to the construction of s 3, we do not have to decide that point.

So we come to the issue of law on the construction of the Act. Section 3 (1) provides:

'A person who has been arrested under the last foregoing section or section 6 (4) of the [Road Traffic Act 1960] may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under subsection (7) of the last foregoing section. . . .'

Section 3 (3), so far as relevant, provides:

'A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence . . .'

Section 3 (6) provides:

'A person shall not be treated for the purposes of section 2 (1) of the [Road

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Traffic Act 1962] or subsection (3) of this section as failing to provide a specimen unless—(a) he is first requested to provide a specimen of blood, but refuses to do so; (b) he is then requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood but refuses to do so.'

Section 3 (7) then provides that the first specimen of urine is to be disregarded. The reason for the provision as to two specimens of urine no doubt is that the first specimen of urine is not likely to be truly representative of the alcohol content of the blood. Section 3 (10), to which we have referred, provides that the constable, on requiring the provision of a specimen, must warn the person concerned of the possible penal consequences of a failure to comply.

The appellant's contention, shortly stated, is that once a specimen has been provided suitable for analysis in accordance with s 3 (6)—and that means, in the case of urine, the second of the two stipulated specimens—there is no right to require a further specimen. A specimen provided under s 3 may be of blood or of urine but there cannot lawfully be required specimens of both blood and of urine nor (subject to the express provisions of s 3 (6) (b)) more than one specimen of either. If an adequate blood specimen has been provided under s 3 (6) (c), there is no right to require specimens of urine under s 3 (6) (b). If an adequate second specimen of urine is provided under s 3 (6) (b), there is no right to require a blood specimen under s 3 (6) (c). If a blood specimen is required and provided under para (c) after a second specimen of urine has been provided under para (b), it is for the prosecution to prove, if it can, before there can be a conviction founded on the analysis of the blood specimen, that the second specimen of urine was inadequate. It does not matter that the defendant may thereafter have 'consented' to giving a specimen of blood as a result of a 'request' purporting to be made under para (c), at any rate, where, as here, the appellant's 'consent' is related to the continuing effect of a warning as to the consequences of failure. Section 3, read as a whole, cannot properly be interpreted as authorising the constable to make any further requirement or request for another specimen after the procedure under s 3 (6) has resulted in a proper specimen for analysis, whether of blood or of urine, having been provided. The provision of the Interpretation Act 1889, s 1 (1), that, unless the contrary intention appears, words in the singular include the plural does not apply here, because the context, including the general approach to the interpretation of a criminal statute and the express provisions of s 3 (6), shows a clear contrary intention. If it were otherwise, there would be nothing to prevent one requirement after another. That is something which would be oppressive and cannot have been intended.

For the Crown, it was contended that there is nothing in s 3 to limit the right of the constable under s 3 (1) to make further 'requirements', even though a proper specimen has been provided. If the constable genuinely believes that the quantity provided is inadequate for analysis, he may lawfully require or request another specimen. His opinion, if honestly held, is sufficient. In support of this proposition counsel for the Crown referred to a number of breath test cases, which, with all respect, do not in our view assist. Counsel further submitted that if the constable is wrong in his belief, it may be that the person concerned, if he should refuse to give a further specimen, may have a valid defence to a charge of failing to provide a specimen, for he may have a reasonable excuse for so failing. But if a further specimen is requested and is in fact provided, it is a specimen which has been provided 'under s 3' (that is, in compliance with the provisions of s 3), and the specimen can thus be used to found a conviction under s 1 (1) of the Act. Counsel for the Crown sought support for his submission from the fact that s 3 (8) of the 1967 Act expressly provides

for the application of sub-ss (2) to (7) of s 2 of the Road Traffic Act 1962 to proceedings under s 1 of the 1967 Act. Section 2 (4) and (5) of the 1962 Act clearly contemplate that there may be two specimens. However, in our view, that argument does not avail the prosecution. We think that the reference in s 2 (4) to 'one of two' specimens, is merely looking forward to s 2 (5); and sub-s (5) on its terms refers only to a case where the blood specimen originally taken is in fact inadequate, because it is not practicable to divide it into the two required portions. Thus no inference is to be drawn from those subsections that where a specimen originally taken is inadequate the Act authorises or contemplates the taking of further specimens.

We think the appellant's submission is right. Section 3 (6) is intended to lay down the procedure, and the totality of the procedure, to be followed once a requirement to provide a specimen has properly been made under s 3 (1), accompanied by the warning of the penal consequences of failure to provide a specimen, but no specimen has thereupon been provided. Once the person has complied with the request thereupon made under (a) or (b) of sub-s (6), he is not to be treated—this is what the subsection expressly says—as failing to provide a specimen for the purposes of sub-s (3). That is because he has provided the specimen (or as regards urine, the two specimens) required by the section. If he has provided the specimen required by the section, the original 'requirement' can no longer be effective. The warning under s 3 (10) can no longer properly remain operative, because a person cannot fairly be left subject to a warning of the consequences of failing to provide a specimen, when he has, consequent on the warning, already done that very thing. Nor can there be thereafter a new requirement, coupled with a new warning, so as to set in motion once again the procedure of s 3 (6) which has already been carried through in accordance with its terms so as to result in the provision of a proper specimen suitable for analysis. The section does not contemplate that when a requirement once made has been complied with there may be further requirements.

The specimen of blood which the appellant gave was therefore a specimen which the police officer was not entitled to require to be given. It cannot be said that the appellant would have consented to give it if he had been aware that the original requirement and the accompanying warning of the penal consequences of failure were no longer operative.

We do not have to decide what would be the position if the second specimen of urine duly given were accidentally spilt. If—an example suggested by the prosecution—it were deliberately spilt by the person who had given it, very different considerations might apply. Nor is it necessary for us to decide what the position would be if it remained unknown—if the prosecution were not able to say, as they are able in this case—whether or not the specimen would have been sufficient. Those matters may have to be decided if they arise.

We are aware that what went wrong here is something which might be regarded as an unimportant deviation caused by an understandable mistake. Yet it does not seem to us that it can be regarded as less important than the procedural failure which was considered in *Scott v Baker* (1).

It was at least formally submitted by the prosecution that in any event this is a case in which the proviso to s 2 (1) of the Criminal Appeal Act 1968 should be applied. Despite the fact that there is every reason to suppose that the sample of urine, properly provided, would on analysis have shown the same excess of alcohol in the blood as did the blood sample which was actually analysed we do not think we are entitled to apply the proviso. We say this with regret, but we think that this is another logical and inevitable consequence of *Scott v Baker*. If the court has to reject the analysis of the blood sample in considering the validity of the conviction, it would not be logical

(1) 132 JP 422; [1968] 2 All ER 993; [1969] 1 QB 659.

to take it into account so as to hold that there was no miscarriage of justice in the conviction. It would mean that this court could uphold a conviction even though in the court below there should have been a direction for acquittal. Accordingly this appeal must be allowed.

*Conviction quashed.*

Solicitors: Somers & Laity; Solicitor, Metropolitan Police.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### COURT OF APPEAL (CRIMINAL DIVISION)

(LAWTON, LJ, MACKENNA AND SWANWICK, JJ)

13th, 31st July 1972

R v KILBOURNE

*Criminal Law—Evidence—Child—Corroboration—Sexual offence—Evidence of similar offence on another child on different occasion—Similarity in mode of committing offence—Evidence of child in one group—Corroboration by evidence of child in another group.*

The appellant was convicted of one offence of buggery, one of attempted buggery, and five offences of indecent assault, all the offences relating to young boys. The counts fell into two distinct groups. Counts 1 to 4 related to offences against J, P, M and S, alleged to have been committed in October and December, 1970; counts 5 to 7 related to offences against G and K, alleged to have been committed about a year later. The boys in each group knew the other boys in that group, but there was no evidence that any of the boys in the first group were known to either of the boys in the second group. All the boys were aged between 9 and 12 and gave sworn evidence. The case for the prosecution was that all the offences were committed in the appellant's house and that he had invited the boys there by various inducements. With one exception all the offences bore a striking resemblance to each other in the manner of their commission. The appellant admitted that all the boys had been to his house, but contended that his association with them had been completely innocent. The Court of Appeal regarded a passage in the summing-up of the judge as a direction that, as it was virtually impossible for the two groups to have collaborated, the jury were entitled to regard the evidence of the boys in one group as corroborating the evidence of the boys in the other group. On appeal,

HELD: (i) the evidence of the boys in one group was admissible on the counts relating to the other group since, in the absence of any evidence suggesting a conspiracy between the two groups, the probative force of all the acts constituting the offences regarded together was much greater than that of one act alone and there was a sufficient nexus between the offences in that the evidence went to show not merely that the appellant was a homosexual (which would not have been sufficient to make the evidence admissible), but that he was a man whose homosexual activities took a particular form; further, the evidence of each boy was admissible to rebut a defence of innocent association.

(ii) the uncorroborated evidence of one group of boys could not be corroborated by the admissible but uncorroborated sworn evidence of boys of the other group, and, as there had been a misdirection on corroboration, the convictions must be quashed.

APPEAL by John Kilbourne against his conviction at the Crown Court at Leeds of buggery, attempted buggery, and indecent assault, and the sentences then passed on him.

E A Greenwood for the appellant.

C J Holland for the Crown.



*Cur adv vult*

31st July. **LAWTON LJ** read the following judgment of the court: The appellant, John Kilbourne, was convicted at Leeds Crown Court after a trial before **LAWSON J** and a jury on one count of buggery, one of attempted buggery, and five of indecent assault. He was sentenced to ten years' imprisonment for buggery, seven years for attempted buggery and five years' imprisonment on each of the other counts. The sentences on counts 1 to 4 were to be concurrent with one another and the sentences on counts 5 to 7 were to be consecutive to the sentences on counts 1 to 4, but concurrent with one another. These sentences totalled 15 years; all were certified to be extended ones. He now appeals by leave of the single judge against both his conviction and his sentences.

The appeal against conviction raises this problem. When a number of boys, not being accomplices, give evidence about acts of indecency by an accused on different occasions, in what circumstances, if any, is the evidence of each one admissible on counts involving others, and, if it is, is such evidence capable of being corroboration of the evidence of others?

The counts fall into two groups. Counts 1 to 4 referred to offences alleged to have been committed in the months of October and December 1970 and involved four boys, John, Paul, Mark and Simon; counts 5 to 7 alleged offences in the same months of the following year and involved two boys, Gary and Kevin. All the boys save two were aged ten at the time of the alleged offences: the boy Mark in count 3 was then nine and the boy Kevin in count 7 was aged 12. The trial judge was of the opinion that they were all old enough to be sworn in the form prescribed by s 28 of the Children and Young Persons Act 1963, and they were so sworn. It follows that no question arises about the effect of the unsworn evidence of children.

The Crown's case against the appellant can be stated shortly. It was alleged that he had encouraged small boys to come to his house by providing them with comics, playing cards, small gifts of money, and light refreshments and by holding out inducements such as allowing them to take his puppy for a walk or to clean his van. Having got the boys into his house he committed, so the prosecution alleged, the acts charged in the indictment. Save on count 3, it is unnecessary to go into any detail about the evidence; it suffices to say that John, Paul, Simon and Gary all alleged that the appellant had got them on the floor face downwards, had lain on top of them, moving up and down. Kevin alleged that the appellant had handled his penis and had asked him to do the same to him. If the boys concerned (Mark excepted) were telling the truth, as the jury must have found they were, the offences of which he was convicted were committed. At his trial the appellant admitted that all the boys named in the indictment had been to his house; he denied that he had enticed them there for any indecent purpose and that the acts alleged had been committed by him.

The judge in his summing-up summarised the appellant's defence as follows:

'His case is, "Yes, they all came. They come a great deal but my association with these boys was an entirely innocent association, apart from a little bit of skylarking".'

After arrest the appellant was alleged to have said to the police in relation to the boys named in counts 1 to 4:

'I never committed buggery with them but I've pretended to a lot of times with some of them . . . I'll be fair with you and I tell you that I've played with the private parts of them all but I don't know how many times I've done it.'

The appellant denied that he had said anything of the kind, but, if he did, there was ample evidence capable of corroborating the evidence of four of the boys.

Counsel for the Crown appreciated that this corroborative evidence depended on the assessment which the jury might make of the credibility of the police officers who gave it; and by way of safeguarding his case against the possibility that the jury might reject the police evidence, he submitted to the trial judge, so he told us, that there was other evidence which was capable of corroborating some of the evidence of the boys. It is this submission which gives rise to the main point in this appeal; but before dealing with it, we would like to dispose of a problem arising on count 3, which charged the appellant with bugging the boy Mark. [His Lordship, having considered the evidence in relation to count 3, held that the verdict on that count was unsafe and accordingly should be quashed.]

We turn now to the main problem which arises in this case. The nature of the charges necessitated the judge giving the jury a direction about the need to look for corroboration of the boys' evidence. This he did in general, but, in our judgment, adequate terms. He ended his general direction by telling the jury 'to look around to see whether there is corroboration'. What he did not do was to specify clearly what was, and what was not, capable of being corroboration; but he made some effort in this respect. For example, he told the jury that the evidence of the police officers to which reference has already been made, was capable of being corroboration.

Complaint was made to us that when dealing with the evidence of John's mother as to what she had noticed about his anus, the judge had told the jury that such evidence could be corroboration. The context in which this direction came must be examined. It was in these terms:

'The evidence of [John's mother] and the evidence of the boy [Paul] can be taken as some corroboration of [John's] evidence that indecent things were done to him, and in the case of [John's mother] her evidence that she saw a swelling on his bottom on one occasion can be evidence to corroborate [John's] own evidence that he was knocked about.'

In our judgment the judge was not directing the jury that such evidence was capable of corroborating John's evidence so as to implicate the appellant in the offence charged. Nevertheless, in our judgment, the direction of the judge could have been clearer as to what evidence was, and what was not, capable of being corroboration; but we do not consider that the lack of clarity was sufficiently grave to make the verdict unsafe or unsatisfactory on that ground.

More fundamental was the submission that the judge had misdirected the jury by telling them that they could regard the evidence of the boys Gary and Kevin, who had given evidence about what had been done to them in the autumn of 1971, as corroboration of the evidence of the boys John, Paul, Mark and Simon, whose evidence related to the autumn of 1970, and vice versa. The first matter to be decided is whether the judge did so direct the jury.

The passage which is said to be a direction to this effect was in these terms:

'You would be entitled to take the evidence of [Kevin] and [Gary], or either of them, if you think that their evidence is true as to what was done to them by the [appellant], and you would be entitled to take this view of it: "Well, we can use the evidence of [Kevin] and [Gary]", or either of them if you accept it as reliable, "as supporting evidence given by the boys in the first group", but what you must not do is to use the evidence of [John] as to what was done to him to reinforce the evidence of another boy in the first group, [Paul] for example, as to what was done to him. You can use the evidence of the first group, if you accept it, in

weighing up the evidence of [Gary] and [Kevin]. You can use the evidence of [Gary] and [Kevin], or either of them, if you accept it, in weighing up the evidence of the boys in the first group.'

The reason why the judge differentiated between the two groups was because the boys in each group knew each other well and could have collaborated in putting forward their stories whereas it was unlikely, if not impossible, that the two groups could have got together to tell false stories or to embellish true stories with accusations of indecencies.

Each member of this court, on reading the transcript of the summing-up before coming into court, had construed the passage just quoted as a direction on corroboration. Counsel for the Crown submitted that it should not be read as such but as a direction that the evidence of each group could properly be considered when dealing with the counts relating to the other group. This may be what the judge intended but in our judgment it is probable that the jury understood the direction in the sense we all understood it. It follows, so it seems to us, that fairness requires that it should be considered as a direction on corroboration and as such we have to decide whether it was correct in law.

This problem has had to be considered in three stages: first, we have had to decide whether the evidence of one group of boys was admissible at all on the counts in which the other group of boys were named. If it was not, there was a misdirection as to the admissibility of evidence; but if it was admissible, the second and third stages have to be considered. The question at the second stage is whether such evidence if it had involved neither victims nor children could have been capable of being corroboration; and the third stage is whether in the circumstances of this case in which child victims were involved, it was capable of being corroboration.

In our judgment the problem whether the evidence of one group of boys was admissible on the counts relating to the other group has been resolved in favour of admitting the evidence by the decisions in *R v Sims* (1), *R v Chandor* (2) and *R v Flack* (3). In the present case, with the exception of the penis touching incident involving the boy Kevin, each accusation bears a resemblance to the other and shows not merely that the appellant was a homosexual (which would not have been enough to make the evidence admissible), but that he was one whose proclivities in that regard took a particular form. Further, the evidence of each boy went to rebut the defence of innocent association which the appellant put forward: this by itself made the similar fact evidence admissible (see *R v Chandor* per LORD PARKER CJ). We have had no doubt that the evidence of one group of boys could properly be taken into account by the jury when considering the counts relating to the other group. But for what purpose since only relevant evidence is admissible? What, for example, did Gary's evidence prove in relation to John's on count 1? The answer must be that his evidence, having the striking features of the resemblance between the acts committed on him and those alleged to have been committed on John, makes it more likely that John was telling the truth when he said that the appellant had behaved in the same way to him. Professor Cross in his book on Evidence (3rd edn., p. 182), has pointed out that, subject to special rules

'it is difficult to see how admissible evidence of the misconduct of the defendant or accused on other occasions could ever fail to corroborate the evidence relating to the question with which the court is concerned. If it is admissible at all on account of its relevance for some reason other than its tendency to show a

(1) [1946] 1 All ER 697; [1946] KB 531.

(2) 123 JP 131, 194; [1959] 1 All ER 702; [1959] 1 QB 545.

(3) 133 JP 445; [1969] 2 All ER 784.

propensity towards wrongdoing in general or wrongdoing of the kind into which the court is inquiring, the conduct must, it would seem, implicate the defendant or accused in a material particular in relation to the occasion into which the court is inquiring.'

We agree with him, but as he pointed out there is no English authority on this topic. The problem in this case, however, is whether any special rules do apply.

*R v Sims* (1) is the relevant authority. In that case the accused had been tried and convicted on an indictment charging acts of buggery committed on different occasions in similar circumstances with a number of different men. The men had given evidence against him. Two questions arose. The first was whether the evidence given on each count was relevant to prove the guilt of the accused on all the others. It was held that it was. The second was whether the evidence of the men could be considered as corroborating one another. It was held that it could not. We cite two passages from the judgment of the full court. The first is:

'Applying these principles, we are of opinion that on the trial of one of the counts in this case, the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence . . . The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming . . . In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or an innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust.'

The second passage is:

'We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution; but the judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing-up on that account.'

Neither of these passages, as we have cited them, appears to be affected by criticisms of *R v Sims* in later cases.

We make two comments on the passages in question. (i) It is perhaps surprising that the evidence could not be regarded as corroboration if, as the court said in the first passage, the coincidence of all the accomplices telling a similar story, without any evidence of conspiracy, made an 'overwhelming' case against the accused. (ii) In respect of corroboration a child giving evidence of an indecent act committed against itself is in the same position as an accomplice. If the similar fact evidence of one accomplice cannot corroborate that of another, then children giving such evidence cannot corroborate each other.

(1) [1946] 1 All ER 697; [1946] KB 531.

We refer to the later case of *R v Campbell* (1) to distinguish it from *Sims*' case and from the present case. There the accused was charged with committing a number of indecent assaults on different children. It was held that the evidence of child A that he had seen the accused assaulting child B could corroborate B's evidence of this assault, even though A had also given evidence to prove that on another occasion he himself had been assaulted. That is not the present case or *Sims*' case. The evidence of A corroborating B was not evidence of a similar assault; it was evidence of the same assault given by a child who in respect of that assault was neither an accomplice nor a victim.

At the end of the judgment in *Campbell*'s case the following passage is found:

'As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R. v. Sims* (2), subsequently approved on this point by the House of Lords in *Harris v. Public Prosecutions Director* (3), shows that such evidence can be given to rebut the defence.'

Here LORD GODDARD CJ is apparently distinguishing between evidence which can be used as corroboration and evidence which may help the jury in some other way to determine the truth. A's evidence that the accused indecently assaulted him may not be used to corroborate B's evidence that B was indecently assaulted, but it may be used in some other way to help the jury to determine the truth of B's evidence: see Cross on Evidence (3rd edn., pp. 120, 121), where he cites *Sims*' case as an authority for this difficult distinction.

*R v Mitchell* (4) introduces a further complication. There the accused was charged with indecently assaulting a child, S. The prosecution called another child, J, to prove that J had been assaulted by the accused in similar circumstances. It was held that it was the judge's duty in such a case to warn the jury of the danger of acting on J's evidence if it were uncorroborated. As J's evidence had apparently been offered as corroboration of S's, the decision suggests that, notwithstanding *Sims*' case (2), the corroborated evidence of the accomplice (or child) A may be used as corroboration of the evidence of an accomplice (or child) B who is alleging a similar offence.

Because the judge's direction in the present case might have led the jury to believe that the evidence of one group of children giving evidence about a different series of offences (although not itself corroborated) could corroborate the evidence of the other group, it is, we think, inconsistent with the rule laid down in *Sims*' case, even as qualified by *Mitchell*'s case. Bearing in mind the observations of LORD DIPLOCK in the recent case of *Director of Public Prosecutions v Merriman* (5) about the duty of the

(1) 120 JP 359; [1956] 2 All ER 272; [1956] 2 QB 432.

(2) [1946] 1 All ER 697; [1946] KB 531.

(3) 116 JP 248; [1952] 1 All ER 1044; [1952] AC 694.

(4) (1952), 36 Cr App Rep 79.

(5) p 659, ante.



Criminal Division of this court not to depart from precedents which are in favour of the accused, we think it is our duty to follow *Sims*' case, which was, as we have said, a decision of the full court. Accordingly, we must hold the direction to be defective, with whatever consequences may follow from this view.

One further point on the appeal against conviction requires consideration. The trial judge directed the jury as to what constituted an indecent assault in these terms:

'It means a deliberate touching of somebody else's body, clothed or unclothed, with an indecent intention. That is to say, a deliberate touching which is activated by some indecent purpose.'

In our judgment, this direction was much too wide and could cover acts which were nothing more than preliminary steps towards committing an indecent assault, as for example, touching a woman's hand. In *R v Leeson* (1) D1PLOCK LJ said:

'The definition of "indecent assault" which has long been accepted in these courts is an assault accompanied with circumstances of indecency on the part of the prisoner towards the person assaulted.'

In the circumstances of this case, however, the acts which the jury must have been sure had been proved were clearly indecent assaults. Had there been a correct direction as to what was an indecent assault the appellant was bound to have been convicted, so the misdirection avails him nothing.

There having been a misdirection about corroboration, what is the result? There was ample other evidence coming from oral statements which the appellant was alleged to have made to the police officers which was capable of being corroboration if the jury accepted it; but there was an issue at the trial whether the appellant had said what he was alleged to have said. We do not know whether the jury accepted the evidence of the police officers. If we had known, or could have found out that they did, we should have had no hesitation in applying the proviso to s 2 (1) of the Criminal Appeal Act 1968.

The appeal against convictions will be allowed.

*Convictions quashed.*

Solicitors: Registrar of Criminal Appeals; T B Atkinson, Chief Prosecuting Solicitor, Leeds.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) (1968), 52 Cr App Rep 185.

QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

10th July 1972

QUATROMINI AND ANOTHER v PECK

*Criminal Law—Vagrancy—Being found in enclosed yard—'Yard'—Railway sidings—Sidings covering area one mile long by quarter of mile wide—Surrounded by buildings or fences—Vagrancy Act, 1824, s 4.*

An enclosed yard within the meaning of s 4 of the Vagrancy Act 1824 is a relatively small area contiguous to, or attached to, or used for purposes ancillary to those of a building.

The appellants were found in a railway siding approximately one mile long and a quarter of a mile wide. The siding was surrounded by buildings or a boundary fence apart from a gap of about 100 yards. The appellants were convicted at a magistrates' court of being found in an enclosed yard for an unlawful purpose, contrary to s 4 of the Vagrancy Act, 1824. On appeal,

HELD: the siding, though enclosed, was not a 'yard' within the meaning of s 4, and the appeals must be allowed.

CASE STATED by Hendon justices.

The appellants, David Peter Quatromini and Richard Tresadern, were convicted by justices of being found on enclosed premises, namely, a yard, at Cricklewood railway sidings on 30th November 1971 for an unlawful purpose, contrary to s 4 of the Vagrancy Act 1824. They now appealed.

Richard Du Cann and Colin Nicholls for the appellants.

P Temple-Morris for the respondent.

**LORD WIDGERY CJ:** This is an appeal by Case Stated by justices for the petty sessional division of Gore in respect of their adjudication as a magistrates' court at Hendon on 20th January 1972. On that date the justices convicted the two appellants of the offence of being found on enclosed premises, namely, a yard, at Cricklewood railway sidings on 30th November 1971 for an unlawful purpose contrary to s 4 of the Vagrancy Act 1824.

The facts were that a police officer on duty in a public road adjoining the Cricklewood railway sidings, to which I must return for more detail in a moment, saw these two men and two others run out of an entrance to the sidings and scatter. Two of them were eventually apprehended and dealt with for this offence. The area with which the appeal is concerned is described colloquially as the Cricklewood railway sidings. It is a very large area, approximately one mile long from north to south and a quarter of a mile wide. The justices find that it is surrounded on all four sides by fences and that there are buildings where there are no fences. That is slightly qualified by a later finding in the Case where they say, on the eastern side, part of the boundary fence is missing for a distance of approximately 100 yards. When the police went into the area following the apprehension of the two appellants, they found certain property in boxes and cases lying about on the ground, and there was an unoccupied van adjacent to these boxes and cases on a road near the perimeter of the sidings. The case as presented to the justices was that this was an enclosed yard in accordance with the charge, and that the conduct of the appellants, coupled with the presence of these boxes and the van, justified the inference that they were in this enclosed yard for an unlawful purpose. The justices found the case made out and convicted.

One starts by looking at the terms of s 4 of the 1824 Act, familiar though they are. The particular part of the section which gives rise to the offence here refers to

'every person being found in or upon any dwelling house, warehouse, coach-house, stable, or out-house, or in any enclosed yard, garden, or area, for any unlawful purpose ...'

The prosecution have chosen in this case to lay their charge as being one of presence in a yard, and that means an enclosed yard, and accordingly the first question is whether the premises in which this alleged offence took place were an enclosed yard for present purposes. So far as enclosure is concerned, I propose to take the matter quite briefly. We have been shown a large number of photographs which indicate that the fences surrounding this area were in disrepair and in certain places missing, and that there was nothing like a continuous fence right round the premises of such a kind as would present any serious obstacle to those who chose to go in. On the other hand, there was in my opinion here sufficient evidence for the justices to decide that this area was enclosed, and since that is the conclusion which they reached, I would not be disposed to depart from it.

The argument, therefore, really turns, in my judgment, not on whether the place involved was enclosed, but whether it was a yard for the present purpose. One must remember, as counsel for the appellants has reminded us, that this was an Act passed in 1824, and that the meaning of the word 'yard' must be related to that fact. If one goes to the Shorter Oxford English Dictionary, and we are told that the other standard dictionaries agree in this respect, one finds as the primary meaning of 'yard',

'a comparatively small uncultivated area attached to a building or enclosed by it; such an area surrounded by walls or buildings within the precincts of a castle, house, inn, etc.'

One need not pay too much attention perhaps today to the reference to a castle or inn, but the essence of that meaning as I understand it to be is that the word 'yard' is appropriate to a space which is small, and is attached to a building or enclosed by it. Counsel for the appellants has suggested, in his submissions to us, the essential feature—if that is the right definition—of a yard is that it should be a relatively small area and that it should be contiguous to, or attached to, or used for purposes ancillary to those of a building. In other words, it is an area ancillary to a building and a small area at that.

That view of the matter is, I think, fully supported by authority. One begins with *Knott v Blackburn* (1), a decision of this court in 1944. It was a case in which the facts bore a considerable similarity to the present, because, as the headnote shows:

'The place in question consisted of railway sidings about 200 yards long, with lengths of track terminating in stop blocks at one end, and, at the other end, joining the main lines of the railway.'

In that instance the charge had been laid on the footing that the accused had been found in an enclosed area as opposed to an enclosed yard, so 'area' was the vital word. The court held that the sidings which I have just described did not constitute an enclosed area for present purposes. The justices' own views in that case, which were approved by the court, were that

'"area" in the section was not a general term, but must be construed ejusdem generis with, and as a space akin to, a yard or garden attached to or within the curtilage of a specified building, and that in the section, the word bore the special meaning of a basement area.'

(1) 108 JP 19; [1944] 1 All ER 116; [1944] KB 77.

which is not relevant in this present case. The court in *Knott v Blackburn* is treating 'yard' or 'garden' as being clearly related to a small area ancillary to a building, and is deciding that the word 'area', on its face a wider word, is similarly restricted. VISCOUNT CALDECOTE CJ said:

"The words 'yard' and 'garden' which precede the word 'area' in the section, are plainly words of a very limited scope. A garden might, at the most, include a small number of acres, but the railway company has urged that the word 'area' can apply to an enclosed space however large it is. Having regard to the use of the words 'yard' and 'garden' immediately before the word in question here, and bearing in mind that this is a penal section, I think that the word 'area' should be construed in the sense given to it by the justices... I think that that interpretation is right, and I will only say that, if the view I have expressed is not the right one, either the use of the word 'area' in the section is inapt, or the words 'yard' or 'garden' are unnecessary since it would have been sufficient to say: 'in or upon any dwelling-house... or in any enclosed area'."

The next authority is another decision of this court in *Goodhew v Morton* (1). Here the charge was laid on the footing that the accused had been found in an enclosed yard so this, as it were, is a 'yard' case rather than an 'area' case. The premises were rather special because the yard referred to was within a larger area occupied by the same occupier. As the evidence shows, the larger area had a secure fence around it, but the inner yard was one in which the fence was not continuous. The case is very largely concerned with whether or not the inner yard was enclosed at all for the present purposes, but LORD PARKER CJ in his judgment said:

"The question was whether these two respondents were found on or in an enclosed yard, and the matter as it was presented to the justices raised two issues. The first was whether the whole area which is designated was an enclosed yard. It was enclosed by fences but, in my judgment, the justices were perfectly right in saying that the large area was not an enclosed yard within the meaning of the Vagrancy Act, 1824."

Again one gets the indication in these authorities that 'yard' in this context has the limited primary meaning attributed to it in the Shorter Oxford English Dictionary and cannot as a matter of law and construction extend to a very large area such as the one with which we are concerned today, that area being in no sense ancillary to or occupied in conjunction with a building. I think myself that its area alone is enough to make it clear that this is not a yard within the meaning of the present definition. I sympathise with the justices, who I think were misled by the fact that the area is colloquially referred to as a railway yard, and indeed the phrase 'railway yard' has been in common use for many years, but the fact that an area qualifies for description as a railway yard or a vineyard or a shipyard or any similar description of that kind, does not make it a 'yard' for the purposes of the Vagrancy Act 1824. I would allow the appeals.

**MELFORD STEVENSON J:** I agree.

**MILMO J:** I agree.

*Convictions quashed.*

Solicitors: *Sampson & Co*; Solicitor, *Metropolitan Police*.

Reported by *T R Fitzwalter Butler, Esq, Barrister.*

## COURT OF APPEAL (CRIMINAL DIVISION)

(ORR, LJ, GEOFFREY LANE AND MAIS, JJ)

27th April 1972

R v WILLIS. R v SYME

*Criminal Law—Handling stolen goods—Indictment—Alternative methods of handling charged—Desirability of separate counts—Particulars of method of handling—Theft Act, 1968, s 22 (1).*

Although s 22 (1) of the Theft Act, 1968, creates only one offence, viz, handling stolen goods, where the prosecution rely on different methods of the alleged handling it is desirable in practice, though not strictly obligatory in law, that the prosecution should divide the indictment into separate counts. The object of this is to make it clear to the defence what they have to meet and to draw the attention of the court to the direction which has to be given to the jury. In an ordinary case of handling no more than two counts will be necessary, one alleging dishonest receiving under the first part of the subsection and the other alleging dishonest undertaking or assisting in the retention, etc., of stolen goods by or for the benefit of another under the second part.

APPEALS by Muriel Willis and Hugh Bradford Syme against their convictions at South East London Quarter Sessions of handling stolen goods when both were sentenced to 12 months' imprisonment suspended for two years, and the appellant Syme was fined £100. The appellant Willis applied for leave to appeal against sentence.

*P H Norris for the appellants.*

*Michael Worsley for the Crown.*

**GEOFFREY LANE J** delivered this judgment of the court: These two appellants, Muriel Willis and Hugh Bradford Syme, after a trial which started on 18th August were convicted on 9th September 1971 at the South East London Quarter Sessions by a majority of 10 to 2 on one count of handling stolen goods. That was count 6 of the indictment. Jointly accused with them but acquitted on the same count was the appellant Willis's son, John Stewart Willis. Each of the appellants was acquitted on one further count of handling. They both appeal now against conviction with leave of the single judge. The appellant Willis renews her application with regard to sentence after refusal by the single judge. She was sentenced to 12 months' imprisonment suspended for two years and the appellant Syme was sentenced to 12 months' imprisonment likewise suspended for two years and fined £100.

The facts of the case, despite the length of time which it took to try the matter, were comparatively simple. On the night of 30th June 1970 someone broke into a house known as Tapely House, Westleigh, in the county of Devon, and there stole a very large quantity of antiques and porcelain to the total value of something upwards of £10,000. Two men, named Moser and O'Neill, were charged with that burglary, were tried at the same time as the appellants, and were convicted. They were charged in the alternative with handling. Almost exactly one month later on 30th July 1970 two police officers stopped the two appellants in Brook Street, W1. It was about midday. They were together and each of them was carrying a bag. The appellant Syme's bag was opened and it was discovered to contain a teapot and some antique porcelain. According to the police, he stated at that interview that he was a chef and had bought the porcelain from a friend for £600. He said that his co-appellant, Mrs Willis, was called Mrs Willoughby, and that she had been a friend of his for something of the order of five years. They had, he said, been to Sotheby's with regard to the porcelain and had been getting it valued.



They were taken to the police station. At the police station the appellant Syme told the police that the man from whom he had obtained the porcelain was the man Moser. He also told the police that he had about a week earlier sold porcelain 'shepherd and shepherdess' figurines to a shop somewhere behind Selfridges for £500. These two pieces, the 'shepherd and shepherdess' were, in fact, Meissen porcelain. It was on the charge of dishonestly handling those two figurines that the two appellants were acquitted by the jury. The appellant Syme was asked where he had got the money from to buy the porcelain for £600 and he said that it came from some people called Tweedie as he had not any money himself. Later the same day, as one might expect, the flat occupied by the appellant Willis and her son John was searched by the police. There were found there some seven boxes of porcelain and antiques mostly, if not all, the proceeds of the burglary at Tapely House. In the light of this discovery the two appellants were seen again. The appellant Willis was asked a number of questions by the police from which it emerged that some of the porcelain had been left at Sotheby's the day before and also that she had been party to the sale of the Meissen 'shepherd and shepherdess', although that admission she denied in her evidence at the trial. She later made a statement under caution to the police in which she explained how she and the appellant Syme had gone to a shop in George Street to have one of the figurines valued. The value put on that one was 100 guineas. They had, therefore, gone to Sotheby's who had valued the pair together at £600. Thereafter the two of them, that is the appellant Syme and herself, had gone back to André Moser at Streatham where they had bought the rest of the porcelain. For that porcelain the appellant Syme had paid £450 down and had given a promise to pay a further £225—£675 in all. She, that is the appellant Willis, explained at a later stage that Sotheby's had valued a portion of the articles at no less than £6,000. She made no mention of the sale of the Meissen figures in her statement, although, according to the police, as already indicated, she did admit that orally. She explained at the trial why she had been reticent about the Meissen sale and said she was never asked by the police about those figurines and that when she did remember about them she was afraid to mention them.

The appellant Syme, when he was seen again, was told what the police had discovered at the appellant Willis's house. He was asked about the seven boxes of porcelain. He said that that was how the goods had arrived from Moser, namely, in these boxes wrapped in paper or newspaper, and that was his version of events. The one remark which perhaps was of importance reported to have been made by the appellant Syme to the police but denied by him was that when he was questioned by Sergeant Moore he had said to the officer: 'Look, I don't want to get that lady (meaning the appellant Willis) involved in all of this, she did not know anything was wrong'. He explained that remark, or tried to, at the trial by saying that that was a misinterpretation of what he said. What he meant to say was that she did not know any more about it than he did.

The evidence from the antique shop behind Selfridges was that the appellants had gone there on 24th July 1970 to sell the Meissen figures for £500. The appellant Willis had told the shopkeeper that the figures had belonged to an aunt of hers who was in some financial difficulty. This story about the aunt in financial difficulty whose house had apparently been crammed with valuable porcelain was repeated to various shops which they visited when they were selling parts of this haul of porcelain. It was also repeated at Sotheby's. The story about the aunt was sought to be explained at the trial as a private joke between the appellants. The last occasion on which they visited Sotheby's was 30th July and on that occasion, amongst other objects which were presented to Sotheby's for valuation or auction or both, were two Famille-Rose birds of great value, and it so happened that the police had circulated to Sotheby's and to other likely places around the country these two objects as having

been stolen. Once Sotheby's saw these that was the end of the hunt, and that no doubt was why the police stopped the two appellants in the street on that particular day.

Thus on the evidence the sequence of events seems to have been as follows. First of all the Meissen figurines were bought from Moser for £89. They were valued at Sotheby's at £600 and were sold to the shop in George Street or thereabouts for £500. Then and only then was Moser visited again by the two appellants and the rest of the consignment of porcelain was bought for £450 and £225 to come. The form of count 6 in the indictment, that is to say the material count, was an allegation that Muriel Willis and Hugh Bradford Syme, together with John Stewart Willis, handled stolen goods, contrary to s 22 (1) of the Theft Act 1968

'for that you on a day unknown between the 29th day of June, 1970 and the 31st day of July, 1970 dishonestly handled [certain items of porcelain] knowing or believing them to be stolen.'

Thus that count declined particulars as to the form of handling on which the prosecution were relying, nor did it accept the invitation or suggestion put forward in *Griffiths v Freeman* (1) in the Divisional Court or by this court in *R v Sloggett* (2), although it is only fair to say that by the time this case with which we are now dealing came on for trial *R v Sloggett* would only have been reported in the Times newspaper and it is seen from the date at the foot of the indictment which we have been shown that, in fact, the indictment was settled some considerable time before *R v Sloggett* was decided. However, the defence at the trial were alive to the difficulty, as appears from the beginning of the transcript, because there appears an application made by counsel for the appellant Syme asking, in effect, for particulars of the type of handling which was alleged under s 22. Counsel appearing for the Crown said that he would at a later stage narrow the issues down as far as possible. At a later stage in the trial a further application was made by counsel appearing at the trial for the appellant Syme; it seems at the end of the prosecution case although the form of this part of the transcript being in oratio obliqua makes it difficult to decide when. Counsel for the Crown was again unwilling to restrict himself technically in any sense and unwilling to particularise the count further at that time, as it is put in the transcript, and no order for particulars was made by the deputy chairman.

We are told by counsel for the Crown now that in his final address to the jury he made it clear that he was relying on a joint receiving by the two appellants, that is to say, he was relying on the first half of s 22, what one may call the old-style receiving as proof of the handling.

The appellants' grounds of appeal on this aspect of the case, which are somewhat different from those which appear in their typed notice of appeal, are as follows. First of all that the count, count 6, was improperly framed and there were no proper particulars given of the type of handling which was alleged against the appellants, and, secondly, that there was an inadequate direction by the deputy chairman on the question of handling.

The summing-up occupied a considerable length of time and in various passages the deputy chairman dealt with the law relating to handling. As already indicated, the two burglars were charged in the alternative with handling and consequently the first mention of the law relating to handling was in reference to those two men, Moser and O'Neill. It ran as follows:

'Now there is the charge of dishonest handling against Moser and I want to say something about that before I turn to the evidence which the police have

(1) 134 JP 394; [1970] 1 All ER 1117.

(2) 135 JP 539; [1971] 3 All ER 264; [1972] 1 QB 430.

given on the conversations which they say they had with Moser. The dishonest handling charge involves first of all my telling you what the ingredients are of that particular offence. The ingredients are that a person knowing or believing goods to be stolen, dishonestly receives them; that is to say he receives them at a time when he knows or believes that they are stolen. There are alternative limbs in the Theft Act which I want to mention to you. That involves my recapitulating what I have just this moment said; the ingredients are that the person knowing or believing the goods to be stolen, dishonestly receives them or dishonestly undertakes or assists in their retention, removal, disposal or realisation, by or for the benefit of another person or arranges to do so . . . I shall repeat it later on in my summing-up in connection with other defendants.'

Unfortunately he did not so repeat it. But he went on to say:

'As for handling, of course the important ingredient is that a defendant is going to be charged. It must be shown before he can be found guilty to have been in possession; that involves control. There can be no doubt in this case, you may think, on any showing that Moser was in possession and in control of stolen property. The question is whether he knew or believed that it was stolen.'

A little later he said:

'Therefore, as far as Moser is concerned what the question comes down to is: Did he know or believe when he received the goods that they were stolen? Bear that in mind, of course, in regard to all the defendants and I shall remind you of it a little later on in regard to the others.'

Counsel on behalf of the appellants complains that that is the only time when the vital moment for having knowledge is mentioned, but if one turns to a later passage in the summing-up one finds further directions on the law, this time directly related to the appellants Syme and Willis. The passage runs as follows:

'I told you yesterday what the ingredients are of dishonest handling in law. As far as [the appellant] Syme is concerned, there is no question that the two Meissen figures on any showing were in his possession, you may think, possession involving in law control. He bought them. As to whether [the appellant] Mrs Willis was ever in possession of them or of either of them in the sense of their being in her control, either hers alone or jointly with Syme, it is a matter for you, but you may find it difficult to come to any conclusion other than that they were in her possession as well as in Syme's.'

That was an accurate reflection of the evidence. Then:

'You will remember that yesterday I was telling you that as a matter of law handling involves knowing or believing goods to be stolen and dishonestly receiving them or dishonestly undertaking or assisting in their retention, removal or disposal etc. Now, you may think on the evidence that it is not very difficult for you to come to the conclusion that [the appellants] helped one another in the disposal of the property, both of the Meissen figures and of the other items. So that the question comes down to this if those facts are the facts that you arrive at; did they know or believe that these goods were stolen? Decide that question separately in respect of each of them. Remember that the burden of proof is on the prosecution.'

In a later passage, dealing with a possible lie that the appellant Willis had told the police, namely, that she had said to the police that she had never met Moser, the deputy chairman said:

'If it is a lie does it assist you or doesn't it assist you to arrive at a conclusion as to whether when she got the property she knew that it was stolen?'

Finally, the deputy chairman said:

'The prosecution say in relation to John Willis that he assisted in the retention and/or the removal of the stolen property. As I said handling involves knowing or believing the goods to be stolen, dishonest receiving of them or dishonestly assisting in their retention, removal, disposal.'

The Divisional Court in *Griffiths v Freeman* (1), and this court in *R v Sloggett* (2) have stressed two aspects of this particular matter which arises on s 22 of the Theft Act 1968—first, that the section constitutes one offence and one offence only; secondly, that as a matter of fairness and clarity it is advisable in practice, even though not strictly obligatory at law, for the indictment to make it clear that the second half of s 22 (1) is to be relied on if such is, in fact, the case. That was not done here. But the question which this court has to decide is whether that fact, coupled with the directions given to the jury to which I have just referred, operated unfairly and to the prejudice of the appellants or either of them. We have come to the conclusion that they did not.

First, it must have been clear to the appellants at the trial, and particularly after the early request for particulars, that this was the sort of case where either or both parts of s 22 might be applicable. Counsel for the Crown clearly at the trial made that apparent throughout. Secondly, one of the mischiefs at which the decision in *R v Sloggett* is apparently aimed did not arise here. There was a direction and a clear direction, as already indicated, on the words in s 22, namely, 'by or for the benefit of another person'. Moreover the evidence of guilty knowledge at the time of the receipt of the second consignment from Moser, was overwhelming.

The circumstances of the purchase, the knowledge by the two appellants of the value of the goods which they were buying, the lies told by the appellants on a variety of subjects, including the fictitious aunt and her house full of valuable porcelain, by the appellant Willis on the question whether she had ever met Moser, the burglar, and the failure, if there was one, to mention the sale of the Meissen figurines by the appellant Willis—those matters and many others besides added up to what at the end of the case must have been overwhelming evidence against the appellants.

Indeed the only factor casting any doubt, as it seems to this court, on that conclusion was the fact that the appellants had left a number of these items of porcelain with Sotheby's to be valued or auctioned. Once the jury disposed of that point, as plainly a majority of them did, then the rest, so to speak, from the point of the prosecution was plain sailing. Moreover even if the jury were driven to a consideration of the second half of s 22 (1), the evidence was equally or more overwhelming. As I have already said, the element of the benefit of another person was clearly satisfied by the fact that each of the appellants was acting for the other's benefit.

We have been referred by counsel, to whom we are indebted, to a number of other decisions on s 22 of the Theft Act 1968 which seems to have proved so troublesome. They are *R v Marshall* (3), in which case it is fair to say the direction given to the jury was really unsatisfactory quite apart from any consideration of the difficulties of s 22; *R v Alt* (4), in which there had been a plain misdirection in a simple case of the

(1) 134 JP 364; [1970] 1 All ER 1117.

(2) 135 JP 539; [1971] 3 All ER 264; [1972] 1 QB 430.

(3) p 749 ante.

(4) p 751 ante.

first type of s 22 handling, a misdirection as to the time when knowledge on the part of the defendant must be shown; and *R v Tallon* (1) and *R v Ikpong* (2).

The effect of those various decisions, it seems to this court, is to illustrate the desirability in this type of case of the prosecution providing particulars. But, as was stressed in *R v Sloggett* (3), it is a matter of desirability and practice and the prosecution act at their peril, so it seems to us on the authorities, in not particularising the offence. We agree with what fell from the lips of PHILLIMORE LJ in *R v Ikpong* (2), where he said:

'But so often [the prosecution] are not really in a position to do this in a case of dishonest handling of goods until a quite late stage in the case, and the court feels that whilst no doubt it is desirable that the defendant should be informed at the earliest possible moment exactly how the prosecution desire to put the case against him, nevertheless it is quite unrealistic to suggest that this has got to be done in all cases in the indictment, if that means that there have got to be a whole lot of alternative counts ...'

And it further seems to this court that in any event the maximum number of counts which need be put in the ordinary case when dealing with s 22 is two, namely, one to deal with the first part, namely, the old type of receiving, and another one to deal with the second part of the section, that is to say the other type of handling where the prosecution have to prove that the handling was done for the benefit of another person. The purpose of allying the offence in two counts where appropriate is twofold. First, to make it clear to the defence what it is they have to meet; secondly, to draw the attention of the court to the necessity for a full direction on the law relating to those parts of the section which are relevant. For all those reasons it seems to this court that the conduct of the trial, the form of the indictment, and the direction given by the deputy-chairman, all taken together, were nothing except just towards the appellants and it is quite impossible to say that there was anything unsafe or unsatisfactory about the verdict which the jury returned.

That leaves the final point and that is the point taken by counsel for the appellants that the direction as to majority verdicts was objectionable and that the convictions should be quashed on that ground. [His Lordship then considered the facts and held that, although there had been a failure to comply with the practice direction of the court, that failure had not in any way invalidated the trial or caused any injustice and accordingly that ground of appeal also failed. His Lordship continued:] For the reasons which I have already indicated the appeal against conviction by each of the two appellants is dismissed. [His Lordship then went on to consider the application of the appellant Willis for leave to appeal against sentence and stated that it would be refused.]

*Appeals and application dismissed.*

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

Reported by T R Fitzwalter Butler, Esq, Barrister.

(1) (1972) unreported.

(2) Unreported.

(3) 135 JP 539; [1971] 1 All ER 264; [1972] 1 QB 430.



## CHANCERY DIVISION

(MEGARRY, J)

25th July 1972

COOKE v AMEY GRAVEL CO LTD

*Commons—Registration—Provisional registration—Effect—No evidence of existence of rights claimed.*

The plaintiff, who owned land neighbouring that of a company which was engaged in working gravel, registered a claim under the Commons Registrations Act, 1965, to rights of common over the company's land. Pending finality the registration was only provisional, and the company lodged objections to it. On a motion for an injunction to restrain the company from removing the top soil of the disputed land the plaintiff filed no evidence to establish the existence of the rights alleged, but sought to rely on the registration as *prima facie* evidence thereof.

**Held:** while the provisional registration no doubt preserved whatever rights there were, it was no evidence whatever of the existence of the rights claimed, and so the plaintiff was not entitled to the injunction which he sought.

**MOTION** by Fiona Rosemary Diana Cooke, for the continuation of an interlocutory injunction granted to her by STIRLING J, to restrain the Amey Gravel Co Ltd from removing top-soil from Broxhead Common, near Bordon, Hampshire.

*Ian McCulloch* for the plaintiff.

*Rupert Evans* for the defendant company.

**MEGARRY J:** The action in which this interlocutory injunction was granted was commenced in the Queen's Bench Division, and after progressing there for some while it was transferred to this Division. The dispute concerns certain land alleged to form part of a common. That land is owned by the defendant company, which, as its name indicates, is engaged in working gravel. The plaintiff owns neighbouring land and has registered a claim to common rights over the defendant company's land. Her claim is to a right to graze twelve cattle and two horses over the whole of the land comprised in this alleged common. The area in dispute forms but a small part of the area of the alleged common; it is said to be of the order of 1½ acres, whereas the common as a whole has something over 300 acres. The land is identified on a plan annexed to the statement of claim, the alleged common being edged in green and the area of land owned by the defendant company being edged in brown. The whole of the brown land is within the green land save for the south-western tip.

In the Queen's Bench proceedings, an interlocutory injunction against the defendant company was granted, the defendant company consenting to this, or acquiescing. That injunction has been continued down to today in some sort of way, but counsel for the defendant company has refused to consent to the continuation of the injunction any longer, and so counsel for the plaintiff has moved to continue it. It is plain that the injunction ought not to be continued in its present form, since it extends to the entirety of the common and not merely to so much of the brown land owned by the defendant company as is within the area of the common. If any injunction is to continue, it must be limited to so much of the brown land as is within the green marking. The general purport of the injunction is to restrain the defendant company from removing top-soil from the land, and thus from working the gravel.

The state of the plaintiff's claim is this. The claim has been duly verified, submitted for registration and registered. The defendant company has lodged objections to the registration, and accordingly the status of the registration under the Commons Registration Act, 1965, is simply that of a provisional registration. So far as any substantive rights of common are concerned, the plaintiff has filed no evidence in this

motion to establish that any such rights exist. Instead, the plaintiff has relied on the process of registration, and counsel for the plaintiff has prayed in aid the statutory declaration lodged in that process as supporting the allegations of rights of common made in the pleadings. That statutory declaration is not before me. The defendant company has not admitted that there are any rights of common over the land and some evidence has been filed on their behalf to the effect that there are no common rights over the land or, if there once were, that they have been lost by some process of non-user.

Counsel for the plaintiff has accordingly had to found his motion on the basis of claiming an injunction to support or protect the registration under the Act of 1965. He has contended that the mere provisional registration of a claim under that Act is *prima facie* evidence that the rights of common claimed do in fact exist. Such little experience as I have had of the working of the Commons Registration Act, 1965, makes it plain that there is a wide range in the cogency of the claims to rights of common registered under that Act. Some claims are specific claims supported by strong evidence, and at the other extremity there are claims which, speaking temperately, can at best be described as wild-cat claims. The only qualification for achieving registration appears to be that the claim put forward should comply with the prescribed formalities and, I suppose, not be so obviously hopeless or improper that it would be wrong to register it.

Section 10 of the Act provides:

'The registration under this Act of any land as common land or as a town or village green, or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only.'

Counsel for the plaintiff has contended that the latter words carry by implication, or at least are consistent with, the view that a provisional registration, though not conclusive evidence, is at least *prima facie* evidence of the matters registered. That is not an inference that I would draw from s 10. Where the words of exception apply, they seem to me to govern and exclude the whole phrase 'conclusive evidence', and not merely the word 'conclusive'. There is thus no evidence at all, and not evidence which, though not conclusive, is still evidence. No doubt the registration preserves whatever rights there are and prevents their extinction, but I cannot see how registration *per se* provides any evidence at all of the existence of those rights, and what they are.

It seems to me that if a plaintiff wishes to protect his registration under the Act he must at least put before the court some *prima facie* evidence of the existence of the rights of common which he asserts. If he chooses to produce no evidence whatever to that effect, it does not seem to me that he has made out a case for the grant of the discretionary remedy of an injunction. The only thing that a provisional registration appears to indicate is that some claim has been registered and so is not on the face of it so hopeless or irregular that it has failed even to achieve registration. Accordingly, this does not seem to me to be a proper case in which to grant the injunction claimed. I may add that counsel for the plaintiff also at one stage submitted that the Commons Commissioners are the right tribunal to determine these matters. I shall only say that on this footing it seems to me unfortunate that the action, with its process pleadings, discovery and so forth, should be continued with the prospect of being brought to a halt at some future date by a submission that the court ought not to proceed to hear the action but should leave the matter to the Commons Commissioners.

In refusing the injunction I bear in mind the fact that removing soil from the land in question so that the defendant company may work the gravel in it will in effect destroy part of the area of the common for grazing purposes, whatever process of restoration may take place after the gravel has been removed. I also bear in mind

that the defendant company does not allege that there is any great urgency for working this land, and says simply that it wishes to know what the position is so that it can make its plans for future workings. However, on the evidence put before me I cannot see that there is sufficient material to justify me in granting any injunction, and accordingly this motion fails. I, therefore, dismiss it. *Motion dismissed.*

Solicitors: Church, Adams, Tatham & Co, for W Bradly, Trimmer & Son, Alton, Hampshire; Herbert & Gowers & Co. Reported by Philippa Price, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

19th, 20th July 1972

R v WEST SUSSEX QUARTER SESSIONS. Ex parte ALBERT AND MAUD JOHNSON TRUST, LTD, AND OTHERS

*Quarter Sessions—Certiorari—To quash decision of quarter sessions—Application for declaration that footpath not public way—Refusal of quarter sessions to make declaration—Fresh evidence discovered by applicants after hearing.*

Certiorari will not lie to quash the decision of an inferior court merely on the ground that fresh evidence has come to light since the hearing.

The applicants had objected to the inclusion of a footpath in the provisional map prepared by a county council under s 27 of the National Parks and Access to the Countryside Act, 1949, and had applied, under s 31 of the Act, to quarter sessions for a declaration that the path was not a public one, but quarter sessions had refused to make the declaration. After the hearing the applicants obtained a number of further documents which they considered had an important bearing on the issue whether the path was a public way.

**HELD:** an application for certiorari to quash the decision of quarter sessions and for a re-hearing must be refused.

**MOTION** by Albert and Maud Johnson Trust Ltd, the Reverend Charles Edmund Johnson, Richard Valentine Stapleton, and Alan Peter Humphries (personal representatives of Albert Johnson, deceased), J A (Eldon) Ltd (in liquidation), and Charles Edmund Johnson, owners of land known as Lavington Park, Petworth, Sussex, for an order of certiorari to remove into the High Court and quash an order made by the West Sussex Quarter Sessions on 15th November 1971 refusing to make a declaration under s 31 of the National Parks and Access to the Countryside Act 1949 that no public right of way existed over the land owned or occupied by them.

Anthony Cripps QC and F M Ferris for the applicants.

Conrad Dehn QC and Mark Potter for the council.

**LORD WIDGERY CJ:** In these proceedings counsel moves on behalf of a number of applicants for an order of certiorari to bring up to this court, with a view to its being quashed, an order made by the West Sussex Quarter Sessions whereby the court refused to make a declaration under s 31 of the National Parks and Access to the Countryside Act 1949, that no public right of way existed over land owned or occupied by the applicants.

The first ground on which relief is sought is:

'That since the hearing before quarter sessions fresh evidence has become available to the applicants, which evidence could not have been obtained with reasonable diligence for use at the hearing and is such that, if given at the hearing, it would probably have had an important influence on the result of the application to quarter sessions and is such that it is apparently credible evidence.'

There are two other grounds but they seem to me to be merely elaborations of the first and fundamental ground.

The National Parks and Access to the Countryside Act 1949 places certain obligations on county councils for the preparation of maps designed to show the existence of public footpaths within the county area. The first obligation was imposed by s 27 of the Act which required county councils to make a survey of the public paths in their county and to prepare a draft map which would show the results of that survey. Provision was then made in the Act for the draft map to be exhibited, and for landowners and others to make objections to the draft map. It was open to landowners to make objections on the basis that paths had been wrongly inserted, and open to others to object on the ground that true public footpaths had been omitted. The county councils were required to consider these objections and give effect to them as they thought fit, and then, having so considered the objections, to prepare what was called a provisional map and statement showing the conclusions of the county council. When the provisional map had been made and published landowners were given power under s 31 of the Act to make an application to quarter sessions for a declaration that a particular path shown on the map as public was not a public footpath at all. All that was done in this case, and no doubt it is a matter of very considerable moment to the applicants whether the path in question is or is not a public path. It was shown on the provisional map; objection was taken as I have described; and in November 1971 quarter sessions refused to declare that there was no public footpath. The effect of that is that there is now a public footpath along this route for all time.

The case that was put before us by counsel for the applicants is an application for certiorari. He has explained to us, with a wealth of illustration from the very considerable volume of documents provided, that there is a large quantity of evidence which might be made available now on the issue which quarter sessions had to determine, but which was not in fact available at the date of the hearing in November 1971. It is impossible, and certainly unnecessary, to attempt to give a detailed account of all the steps that this dispute has gone through over the last ten years or so, but clear it is that in anticipation of the hearing before quarter sessions the applicants' solicitors were making enquiries of the respondent county council as to the nature of the respondents' case. The procedure before quarter sessions in these cases is that the county council opens, because the onus is on them, and the applicants and their solicitors naturally enough were enquiring of the respondents what the respondents' case was to be, what the documents were which were before them. There is no procedure in the nature of discovery when such an application is made, and there is certainly no legal obligation on the county council to give away its case in advance. But one would hope that county councils would not rely on their strict rights in this regard, and indeed the respondent county council, after perhaps a certain lack of enthusiasm in their correspondence originally, did in fact accord to the applicants a considerable amount of information about the nature of their case and the supporting documents.

On 25th October 1971 it was agreed that lists of documents should be exchanged, and that the parties should have the right to inspect and copy the listed documents. In the ensuing two weeks or thereabouts between that arrangement being made and the actual hearing, lists were exchanged, but some criticism is made of the content of the lists. Understandably enough, when the applicants had seen the respondents' documents, new lines of enquiry were suggested. Anyone who has had practical experience of this kind of work knows that as the date of the hearing draws near, so more and more information seems to appear, and those last 14 days before the hearing must have been very active ones for the applicants and their advisers. But no application to adjourn the hearing was made—I say that without intending in any way to be critical, but merely as a plain neutral statement of fact—and it

is evident that when the date of the hearing arrived the applicants did not think that the information which they had obtained and which they had considered, justified their asking for an adjournment, and the hearing began. It lasted five days, which gives some idea of the kind of material which has to be considered, and in the course of the hearing certain additional documents came to light which had not been disclosed on the exchange of documents, but even then it is I think noteworthy that the applicants did not find it necessary to ask for an adjournment in the course of the hearing. Again I say that without any desire to be critical, but it is important to observe, I think, that nothing which arose in the course of the hearing seems to be of such moment as would cause the applicants to ask for an adjournment. The hearing was concluded, the decision of the quarter sessions was given, and it was adverse to the applicants.

Thereafter a great deal of additional enquiry and investigation was made. Naturally enough in the course of the hearing many new ideas had been formed and new theories had raised their heads and the applicants, notwithstanding the conclusion of the proceedings, went on with their enquiries. They have delved into the archives of this council and that, and obtained a great deal of documentary evidence which has, I would accept without hesitation, a bearing on the issue which quarter sessions were considering. Now, eventually, having collected this volume of additional evidence, the applicants come before this court and ask for an order of certiorari so that the decision of quarter sessions may be quashed, and a rehearing take place at which the whole of the evidence can be deployed. The applicants say with truth that, unless this court can assist them in this way, there is no other procedure known to the law which will give them relief, and they say that a clear injustice will be perpetrated if they are not allowed to re-open the hearing before quarter sessions in the way which they request.

Having dealt with that, one can get down to the real issue which arises here. Counsel for the applicants asks for certiorari, and he was met at a very early stage in the argument with a request for authority for the proposition that certiorari would lie in respect of a decision of a subordinate tribunal merely because fresh evidence had come to light since the date of hearing. He was unable to give us any such authority, and I am satisfied that no such authority exists. The nearest which we have come to it is a case in this court in 1947, *R v Leicester Recorder, ex parte Wood* (1). There LORD GODDARD CJ, with the approval of SINGLETON and HAVERS JJ, recognised that, if an order is obtained in an inferior court by virtue of perjured testimony given by the applicant in that court, certiorari may lie to set aside the decision. It may be that is so, but it is a very long way from the present case. There is no question here of forgery, no question of fraud, therefore there is no authority in support of the proposition that certiorari will lie merely because fresh evidence has come to light since the hearing.

Should certiorari go in such a case? I would answer emphatically not. The prerogative orders are the great residual jurisdiction whereby this court controls the activities of subordinate tribunals, and it controls them in three main categories, first against excess of jurisdiction, secondly against errors of law on the face of their judgments, and thirdly, and perhaps most important, against a denial of natural justice. Within those three heads, this court can and will by certiorari control the errors of lower tribunals, but it is a total misconception of the function of the prerogative orders to think they can be used as a supplementary or additional ground of appeal in circumstances such as the present.

I have no doubt in my own mind that, although I have a good deal of sympathy, if I may say so, with the applicants in this case, we would be entirely wrong if we

(1) 111 JP 355; [1947] 1 All ER 928; [1947] KB 726.



endeavoured to use our powers under the prerogative orders to upset this decision. The reason why the applicants are unable to obtain redress is the familiar principle that in all litigation there must be finality at some time. With matters going to quarter sessions finality of fact has to be achieved at the hearing at sessions; no further appeal is provided, and harsh though the result may be in individual cases, that is a principle which is as important as any which this court has to deal with. For all those reasons I would refuse this application.

**MELFORD STEVENSON J:** I entirely agree.

**MILMO J:** I agree.

*Certiorari refused*

Solicitors: Oswald Hickson, Collier & Co, for Bowles & Stevens, Worthing; Sharpe, Pritchard & Co, for G C Godber, Chichester.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

24th July 1972

R v HARROW JUSTICES. Ex parte MORRIS

*Magistrates—Bail—Order that surety deposit sum of money or security with court—Validity—Magistrates' Courts Act, 1952, s 105—Criminal Justice Act, 1967, s 21 (1).*

Justices, when agreeing to admit an accused person to bail, have no power either at common law or under s 105 of the Magistrates' Courts Act, 1952, or s 21 (1) of the Criminal Justice Act, 1967, to stipulate that, before bail is granted, the surety must deposit with the court a sum of money or other security. If there is doubt whether a surety will be able to pay the sum which he has committed himself to pay the justices can properly reject him as a surety.

MOTION by Walter Albert Morris for an order of certiorari to bring up and quash an order made by the Harrow justices whereby they ordered that the applicant, who had been charged with burglary contrary to s 9 of the Theft Act 1968, should not be admitted to bail until each of his sureties for £2,000 had deposited £500 with the court.

M I Birnbaum for the applicant.

Gordon Slynne as amicus curiae.

The respondent justices were not represented.

**LORD WIDGERY CJ:** In these proceedings counsel for the applicant moves for an order of certiorari to bring up to this court and quash an order made by the justices sitting at the Harrow Magistrates' Court on 19th May 1972, the substance of the order being that the applicant should not be admitted to bail unless two sureties had each deposited the sum of £500 at the magistrates' court.

The application raises a short but interesting point on whether it is lawful for a court, when granting bail and then requiring sureties, to impose the further requirement that the sureties shall actually deposit hard cash with the court before the bail is granted. The power of justices to grant bail is regulated by s 105 of the Magistrates' Courts Act 1952 at the present time, and that provides in sub-s (1):

'Where a magistrates' court has power to remand any person, then, subject to any enactment modifying that power, the court may—(a) remand him in custody, that is to say, commit him to custody to be brought before the court at the end of the period of remand or at such earlier time as the court may require;

or (b) remand him on bail, that is to say, take from him a recognizance, with or without sureties, conditioned as provided in subsection (3) of this section . . .

One goes to sub-s (3), which provides:

'A recognizance on which a person is remanded on bail as aforesaid may be conditioned—(a) for his appearance before the court at the end of the period of remand; or (b) for his appearance at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned . . .'

Then there are further additional provisions in regard to the use of the power in s 105 (1) (b).

Reference to form 119 in the Magistrates' Courts (Forms) Rules 1968 reinforces the view which I take of the language of s 105, that what is contemplated here is that the accused shall be required to enter into a recognizance, which means assume a potential financial obligation if he breaks any condition which is legitimately applied to that recognizance under the section, and furthermore that the function of the sureties, if any are required, is that they shall be liable potentially to make the same financial contribution as that required of the accused if the accused fails to honour his recognizance and/or himself fails to make payment of his own obligation thereunder.

There is nothing in the language of the section, in my view, which authorises justices to require any sureties to put up money as a condition of granting bail. The essence of a recognizance I would have thought, in its ordinary sense and in the sense in which the draftsmen of the Act and the draftsmen of the rules contemplated, is that it is a promise to pay, an obligation to pay, arising potentially in the future if certain conditions are not satisfied.

Counsel, who has assisted the court by appearing as amicus in this case, has submitted that at common law references to sureties and recognisances in the context of the subject of bail are all consistent with this view, and neither counsel has shown us any authority which supports the view that a payment of cash down is or can be contemplated.

We are, however, told that although that may have been the accepted view prior to 1967, some courts are construing s 21 of the Criminal Justice Act 1967 as authorising this, and for all I know certain kindred practices. Section 21 (1) provides:

'The conditions on which any person is admitted to bail may include conditions appearing to the court to be likely to result in his appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime.'

In my opinion that subsection does not in any way touch the essential character of the recognizance which can be required in the event of a grant of bail. It enlarges the terms of s 105 (3) so as to increase the range of conditions which can be imposed on the conduct of the accused himself, but I see nothing in s 21 (1) to alter the character of the recognizance or to alter the feature of it which causes it to be the undertaking of a potential future liability rather than an obligation to put money down at the time when the grant of bail is made. That view is reinforced by s 21 (2) of the Criminal Justice Act 1967 which provides:

'A court which on admitting, or directing the admission of, any person to bail imposes a condition under the foregoing subsection shall not require him to find sureties in respect of that condition.'

If any language were required to show that the obligation of sureties must not be extended by s 21, I would have thought it was to be found in sub-s (2). Further support in modern statutory language for the view that a payment of a lump sum is not something which can normally be required is to be found in s 37 of the Criminal

Justice Act 1948, sub-s (2) of which, dealing with the recognisance entered into on the occasion of an appeal by Case Stated or application for certiorari, provides:

'A recognizance entered into for the purposes of the last foregoing subsection shall be in such reasonable sum as the court thinks necessary to fix, and the court may require the recognizance to be entered into with or without sureties and may, in lieu of requiring a person to enter into a recognizance, consent to his giving other security.'

That subsection contemplates that security in the sense of a deposit may be appropriate, but only with the consent of the accused and the court. It appears not to be in any sense a normal or regular provision which should be imposed adversely to the wishes of the accused himself.

I would conclude by emphasising that where a court proposing to grant bail is minded to require sureties to enter into a recognisance, the court may, and no doubt will, refuse to grant bail if not satisfied that the sureties are good for the sums which they have promised to pay. If there is doubt whether a surety will, in the event, be able to pay the sum which he has committed himself to pay, the justices can properly reject him as a surety, and in the absence of a substitute, refuse bail, but, having decided that a surety is adequate to stand bail for the amount involved, there is, in my judgment, no authority for the court to go on and require that that surety shall put down any specific sum of money or other security as a condition of bail being granted. In my judgment, the submission put before us by counsel for the applicant is correct, and I would order certiorari to issue.

**MELFORD STEVENSON J:** I agree.

**MILMO J:** I agree.

*Certiorari granted.*

Solicitors: Michael Sears & Co; Treasury Solicitor.

Reported by T R Fitzwalter Butler, Esq, Barrister.

### QUEEN'S BENCH DIVISION

(LORD WIDGERY, CJ, MELFORD STEVENSON AND MILMO, JJ)

24th, 25th July 1972

R v AYLESBURY CROWN COURT. Ex parte SIMONS

*Criminal Law—Criminal damage—Arson—New statutory offence—Not triable summarily—Criminal Damage Act, 1971, s 1 (1), (3), s 7 (1).*

By s 7 (1) of the Criminal Damage Act, 1971: 'In sched 1 to the Magistrates' Courts Act, 1952 (indictable offences triable summarily with the consent of the accused when adult), for para 2 there shall be substituted the following paragraph:—"2. Offences under s[3] 1 (1), 2 and 3 of the Criminal Damage Act 1971."'. Schedule 1 to the Act of 1952 sets out the indictable offences by adults which may be dealt with summarily with the consent of the accused.

By s 1 (1) of the Act of 1971: 'A person who without lawful excuse destroys or damages any property belonging to another . . . shall be guilty of an offence.' By s 1 (3) 'An offence committed under this section by destroying or damaging property by fire shall be charged as arson'. By s 11 (1) 'The common law offence of arson is hereby abolished'.

**Held:** the new offence created by s 1 (3) of the Act of 1971 is not triable summarily.

*Criminal Law—Criminal damage—Arson—Form of indictment—Criminal Damage Act, 1971, s 1 (3).*

In an indictment alleging an offence under s 1 (3) of the Criminal Damage Act, 1971, the offence should be charged under s (1) and s (3), not under s 1 (1) alone.

**Motion** by Joseph Malcolm Simons on behalf of the Thames Valley Police for orders of mandamus directed to the judge of Aylesbury Crown Court to hear

the cases of Keith Stewart Kay and Trevor John Messenger who had been committed to the Crown Court for sentence under s 29 of the Magistrates' Courts Act 1952 by Aylesbury justices after they had pleaded guilty to arson contrary to s 1 (1) and (3) of the Criminal Damage Act, 1971.

*I O Griffiths* for the applicant.

*Iain McLeod* for the respondent Kay.

The respondent Messenger did not appear.

**MELFORD STEVENSON J:** These are two applications by the prosecutor for orders of mandamus addressed to the judge of the Crown Court at Aylesbury to hear and determine two cases of Kay and Messenger. In March and April 1972 the two respondents, Kay and Messenger, were charged with arson of a house at Aylesbury. Both purported to elect summary trial before the justices, and the justices purported to commit them under s 29 of the Magistrates' Courts Act 1952 for sentence. In both cases this court has to consider whether the justices in purporting to deal with the alleged offences summarily and committing the respondents for sentence to the Crown Court, were acting within their jurisdiction under ss 29 and 19 of the Magistrates' Courts Act 1952. That involves consideration of the Criminal Damage Act 1971, in particular s 1, on which is raised the question whether that section creates one or three offences.

It is perhaps relevant to observe that the section is a composite section obviously designed by Parliament to cover a large area of criminal law relating to damage to property. That view is inescapable when one looks at the repeal section of the Act, which is s 11, and observes the great variety of statutes dealing with various forms of damage to property which are repealed by this Act. It is also worth observing while looking at s 11, that sub-s (1) says: 'The common law offence of arson is hereby abolished.'

Going back now to s 1, it is expressed in this language:

'(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

'(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.

'(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.'

The last-mentioned is the provision which is intended to replace the common law offence of arson abolished by s 11 (1). So there are three types of offence contemplated by the section which can be compendiously described as (i) damaging property intending to destroy or damage it, (ii) destroying or damaging property with the intent of endangering life; and (iii) an offence under either of those provisions, intending to achieve either of those results by fire.

Section 4 of the Act deals with the punishment of what are described as offences, in the plural. By s 4 (1):

'(1) A person guilty of arson under s 1 above or of an offence under s 1 (2) above (whether arson or not) shall on conviction on indictment be liable to imprisonment for life.'

So that maximum sentence is attracted in a case where there is an intent to endanger

life as a result of damage to property or under any one of the three heads of the section where fire is used. Then the section goes on:

'(2) A person guilty of any other offence under this Act shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.'

That rather dramatic difference in penalty suggests in my view that the section is intended to create, or indeed preserve, quite different offences.

In the present case, the respondents arrived at the Aylesbury Crown Court on 14th April 1972 and it was submitted by their counsel that the justices had wrongly assumed jurisdiction in hearing and determining the matter. The respondents contended that the offence of arson under s 1 (1) and (3) with which each respondent was charged was not triable summarily even with his consent, but could only be tried on indictment.

One has then to look at s 7 of the Criminal Damage Act 1971 which deals with the jurisdiction of magistrates' courts, and it says this:

'(1) In schedule 1 to the Magistrates' Courts Act 1952 (indictable offences triable summarily with the consent of the accused when adult), for paragraph 2 [which formerly dealt with offences falling within the class of malicious damage to property] there shall be substituted the following paragraph:—"2. Offences under section[s] 1 (1), 2 and 3 of the Criminal Damage Act 1971".'

From this it follows that what I may call the new form of arson for which provision is made in s 1 (3) of this Act is not triable summarily. The offences which are triable summarily are the offences provided for in s 1 (1), that is to say, damage to property where there is no intent to endanger life. The offence under s 1 (2) where there is an intent to endanger life is not triable summarily, but offences under ss 2 and 3 of the present Act are so triable. These sections relate to threats to destroy or damage property and possessing anything with intent to destroy or damage property.

It follows, in my view, that the offence with which we are here concerned, namely, arson under s 1 (3), is excepted from those offences for which the accused can with his consent be tried summarily, and if that is a correct view of the construction of this section, then plainly these justices were not acting within their powers in purporting to commit the two respondents for sentence under s 29 of the Magistrates' Courts Act 1952, and the judge of the Crown Court would have been quite wrong in purporting to sentence them in consequence of any such order of committal. It follows in my view from that conclusion that this application for mandamus must be refused.

**LORD WIDGERY CJ:** I agree. I have found it quite impossible to construe this short Act in such a way that every part of it is consistent with every other part of it, and in the difficulty thus prevailing I prefer a construction which does not result in an offence being tried summarily when the maximum penalty for that offence is imprisonment for life.

**MILMO J:** I agree. I would only add that, in my judgment, this offence was properly charged, and it is important that it should be so charged, by charging under s 1 (1) and (3). It would be quite wrong in my view to bring the charge under s 1 (1) alone if the prosecution intend to charge arson and thereby bring the offence within s 1 (3) and make it an offence punishable with life imprisonment.

*Mandamus refused.*

Solicitors: Sharpe, Pritchard & Co, for J Malcom Simons, Kidlington, Oxfordshire; Boyle & Ormerod, Aylesbury.

Reported by T R Fitzwalter Butler, Esq, Barrister.



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<b>MAGISTRATES</b> - Committal for trial - Young person - Justices to be of opinion that there is sufficient evidence to put defendant on trial - Adequacy of written statements tendered as constituting case for prosecution - Criminal Justice Act, 1967, s 1 - Children and Young Persons Act, 1969, s 6 (1). <b>R v Coleshill Justices. Ex parte Davies</b> .. .. .	<b>QBD</b>	<b>51</b>
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